

# Memorandum

20 September 2017

To: Senate Council

**From:** Members of the Ad Hoc Senate Council Committee Regarding AR 6:2 (Chair: Jennifer Bird-Pollan; Members: Garrett Bell, Jeffrey Bosken, Alice Christ, Diane Follingstad, Davy Jones, Willis Jones, Beth Kraemer, TK Logan; Participants: Martha Alexander, Marcy Deaton)

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## **Charge and Recommendations**

In October 2016, the University Senate Council formed a Committee to consider the Administrative Regulation (“AR”) 6:2, regarding Sexual Assault and Sexual Harassment. Since the formation of the committee in October 2016, the members of the committee have been meeting regularly. The committee began by considering the document in its current form, and created a list of what we believe should be addressed in the current document, and what might be missing, if we were drafting a new Regulation from scratch. As a result of a Senate Council meeting in December 2016, the Committee’s purview was expanded. Beginning in December 2016, the Committee added consideration of AR 6:1, dealing with discrimination and harassment, to the list of items it would consider. This Memorandum details the findings of the Ad Hoc Committee.

## **Background Information regarding AR 6:1 and 6:2**

In 2008 the University of Kentucky administration sought the advice of the University Senate Council regarding a new draft regulation relating to sexual assault, which was officially promulgated as AR 6:2, published on January 26, 2009. In response to new guidance from the Department of Education, the President issued an interim revision to AR 6:2 on September 30, 2014. This interim Regulation was published without consultation with the University Senate, though, as an interim regulation, it did not require Senate consultation under the AR 1:6 “Regulation Review Process”. However, a revision to AR 6:2 promulgated in Dec. 2014 without solicitation for Senate Council advice was not identified by the administration as ‘interim’. On April 15, 2015 the President submitted to the Board of Trustees a proposed new “Appendix” to AR 6:2. On June 19, 2015, the President then promulgated another revised AR 6:2 that newly included an “Appendix.” The Senate Council realized it had not been consulted regarding this new final AR, and at its June 17, 2016 retreat voted to form a committee comprised of faculty, staff, and students to review AR 6:2.

## **Recommendations**

The main substance of this memorandum is a list and explanation of the amendments this Committee recommends regarding the existing ARs 6:1 and 6:2. As a preliminary comment, however, one must remember that Title IX investigations and hearings are not criminal proceedings, but instead deal with a civil rights claim about equal access to education and work place. As a result, the investigation and hearing are not proceedings of the Complaining Witness against the Respondent. Instead, the complaint is brought by the University, the hearing is administered by the University, in compliance with the proceedings described in ARs 6:1 and 6:2, and then a decision is made about whether or not the Respondent is compromising the Complaining Witness's equal access to education. Our recommendations are a response to the unusual status of these investigations and hearings, which implicate due process considerations, in light of the potential sanctions available, but which are also designed specifically to address the requirements of the federal Title IX rules and other relevant federal and state civil rights laws.

The following section of the memorandum identifies the specific recommendations that our committee makes regarding changes to the ARs 6:1 and 6:2. This is a list of independent recommendations, any of which can be adopted without the adoption of the entire list of recommendations.

1. On 24 January 2017, the Committee voted to combine ARs 6:1 and 6:2. All procedural elements in place for AR 6:2 will now apply for alleged offenses under the old AR 6:1. The Committee felt that there were no good justifications for distinguishing allegations of harassment and discrimination (traditionally covered under old AR 6:1) from allegations of sexual assault, stalking, dating violence, and domestic violence (traditionally covered under old AR 6:2). There was very little procedural detail in the old AR 6:1. The Committee recommends that all new proposals included in this memo and attached amended AR 6:2 apply to all allegations that would have been included under the old AR 6:1 or old AR 6:2.
2. Many of the proposed changes to AR 6:2 have been added to clarify the existing practice through amendments to the language.
3. To simplify the document and make clear that the important information previously found in the Appendix is part of the rules of AR 6:2, the Committee eliminated the separate Appendix, and incorporated the procedures detailed in the Appendix into the text of the Regulation itself.
4. The Committee believes it is important to ensure that any Complaining Witness who brings a complaint to the Office of Institutional Equity and Equal Opportunity receive notice of the ultimate resolution of that complaint. To answer concerns that Complaining Witnesses are not being notified of the resolution, our proposed amendments clarify what information must be shared

with Complaining Witnesses. (See revised AR 6:2, Section VII. Part C.9, page 11.)

