

## MEMORANDUM

To: Andrew Hippisley, Chair of the University Senate Council

From: Michael P. Healy, Academic Ombud

Date: August 21, 2015

Re: Academic Issues for University Senate Consideration

Senate Rule 6.2.1.7 requires that the Academic Ombud present an annual report of activities to the University Senate. That report will be provided soon to the University Senate, the Provost and the Student Government Association as required by the rule. Senate Rule 6.2.1.7 also provides that the Academic Ombud may report to the Senate Council on matters that affect student academic affairs. I am providing this report based on my experiences as Academic Ombud over the past year. I wish to raise two academic issues that the Senate Council may wish to consider during the next academic year: the effect of the total number of student absences from a course and the standard of proof for student academic offenses.

1. The Effect of the Total Number of Student Absences from a Course: Senate Rules include only one rule that addresses the issue of excessive absences. Senate Rule 5.2.4.2 provides, in relevant part, that “[i]f attendance is required by the class policies elaborated in the syllabus or serves as a criterion for a grade in a course, and if a student has excused absences in excess of one-fifth of the class contact hours for that course, a student shall have the right to petition for a ‘W,’ and the Instructor of Record may require the student to petition for a ‘W’ or take an ‘I’ in the course.”

Four aspects of this rule are clear and notable. The rule applies only to the number of excused absences. The rule does not provide for the aggregation of excused and unexcused absences. The rule provides that a student may be required to withdraw or receive a grade of I, in the event of excessive excused absences. The rule does not provide that a student will receive a failing grade in the event of excessive absences.

Notwithstanding the clear terms of this rule, faculty appear uncertain about its content and often define in their course syllabi policies that conflict with it. For example, the guidance on the content of the syllabus provided until recently by the University Senate stated that “[s]tudents are expected to withdraw from the class if more than 20% of the classes scheduled for the semester are missed (excused or unexcused) per university policy.” Even greater conflict with the Senate Rule is apparent in the policy defined in some course syllabi, which provide that, if a student is absent for any reason from more than one-fifth (or 20%) of class meetings, the student will receive a failing grade for the course.

The question of whether or how absences may be aggregated by an instructor when evaluating a student’s performance in a course is difficult. The Senate Rules require that faculty distinguish between excused and unexcused absences when absences affect a student's grade. Most importantly, Senate Rule 5.2.4.2 provides unconditionally that “[a] student shall not be penalized for an excused absence.” In sharp contrast to this rule, faculty may reduce a student's

grade for one or more unexcused absences, provided that the instructor describes any such rule of class attendance in the syllabus and applies that rule to all students in the class.

Consider first the question whether the Senate Rules permit the aggregation of excused and unexcused absences to trigger a student's withdrawal from the course when the student is absent a total of more than 20% of classes. As I read the Senate Rules, they locate a right to withdraw from courses in the student and then limit or condition that right in various ways.<sup>1</sup> See Senate Rules 5.1.8.2, 5.1.8.3, and 5.2.4.2. The only relevant condition on each student's withdrawal rights, defined in Rules 5.1.8.3 and 5.2.4.2, relates to the total number of excused absences. The intent of the rule seems to be that, if attendance in a course is required, a student should not receive credit for the course when the student has had to be absent from the course for too many classes for reasons that the rule recognizes as legitimate. The negative inference of these express rules defining a student's ability to withdraw from a course is that a faculty member cannot force a student to withdraw based on the combined total of excused and unexcused absences.

The conflict is much clearer between the Senate Rules and the award of a failing grade to a student when the total number of excused and unexcused absences exceeds 20%. Consider the hypothetical of a class that meets 45 times. A student who was absent from ten classes would exceed the 20% limit. Assume that the student has seven excused absences and three unexcused absences. Regarding the excused absences, the number would not trigger the instructor's discretion to have the student withdraw from the course under Rule 5.2.4.2. Regarding the unexcused absences, the student could properly claim that there should be no penalty depending on the terms of the syllabus. Forced withdrawal from the course would likely be viewed as a penalty for the excused absences.

My reading of the current Senate Rules is that they make an intentional distinction between the treatment of excused and unexcused absences. The rules are quite careful about constraining faculty authority regarding excused absences, but grant faculty great discretion regarding the treatment of unexcused absences. Although the rules are silent about the aggregation of absences, their spirit in my view is to protect students from being penalized for excused absences. Given this purpose of the current rules, I would have serious doubts about a faculty member's authority to force a withdrawal when a student has excused absences for up to 20% of class meetings. A fortiori, a student could not be given a failing grade in such a case (unless the failing grade resulted from the application of the rules for only unexcused absences defined by the syllabus).

