

MEMORANDUM

April 16, 2019

TO: President Michael H. Schill

FROM: Kevin S. Reed, Vice President and General Counsel
Jeslyn Everitt, Assistant General Counsel

RE: Presidential Authority and the Draft Policy on Academic Continuity

Summary of Question Presented and Answer Thereto:

You have asked for our office's opinion whether the draft Policy on Academic Continuity, if enacted, would create a conflict with Board-enacted policy which delegates certain powers to the faculty as well as to the university President. The latest amendments to the Academic Continuity Policy proposal would vest in the Academic Council the authority to approve an Academic Continuity Plan that the policy provides is to be developed by the Academic Council "in coordination with designees from the Office of the Provost." You have asked whether enactment of the policy as proposed would deprive the President of authority, in the event of a significant academic disruption, to enact an Academic Continuity Plan in the unlikely circumstance that the Academic Council fails to approve such a Plan.

My answer: the proposed policy would not deprive the President of authority to enact an Academic Continuity Plan should one be required. The Policy on Retention and Delegation of Authority (Policy I.01.01) reserves to the President plenary authority to direct the affairs of the university and its personnel for all such matters that the Board did not retain to itself. While the draft policy on Academic Continuity vests in the Academic Council a critical role in crafting and approving an Academic Continuity Plan in the event of a significant disruption of University functions, the President retains both the authority and the responsibility to take necessary steps, including the creation or suspension of University policy, to ensure the safe and continued functioning of the University.

The Proposed Policy:

The amended policy proposal currently under consideration provides as follows, in the event the University President declares a "Campus State of Emergency":

"After such a declaration, the Academic Council will be convened to determine, in coordination with designees from the Office of the Provost, an appropriate Academic Continuity Plan, if needed, to manage any associated disruption of academic activity. Approval of any such plan will require a majority vote of the faculty members of the Academic Council."

While the proposed policy does not prescribe the precise contents of an Academic Continuity Plan (and it recognizes that a Plan may provide a range of options), it does mandate that the Plan “include provisions for continuation of academic activities and awarding of grades.” The proposed Policy goes on to recognize that the Academic Council “may authorize the use of the emergency grades. . .”

The question posed is, what happens in the event the Academic Council fails for whatever reason to approve an Academic Continuity Plan by majority vote as the current policy draft contemplates and whether, under such circumstances, the university President retains authority to adopt an Academic Continuity Plan under the Policy on Retention and Delegation.

Analysis

The question of who has the authority under University policy to approve an Academic Continuity Plan hinges on who has (or shares) authority for the academic program of the university. It is without question that the Board of Trustees, per statute as well as University policy, has ultimate say over such matters. “The Board has the authority to establish standards, qualifications, policies and practices relating to admission to study at the University and the curriculum, grading, credits, scholarships, and academic standards of the University.” (Policy I.01.01, section 1.8.3.) See also ORS 352.087(q), concerning the powers and duties of a university’s governing board, conferring on boards the authority to “establish, supervise and control academic and other programs, units of operation and standards, qualifications, policies and practices relating to university matters such as admissions, curriculum, grading, student conduct, credits, scholarships and the granting of academic degrees, certificates and other forms of recognition.”

The Board may, and has, delegated some of these powers through the Policy on Retention and Delegation of Authority and, in doing so, has delegated that authority both to “the professors” and the president. Of course, the Board continues to retain power to act even in those areas it has otherwise delegated.

Any Academic Continuity Plan developed by the Academic Council and the Office of the Provost will clearly revolve around issues that are at the core of the university’s academic program, issues over which the faculty have a substantial, though not exclusive, say. According to the Delegation:

“The faculty shall have primary authority over choice of method of instruction; subject matter to be taught; academic standards for admitting students; and standards of student competence in a discipline.” (Policy I.01.01, section 1.8.3.)

That same policy defines “the faculty” as “the president and the professors” and states that “the president of the university is the president of the faculty,” definitions that have their source in Oregon statute, at ORS 352.096 and ORS 352.146:

ORS 352.096(2): “The president of a public university listed in ORS 352.002 (Public universities) is the president of the faculty. The president is also the executive and governing officer of the university, except as otherwise provided by statute or action of the governing board. Subject to the supervision of the governing board, the president of the university has authority to direct the affairs of the university.”

ORS 352.146: “The president and professors constitute the faculty and as such have the immediate government and discipline of a public university listed in ORS 352.002 and the students therein, except as otherwise provided by law or action of the governing board of the public university. The faculty may, subject to the supervision of the governing board and ORS 352.089, prescribe the course of study to be pursued in the university and the textbooks to be used.”

Accordingly, the faculty—which includes the President—has been given primary authority over the university’s method of instruction and academic standards.