5. The old AR 6:2 made all University employees, with the exception of the VIP Center, Health Services, and Counseling Services, mandatory reporters of offenses of which they became aware. (See [existing AR 6:2, Section VI, Part A, page 7](#); [existing AR 6:2, Section VI, Part D, page 8](#).) While the Committee understands the rationale for wanting significant reporting, the Committee also believes that making effectively all University employees into mandatory reporters would likely have the effect of stifling faculty-student interactions. The Committee ultimately determined that the downsides of such a mandate are likely to exceed the benefits from having mandatory reporting. Instead, the Committee recommends a change to the old ARs, making only individuals with authority to redress, or those whom students might reasonably expect to have that authority, into mandatory reporters under the new AR. Responsible Employees are defined in the AR as anyone who “(i) has the authority to take action to redress the prohibited conduct; (ii) has been given the duty of reporting incidents of prohibited conduct or any other misconduct to the Title IX Coordinator or designee; or (iii) who an individual reasonably believes has this authority or duty.” This is the definition of "responsible employees" in Title IX guidance. (See [Questions and Answers on Title IX and Sexual Violence, April 29, 2014 Frequently Asked Questions, page 15](#).) We recommend that UK's definition of "responsible employees" not include any additional employees in category ii (where currently ALL employees are included). This change is consistent with the AAUP's recommended best practices in "The History, Uses, and Abuses of Title IX" June, 2016. <https://www.aaup.org/report/history-uses-and-abuses-title-ix>, and practice at other universities (see for example <https://www.brown.edu/about/administration/title-ix/policy> and [https://prevention.uoregon.edu/sites/prevention1.uoregon.edu/files/Gender\\_based\\_employee\\_reporting\\_responsibility\\_policy\\_effective\\_Sept.15,2017\\_0.pdf](https://prevention.uoregon.edu/sites/prevention1.uoregon.edu/files/Gender_based_employee_reporting_responsibility_policy_effective_Sept.15,2017_0.pdf)).

Using the current AR 6:2 definition of “Responsible Employees” as the category of mandatory reporters will not clarify who on campus is specifically required to report allegations under this Regulation, nor does it resolve the concerns addressed above about stifling faculty-student interactions. (See [existing AR 6:2, Appendix, Part II “Definitions,” Section N, page 13](#).) The administration may consider excluding specific groups of people from the definition of Responsible Employees, or training employees to help them understand whether or not they are Responsible Employees. The proposed amendments to AR 6:2 include a list of potential Responsible Employees. (See revised AR 6:2, Section IV “Definitions,” Part AA, page 6.) The Committee understands that the Office of Institutional Equity and Equal Opportunity is already offering training to UK employees, which covers some of these issues.

6. In order to quickly address the needs of Complaining Witnesses, AR 6:2 includes the possibility of temporarily suspending the Respondent from UK's premises. (See [existing AR 6:2, Appendix, Section IV “Interim Remedies,” Part A and Part](#)

*B, page 17.*) In order to provide procedural rights to Respondents, anyone temporarily suspended from campus in this manner must be able to appeal that suspension in a timely manner. The old AR 6:2 included a procedure for students, but included no guidance for faculty or staff Respondents subject to a temporary suspension from campus. The Committee believed such a procedure ought to be included for all Respondents, so the Committee recommends that faculty Respondents be able to appeal any temporary suspension from campus to the Senate Advisory Committee on Privilege and Tenure (SACPT). Staff Respondents must be able to appeal any temporary suspension from campus to the Staff Senate Staff Issues Committee. Further, since the UAB is primarily an academic body, we believe it would be more appropriate for students to appeal interim remedies to a body specifically designed to deal with the kinds of issues that arise under AR 6:2. We suggest using the Community of Concern for appeals of interim remedies. (*See revised AR 6:2, Section XI "Interim Remedies," Part B, Number 2, page 14.*)