At the College of Law, where I teach, we are subject to accreditation by the American Bar Association. One of the accreditation standards is that students attend classes and that law schools enforce class attendance. We accordingly have a rule which provides that a student must be withdrawn from a class when the student has missed more than 25% of classes, regardless of whether the absence is excused or unexcused. The University might want to adopt such a rule

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<sup>1</sup> An exception to the student's right to withdraw is defined by Senate Rule 5.1.8.1. That rule allows the Department and Dean to withdraw a student from a class when a student "miss[es] the first two class periods of a course without notifying the department of the[] intention to attend." Id.

when a course makes class attendance mandatory. One possible objection to such a rule is that it may undercut an instructor's rule that penalizes a student's grade based on unexcused absences. If an amended rule regarding withdrawal from a course were to aggregate absences and did not distinguish between excused and unexcused absences, a student could potentially avoid the grade penalty for unexcused absences by simply not attending classes and then by exercising a right to withdraw from the course once total absences exceeded the 20% rule.

The Ombud's Office thought that the absence policies adopted by other Universities might provide useful context for considering our own rules in this area. Our brief inquiry indicated that the University of Kentucky has defined institutional rules that are more protective of student rights than other Universities, which often delegate policy on this issue to units within the University or to course instructors. For example, Ohio State University's Rule 3335-9-21, titled "Absences," provides that "[e]ach department or school may make its own rules relative to occasional absences by students from scheduled activities. If, however, a student is absent from a course to such an extent as to imperil his or her credit, or is notably irregular in attendance, it shall be the duty of the instructor concerned to report the facts promptly to the dean of the college in which the student is enrolled. The dean may take such action as deemed appropriate." Group absences "to participate in a university sanctioned event" appear to be the only University-recognized excused absences, although the effect of that recognition is not clear. See Rule 3335-9-22. These rules may be found at <http://trustees.osu.edu/rules/university-rules/chapter-3335-9-attendance-and-graduation.html>. The University of Louisville's policy is similar to Ohio State's policy. Colleges may define their own policies, but there is specific protection for "a student's participation in a university-sanctioned event or activity." See <http://louisville.edu/provost/policies/classroom>. The policy of the University of Tennessee delegates to individual colleges the absence rules. See [https://academic.uthsc.edu/policy\\_docs/attendance.php](https://academic.uthsc.edu/policy_docs/attendance.php) ("each college develops its own methods for tracking class attendance and for defining conditions for excused absences").

Indiana University's College of Arts & Sciences has posted its policy about absences and can be found at <http://college.indiana.edu/ado/policies.shtml>. That policy states that, "[w]ith the exception of days covered by the Religious Observances Policy and Procedures of Indiana University, illness or military orders are usually the only acceptable excuses for absence from class. Absences must be explained to the satisfaction of the instructor who will decide whether omitted work may be made up. In all cases of absences other than those following the Religious Observance Policy and Procedures, however, it is the individual instructor who decides whether or not to excuse an absence and/or to allow missed work to be submitted."

2. The Standard of Proof for Student Academic Offenses. During the Spring 2015 semester, the University Senate considered and adopted a Draft Governing Regulation on faculty discipline. The terms of the Draft Regulation and the Senate's discussion indicated support for the application of the "clear and convincing" standard of proof for the adjudication of disciplinary charges against faculty. As adopted, the Draft Regulation requires that clear and convincing proof of a violation be presented before a faculty member may be found liable for a violation and be subject to sanctions. If the University Senate believes that this standard ought to

be applied to determine faculty liability for violations of University standards, the University Senate should consider adopting the same standard for use in student academic offense cases. Such cases may have significant and properly adverse effects on students who are determined to have committed academic offenses. If the Senate believes a heightened standard of proof should apply to faculty discipline, it should consider applying the same standard to student academic offenses.

The current University Senate rules are unclear on their face about the applicable standard of proof in academic offense cases. The rules applicable to the determination and appeal of academic offenses do not expressly define the burden of proof to be applied by the instructor and department chair in the initial decision about whether an offense was committed or by the University Appeals Board when a student appeals the decision that the student committed an academic offense.

The practice of the Appeals Board is that the preponderance of the evidence standard is applied when a student appeals the decision that the student committed an academic offense. This practice is long standing and is consistent with the only Senate Rule that calls for the application of the preponderance of evidence standard. That rule, Senate Rule 6.6.0, applies when the Appeals Board considers the appeal of a student's violation of an Honor Code adopted by a College. Senate Rule 6.6.0 assumes that the College's Honor Council applied the preponderance of evidence standard in making the liability determination. The rule provides that the Appeals Board's review of the determination must ensure that there was sufficient evidence to support the Honor Council's decision that there was a violation.

The Constitution's due process clause permits the use of either standard when a government agency adjudicates the liability of a person who may be subject to serious sanctions when found to have violated applicable standards. See *Steadman v. Securities and Exchange Comm'n*, 450 U.S. 91 (1981). The choice between the two burdens of proof is, in the context of academic offenses, one of policy and not law. If the Faculty Senate believes that a standard that provides greater protection to the person accused of a violation is the proper policy when the accused person is a faculty member, the Faculty Senate may wish to consider if the more protective standard should also apply to a student accused of an academic offense.

In sum, the Senate Council may wish to consider amendments to the Senate Rules relating to the effect of total absences from a course and to the standard of proof in academic offense cases.