The proposed policy charges the Senate-appointed Academic Council with determining what an Academic Continuity Plan should consist of and whether it should be implemented. That role, however, is not exclusive. The Board has given the faculty “primary” (i.e., not exclusive) authority over certain academic affairs and, with respect to this authority, the Policy on Retention and Delegation of Authority explicitly provides that the president is a constituent of “the faculty” in whom the authority is vested. Moreover, elsewhere in Policy I.01.01 the Board gives broad authority to the President to conduct the affairs of the University, authority limited only insofar as the Board may have retained a particular power to itself.

“Subject to the supervision of the Board and Board action, the President shall direct the affairs of the University. The authorities and responsibilities of the President of the University include, but are not limited to, the authorities and responsibilities set forth in and modified by section 1.0 and this section 3.0. . .” (Policy I.01.01, section 3.1)

Accordingly, under the President’s broad authority to direct the affairs of the University and as the president of the faculty, the President retains authority to approve an Academic Continuity Plan in the event of a Significant Academic Disruption.

The question remains, however, whether the President might, by acquiescing in the enactment of a policy that purports to give exclusive authority to the Academic Council to approve an Academic Continuity Plan, be delegating and relinquishing the President’s authority in that regard. The answer to that question is “no,” since the Board has made clear that notwithstanding any delegation the President retains responsibility for the orderly functioning of the University: “[T]he President may delegate any authorities and responsibilities, except as provided by Board actions. Any delegation must be consistent

with Board actions. The President remains responsible for the proper functioning of the University, notwithstanding any delegation.” (Policy I.01.01, section 3.1.)

Therefore, in the unlikely event that the University were to face a Significant Academic Disruption such that the “proper functioning of the University” with respect to the continuation of academic operations were in jeopardy, the President would remain both empowered and obligated to take appropriate actions to enable the operation of the University, including the approval of an Academic Continuity Plan, irrespective of any direct or constructive delegations of the President’s authority. And, as always, the Board retains authority and responsibility to act if necessary to protect the orderly operation of the University.¹

The President’s power to enact an Academic Continuity Plan is further expressed in the form of the President’s express authority to take such emergency or temporary actions as are necessary to ensure the continued safe operation of the University. See, e.g., Policy I.01.01, section 3.3 (“The President of the University shall establish emergency and temporary policies, standards and directives when the Board or the President deems it necessary or appropriate”) and University Constitution at section 7.2.2.2.1 (“in case of an immediate emergency, the University President has the authority to issue a temporary, emergency policy or temporarily suspend an existing policy. . .”).

In short, the draft policy on Academic Continuity vests in the Academic Council a critical role in crafting and approving an Academic Continuity Plan in the event of a significant disruption of University functions. At the same time, the President retains both the authority and the responsibility to take necessary steps, including the creation or suspension of University policy, to ensure the safe and continued functioning of the University.

Conclusion:

I conclude that, should the proposed policy move forward in the Senate with language that provides that the Academic Continuity Plan must be approved by a majority of the Academic Council, you should be clear that you do not have the ability to delegate to the Council the exclusive authority to approve such a plan, nor would you agree that abdicating such authority is appropriate. You reserve the authority, as Policy requires, to approve such an Academic Continuity Plan if necessary to ensure the proper functioning of the University.

¹ See, e.g., Policy I.01.01, section 1.1 (“Board actions have precedence over other policies, standards, directives and other actions of the University and its constituent parts. . . . To the extent permitted by law, the Board may review and intervene in any and all aspects of the University; modify any policy, standard, or directive; amend or rescind any existing policy, standard or directive; and enact and issue such policies, standards and directives as it deems proper for the University.”).

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Side Note re: Public Meetings Law:

I add one additional observation regarding the impact of the proposed amendment to the draft policy. Insofar as the policy gives the Academic Council authority to approve an Academic Continuity Plan, the Academic Council would be deemed a “governing body” for those purposes under the Oregon Public Meetings Law. See, ORS 192.610(3) (“‘Governing body’ means the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration.”). As a governing body, the Academic Council, when taking action under the Policy on Academic Continuity, would be subject to the provisions of the Oregon Public Meetings Law with respect to giving 24 hours public notice before any meeting, allowing the meeting to be open to the press and public, and holding the meeting in locations that are accessible to persons with disabilities or telephonically where the public can listen to the communication. Such rules are not difficult to comply with, and for example there is an exception allowing that the notice be “as is appropriate to the circumstances” in the event of an emergency, but it is important that the Academic Council recognize that it is taking on these additional rules and associated work over the conduct of its business if it is to be vested with decision-making authority in the manner currently proposed. Alternatively, if the Academic Council were instead charged with developing and recommending an Academic Continuity Plan for approval by either the President or Provost, the Public Meetings requirements would not be implicated.

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