7. In order to ensure that both Respondents and Complaining Witnesses have access to someone on campus who can help them navigate the process of an investigation and hearing under AR 6:2, the University should have employees who serve as "case managers" for both Respondents and Complaining Witnesses through the process. Other universities across the United States have adopted this model, employing case managers who serve as point person for issues of the process itself, but who also assist the Respondent or Complaining Witness with a variety of other issues that arise in the course of the investigation or hearing. For instance, either the Respondent or Complaining Witness may need assistance with course schedules, housing arrangements, office arrangements, or other things related to the investigation and/or hearing. Currently this role is played by the VIP Center (for Complaining Witnesses) and the Office of the Institutional Equity and Equal Opportunity (for both Complaining Witnesses and Respondents). The Committee believes that separate employees should serve the roles of Complaining Witness Case Manager and Respondent Case Manager. The Complaining Witness Case Manager might have a primary appointment in the VIP Center while the Respondent Case Manager might have a primary appointment in the Office of the Academic Ombud. We recommend that this process be formalized, either in the current roles, or with new positions created to cover these responsibilities. These case managers might work closely with (or under) the University Community of Concern. (*See revised AR 6:2, Section IV "Definitions," Part H, page 4.*) The Committee understands that a similar organization is in place at the University of Tennessee, and recommends that UK model its case manager structure on that example. (*See [Policy on Sexual Misconduct, Relationship Violence, Stalking, and Retaliation](#), Section 1.4 "Sexual Assault Response Team," page 5.*)
8. Under the current version of AR 6:2 support persons do not have to be a lawyer, but many of the participants in hearings under the current AR have had lawyers serve as support persons. Under the current AR, the University is represented, in

the case of student Respondents, by the Dean of Students. (This structure would change, under another of our proposals.) The current Interim Dean of Students is Nick Kehrwald, and, while he is not a practicing attorney, he has a law degree. The Committee has heard expressions of concern about the inequality introduced by having the University effectively represented by a lawyer, while the student Respondents do not have access to a lawyer if they cannot afford one. Several universities across the country have created a pool of funds to be made available to both Complaining Witnesses and Respondents to cover at least a portion of the costs associated with hiring an attorney to assist the individual in preparing for the hearing, and during the hearing itself. We propose that the University create a pool of funds, capped at a certain amount, for both the Respondent and the Complaining Witness to hire legal representation to assist with the investigation/hearing process at the University of Kentucky. This funding would not be available to cover the costs of legal representation for any civil or criminal proceeding outside of the University. The University could also provide a list of possible attorneys available to assist Respondents and Complaining Witnesses, although those accessing the funds should be able to select legal representation from people not included on the University's list. In addition to a cap on the total amount of funding a Respondent or Complaining Witness could receive from the pool, the University should set an hourly cap on the amount an attorney could receive for this work. That cap should be set in accordance with state law.

9. Currently the Respondent and Complaining Witness may each bring up to two support persons along to the hearing, but those support persons may not actively participate in the hearing. (See [existing AR 6:2](#), Section IV "Definitions," Part U, page 6; [existing AR 6:2](#), Appendix, Section II, Part X, page 16.) Specifically, support persons may not speak in the hearing, and may only confide confidentially with the person they are supporting. We propose opening this up to full participation of the support persons with regard to everything except direct examination of the opposing party. (See revised AR 6:2, Section IV "Definitions," Part II, page 9.)
10. In order to unify the hearing process, the Committee recommends that the University should have one representative who brings the University's case in any hearing brought under AR 6:2, regardless of the identity of the Respondent or the Complaining Witness. Current AR 6:2 identifies a University Representative, but does not identify who fills this role. In practice, the Interim Dean of Students brings the case when the Respondent is a student. Because there has not yet been a hearing under AR 6:2 for an employee Respondent under the current AR, the General Counsel's office has not had to address the question of who would serve in this capacity in a hearing with an employee Respondent. The Committee's recommendation is that the new "University Representative" should not sit in the Office of Institutional Equity and Equal Opportunity, thereby staying out of the investigative phase of the procedures, and should have no authority to alter the finding and sanctions recommendation of the Hearing Panel. (This is not the model under the current AR 6:2, where the Dean of Students brings the

University's case against a student Respondent, and also has the right to modify the Hearing Panel's recommended sanction against any student Respondent). The Committee's recommendation is that the new University Representative should be a member of the General Counsel's office. (See revised AR 6:2, Section IV "Definitions," Part MM, page 9.)

