

To Naomi Cohen and the Human Resources and Administration Committee
From The Faculty Advisory Committee
CC President Ojakian, Alice Pritchard
RE Code of Conduct
Date February 11, 2017

The statement below was endorsed by the Faculty Advisory Committee on February 10, 2017.

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The FAC is grateful to the Board of Regents for the opportunity to review and to comment on the draft of the Board's proposed Code of Conduct. We appreciate that the Board was willing to share a draft and to invite commentary from across the system. We are also eager to contribute toward building a code of conduct that outlines our rights, responsibilities, and values in a way that advances the objectives we all share.

We are, however, of the firm opinion that this current draft of a Code of Conduct does not constitute a statement that we can rally behind or support. Further we believe, the Board, the administration, faculty, staff, students, and institutions would be better served by starting over with a more inclusive process for the construction of the code.

In this memo, we list what we perceive as the major shortcomings of the current draft.

1. This draft is comprised of material lifted from other sources without attribution.

The purpose, the scope, the nine standards and the vast majority of the bulleted items in the Code are taken verbatim or in a slightly edited form from documents at Indiana University and the University of Louisville (see principles.iu.edu and louisville.edu/compliance/ico/code). The closing paragraphs on implementation are from the University System of Georgia (see www.usg.edu/audit/compliance/ethics/). The section on academic freedom is from AAUP's 1940 statement on academic freedom (see www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure).

Given the type of document this is, reasonable people might disagree as to whether or not the word "plagiarism" applies, but certainly all would agree that the preferred practice would be to identify the sources

Standard 7 in the Code states that "community members shall...[ensure the] originality of work, providing credit for the ideas of others upon which their work is built." This document does not meet this standard.

2. By introducing new language from other states, efforts to apply this code will create ambiguities, contradictions, and confusion.

The Scope section includes: "This Code is intended to serve as a synthetic representation of policies and procedures currently governing the BOR and CCSU." Yet, there are no references to draw clear correspondences between current policies and the language in the Code. Since most of the actual language is taken from documents from other states, there can be, at best, only a loose correspondence between the current policies and the Code.

In the complex, often contentious, practical instances in which rights are being protected or individuals are being disciplined or terminated, precise language is critical. Any ambiguities or even small differences in wording between existing policies and the language in the Code is likely to complicate due process procedures and lend credence to claims of selective enforcement or arbitrary rulings. Language matters.

3. The sole reference to off-duty conduct is vague and troubling.

The Code contains only a single reference to off-duty conduct: "This Code also applies to off-duty conduct that negatively impacts an employee's employment relationship with CSCU. Such violations will be addressed under applicable disciplinary procedures." Based on this construction, the "violations" could seemingly refer to anything that is perceived to "negatively impact" the "employment relationship." Such vague language invites arbitrary and capricious enforcement. Actions, opinions, mental and physical conditions, statements, social activism, civil disobedience and who knows what else might be viewed from some subjective perspectives as having a "negative impact" on the "employment relationship."

A large body of case law exists on how off-duty conduct can and cannot be considered by an employer in disciplinary actions or terminations. If the Code is to include any reference to "off-duty conduct," it must be mindful of that case law and be coupled with clear statements on the rights and liberties that employees retain.

4. The statement on academic freedom is constrained and limited.

The FAC appreciates that the Board elected to use language from AAUP on academic freedom, however, only a few sentences from the much longer 1940 statement were included in the document and seem to refer only to teaching and classroom activities. Does this mean that the Board and the system are only recognizing academic freedom within this limited scope? Established principles of academic freedom extend to both research and debates over institutional policy, yet the sentences in the code largely refer to freedom in the classroom. In addition, AAUP has approved several additions and footnotes to the 1940 statement. The rights and responsibilities as well as accumulating case law have necessitated clarifications and extensions since 1940.

The FAC would like to see a more encompassing and up-to-date statement on academic freedom that includes matters of shared governance, discussions of educational policy, research, and civic and political activity during off hours.

5. Many of the standards include fine ideals, yet refer to vague expectations that would be difficult if not impossible to apply objectively.

There are dozens of examples of vague ideals articulated in the Code, but only one will be used as an example here. Standard 2 includes the expectation that community members will "be fair, respectful and open-minded."

Should one be "open-minded" to climate-change deniers? Should a biology professor be "open-minded" to creationists? Should a sociology professor be "open-minded" to arguments that racial inequality is caused by genetic differences in intelligence between races? Should one treat misogynists fairly and respectfully?

Beyond question, a central and enduring challenge for higher education institutions is to balance being inclusive, promoting diversity, and being vigilant in protecting minority populations with promoting a spirit of open inquiry by providing contexts in which people with diverse ideologies, perspectives, theories, and experiences are able and encouraged to speak freely and openly on controversial matters. Does the Code, however, imply an expectation that we must be tolerant and open-minded to those who lie or incite division and exclusion? Is a person being intolerant if they are being intolerant of intolerance?

While a code of conduct may not be able to chart an unambiguous path through such problematic questions, it ought to at least confront them. The charge to be "fair, respectful, and open-minded" is insufficiently discriminating to address the continuing challenges higher education institutions must confront.

6. The Code is not reasoned from the overarching values that are at the core of higher education institutions.

Generally speaking, there are two types of codes: compliance-based codes and value-based codes. Compliance-based codes are lists or restrictions on behavior that are deemed unacceptable. Violations of the code are likely to result in negative sanctions. Value-based codes are aspirational, such that the resulting standards are specified so as to advance the achievement of those ideals. The FAC believes that a value-based code would not only resonate more strongly with the community the Code is designed to serve, but would be a positive contribution to advance our institutional missions.

7. The Code ought to state clearly to whom which standards apply and the degree or extent of constraint.

Most of the standards are introduced with the statement that "community members are expected to." Standard 7, however, states that "community members shall." Certainly "shall" is more constraining than "expected." Does this mean that Standard 7 will be enforced with more rigor, or is this simply an oversight in drafting the Code? Should we attribute anything to the fact that

there is no parallel introduction to Standard 6? Does this mean that the inclusion of standard 6 is only gratuitous?

In addition, there are a large number of items that would seemingly only apply to some members of the community. The Code, however, provides few guidelines to distinguish such differences.

For these reasons, the FAC believes the Board, the administration, faculty, staff, students, and institutions would be better served by starting over and creating a value-based Code of Conduct, which is also careful to reference and include existing language in current regulations, policies, and collective bargaining agreements.