11. The current AR 6:2 indicates that the Hearing Panel will be composed of three members, drawn from a Hearing Panel Pool composed of both faculty and staff. (See [existing AR 6:2, Appendix, Section II "Definitions," Part S, page 15](#); [existing AR 6:2, Appendix, Section II "Definitions," Part T, page 15](#).) In order to ensure sufficient independence, in light of the fact that the University brings the case against the Respondent, the Committee recommends that the Hearing Panel should always be composed of at least two tenured faculty members. If the Respondent or Complaining Witness is a staff Employee, the third person should be a staff member from the Hearing Panel Pool. In all other cases, either another faculty Employee or a staff Employee can serve as the third member of the Hearing Panel. (See revised AR 6:2, Section XIV "Formal Hearing Procedures," Part C, page 16.) The Committee is aware that such a change will require getting more Employees to volunteer as members of the Hearing Panel Pool. In particular, the Hearing Panel Pool will need a larger contingent of tenured faculty members. Therefore, the Committee encourages all Employees to consider volunteering to join the Hearing Panel Pool. The Committee considered the possibility of adding student members to the Hearing Panel Pool, but having student members violates Title IX. In addition, the Committee believes that the presence of students on Hearing Panels would be likely to have a chilling effect on reporting under AR 6:2, and could prove to be detrimental to the ultimate goals of the policy. The Committee is also concerned about the potential risks of liability for Hearing Panel members, which seems especially concerning in the case of students.
12. Current AR 6:2 says that the decision of the Hearing Panel regarding sanctions is a recommendation that can be changed by the Dean of Students, in case of a student Respondent, or "appropriate unit administrator," in the case of an employee Respondent. (See [existing AR 6:2, Appendix, Section VII "Formal Hearing Procedures," Part 18, page 20](#).) The Committee viewed this as a problem, since if our procedures are sufficiently robust, the Committee thinks the decision of the Hearing Panel should stand. The proposed changes to the Regulations allow the Dean of Students, in the case of a student Respondent, or the Appropriate Unit Administrator, in the case of an employee Respondent, to request that the Hearing Panel reconsider the recommended sanction in light of either (1) perceived incommensurability between the accused violation and the proposed sanction, or (2) unforeseen or unintended consequences on the workplace or student life space of the Respondent, including any potential consequences to third parties. Other than this ability to request a reconsideration, the Dean of Students or Appropriate Unit Administrator will have no additional ability to change the sanction recommended by the Hearing Panel. (See revised

AR 6:2, Section XIV “Formal Hearing Procedures,” Part D “Hearings,” Part 18, page 18.)

13. The Committee had a long discussion about the appropriate standard of evidence for the Hearing Panel to use in these cases. Current AR 6:2 requires a “preponderance of the evidence” (50.1%) for a Respondent to be held responsible. (See [existing AR 6:2, Appendix, Section VII “Formal Hearing Procedures,” Part D “Hearings,” Part 15, page 20.](#)) The Committee considered the possibility of introducing a standard of “clear and convincing evidence”, which would be a higher standard. The AAUP argues for using this higher standard in cases like this. The current Secretary of Education Betsy DeVos recently suggested a change to the clear and convincing evidence standard may soon be required by the federal government. The Committee considered the alternatives, but currently all universities use “preponderance of the evidence” for Title IX and other civil rights cases. Given this information, in addition to our understanding that the preponderance of the evidence standard is the current standard requested by the Department of Education, the Committee recommends leaving the standard of evidence the way it is in the current Regulations. If the federal guidance changes, the committee would support a change to the standard of clear and convincing evidence.
14. Members of the Senate Council asked our Committee to reconsider the recommended sanctions under AR 6:2, asking in particular if revocation of degree is an appropriate sanction. Our committee believes revocation of degree may, in certain circumstances, be an appropriate sanction. If a violation of AR 6:2 is committed shortly before graduation, and the Respondent is found responsible, revocation of degree is the only available sanction, since this person would no longer be on campus. Further, this strong sanction will serve as a disincentive to the worse offenses under this AR. We believe revocation of degree is an available sanction for the most egregious offenses under the Student Code of Conduct as well, and we believe that sanction should remain available under AR 6:2 as well.
15. Any determination by a Hearing Panel can be appealed to a panel of the Sexual Misconduct Appeals Board. The current AR 6:2 prescribes that the SMAB Panel be composed of the Chair plus two additional members of the SMAB Pool. (See [existing AR 6:2, Appendix, Section VII “Formal Hearing Procedures,” Part C, page 19.](#)) For the same reasons as those described regarding the composition of the Hearing Panel, the Committee recommends that the Chair of the SMAB be a tenured faculty member, and that the SMAB Panel be composed of the Chair, plus one other tenured faculty member. If the Respondent or Complaining Witness is a staff Employee, then the third member of the SMAB Panel should be a staff Employee. If neither the Complaining Witness nor the Respondent is a staff Employee, then the third member of the SMAB Panel may be either a faculty Employee or a staff Employee, however if the Respondent is a Student, then the



SMAB Panel must be comprised entirely of University Appeals Board (“UAB”) members. (See revised AR 6:2, Section XIV “Formal Hearing Procedures,” Part C “AR 6:2 Hearing Panel,” page 16.)

16. The current Regulations are inconsistent with GR XI regarding the make up of the SMAB. (See [existing AR 6:2, Appendix, Section II “Definitions,” Part S “Sexual Misconduct Hearing Panel Pool,” page 15](#); [existing AR 6:2, Section IX “Appeals to the University Sexual Misconduct Appeals Board \(SMAB\),” Part A, page 21](#); See [existing GR IX, Section D “Composition of the University Appeals Board,” page 3](#).) The SMAB, when hearing appeals from the Hearing Panel regarding a student Respondent, should be a faculty subset of the UAB, and the chair of the UAB should be the chair of the SMAB. Additional non-UAB members of the SMAB pool may hear appeals from employee Respondents. We understand that, at least with regard to the make up of the SMAB pool, the above is happening in practice. The proposed changes to AR 6:2 make clear that this should happen going forward. (See revised AR 6:2, Section XIV “Formal Hearing Procedures,” Part C “AR 6:2 Hearing Panel,” page 16; Revised AR 6:2, Section IV “Definitions,” Parts C and D, page 3.)

17. The Committee considered a variety of difficult issues related to the preservation, use and access to records of past complaints or hearings under AR 6:1 and 6:2 that might pertain to a new complaint or hearing under AR 6:2. Current AR 6:2 makes no reference to this issue, although it does state that past disciplinary records can be considered by the Hearing Panel during the sanctioning phase, once a determination of responsibility has been made. (See [existing AR 6:2, Appendix, Section VII “Formal Hearing Procedures,” Part C, Part 16, page 20](#).)

The Committee recommends that if a Hearing Panel reaches a determination of no responsibility, then that complaint, hearing, and/or determination should not be used in any future investigation, hearing or sanction. The Committee was primarily concerned about the creation of prejudicial conditions towards a Respondent. A dissenting member of the Committee raised the possibility that a Respondent might wish to introduce evidence of past false and harassing accusations, to support a defense against a new false, harassing complaint.

If there is a finding of responsibility by the Respondent at any point (either an admission of responsibility, or a finding by a Hearing Panel), the Committee determined that this might appropriately be considered in future investigations, hearings, and sanctioning determinations.

In considering how and whether records of a previous complaint may be used if the complaint was closed before a hearing, the Committee recognizes that finding evidence related to a subsequent complaint may depend on the emergence of a pattern of behavior. Under new AR 6:2, a previous complaint, even if it were closed without a hearing, may be grounds for investigation of a new complaint, even if the Complaining Witness does not want to proceed. (See revised AR 6:2, Section XIV “Formal Hearing Procedures,” Part D “Hearings,” Part 20, page 18.) However, the Committee also discussed concerns about not creating a



prejudicial environment for a Respondent, and urges caution with respect to the use of previous complaints that were closed before a hearing.

Finally, the Committee agreed that if any files are accessed after a case is closed, the Respondent should be notified and have access to the files. The Committee recognizes that notifying the Respondent about a complaint could have a chilling effect on reporting, but the Committee is concerned that lack of notice could have a detrimental effect on the Respondent's rights to be aware of accusations against him or her. (*See revised AR 6:2, Section XIV "Formal Hearing Procedures," Part D "Hearings," Part 21, page 18.*)

18. Service on the UAB, the AR 6:2 Appeals Board, or in the AR 6:2 Hearing Panel Pool is a very important activity in University service. We ask the Senate Council to urge upon the University administration that time assigned these University-level service activities be shown on the faculty DOE and be considered as part of staff responsibilities, and that this work be valued by supervisors in employee performance reviews.

## **Conclusion**

The above recommendations reflect the thoughts and efforts of the Committee over the past year. We welcome the opportunity to discuss this material with members of the campus community and various stakeholders. We thank the University Administration and the Senate Council for the opportunity to carefully study this important matter, and to provide feedback. We look forward to continuing conversations on this matter.

## **RELATED DOCUMENTS**

### Federal Laws and Policies

Title IX of the Education Amendments of 1972, and its implementing regulation at 34 C.F.R. Part 106 (Title IX)

Dear Colleague Letter 04-11-2011

2014 OCR [Frequently Asked Questions on Title IX and Sexual Violence](#)

### AAUP

[Campus Sexual Assault: Suggested Policies and Procedures 2012](#)

[The History, Uses and Abuses of Title IX July 2016](#)

### Regulations

[GR XI \(05-08-2016\)](#)

[AR 6:2 \(09-04-2007 draft to Senate Council 2008\)](#)

[AR 6:2 \(09-30-2014\)](#)

[AR 6:2 \(12-03-2014\)](#)

[AR 6:2 \(06-19-2015\)](#)

[AR 6:2 Appendix Draft to BoT May 8 2015](#)

[AR 6:2 \(06-10-2016\)](#)

[AR 1:6 \(05-06-2011\)](#)

[AR 1:6 \(Process Flow Chart\)](#)

[AR 6:1 \(07-01-2008\)](#)

[AR 4:10 \(06-24-2016\)](#)

[Draft Questionnaire](#)

#### BoT Meetings

[BoT 05-08-2015 partial transcript](#)

#### Senate/Senate Council Meetings

[SC Minutes 08-18-2018](#)

[SC Minutes 12-07-2015](#)

[SC Minutes 10-05-2015](#)

[SC Minutes 01-25-2016](#)

[SC Minutes 06-17-2016](#)

[SC Minutes 09-19-2016](#)

[SC Minutes 12-19-2016](#)

[Senate Minutes 09-12-2016](#)

[Senate Rules and Elections Committee Minutes 11-19-2015](#)

#### Correspondence

[President to BoT 05-08-2015 re: AR 6:2 ‘Appendix to Sexual Harassment Policy draft’](#)

[General Counsel Thro to Faculty Trustee Grossman 05-13-2016](#)

[President to University 09-21-2016](#)

[General Counsel Thro to Committee Chair Bird-Pollan 12-19-2016 Overview of Due Process in University](#)

[General Counsel Thro to University Community 03-15-2015 re AR 6.2 \(version 12-03-2014\)](#)

[General Counsel Thro to University Community 09-29-2016 re AR 6.2 \(version 06-10-2016\)](#)

[Associate General Counsel to Provost 01-13-2012](#)

[Dec 22 2016 Letter to University Faculty from SC Chair re AR 6-2](#)

#### Court Decisions

[Jane Doe vs. UK 5:15-cv-00296-JMH Aug. 31 2016](#)

[Meetings of Ad Hoc Committee on AR 6.1 and AR 6.2](#)

[10-18-2016 call for organizational meeting](#)

[Notes taken of presentation of Dr Robert Lawson to AR 6-2 committee](#)

#### Additional Documents

[Miltenberg and Byler 2016](#)