

A Supplementary Ruling from the Committee on Faculty Rights and Responsibilities

Appeal by Professor Donald Hindley

December 19, 2007

Our initial ruling on Professor Hindley's appeal (November 29) found serious flaws in the application of the university's procedures for discriminatory harassment, and called for the Provost to withdraw her disciplinary letter of October 30. Because of continuing actions impinging on Professor Hindley's faculty rights, this Committee reserved its authority to issue a supplementary opinion. Now that the teaching semester has ended, and following the Provost's response to our main ruling (December 10), we are able to address the remaining issues of academic freedom and "fair and equitable treatment" in the application of university policies.

I. Academic Freedom. A core principle in this ruling is the matter of academic freedom and its relation to university policies. Our initial concerns have grown more urgent, both in Professor Hindley's own case and for the sake of faculty and students generally. We want to discourage any polarizing theory that treats academic freedom as encroaching on policies for preventing discriminatory harassment—or vice versa. Our earlier ruling embraced the position taken by the U.S. Department of Education, the national agency responsible for enforcing the federal laws on which the university's policies are based. Indeed, members of this Committee were among the vocal supporters of these university-wide policies, and helped to write them in such a way that the interests of both academic freedom and non-discrimination were fully met, without dilution. Most of us were around when the 1964 Civil Rights Act was passed; some of us have taught these subjects in our classes. We emphasize that members of the Brandeis community must have confidence that proper definitions are being applied, that university procedures are fully and fairly followed, and that everyone in our community, at all levels, deals in a respectful manner with the rights and responsibilities of all faculty and students. There is much here that can bring everyone on the campus together—not drive people apart.

In the Hindley matter, we believe that the decision to insert a speech monitor into the classroom has provoked unnecessary controversy, just as the failure to remove the monitor, pending Professor Hindley's appeal, has exacerbated it. Our previously stated view was that speech monitors should not be used as a remedy for alleged harassing speech, probably under any circumstances, but especially when other methods have not been tried. Monitors can alter the dynamics of a classroom, inhibiting faculty and students alike; and their reporting functions remain opaque to the entire campus. (The Provost's December 10 memo underlines the inevitable function of the monitor as censor.) It has been suggested that any disruption from the monitor's presence was due to Professor Hindley—that the confidentiality of the investigation required him to accede without protest, and that he may have caused further harassment by drawing attention to the monitor and to his own grievance. (Indeed, the Provost's memo goes beyond the

scope of a reply to our ruling, alleging possible further violations by Professor Hindley, but without any investigation or opportunity for him to respond.) In contrast to these allegations, we find the root source for what has happened after October 30 in the flaws of the investigative process: the fact that Professor Hindley was not properly involved at any stage of the investigation, that no “problem resolution” steps were contemplated prior to October 30, and that the administration’s operational definition of harassment had not been communicated to him. Adding on new allegations in the guise of a reply memo may be seen as further abandoning due process.

Given these procedural failings, it was not reasonable to expect Professor Hindley to remain mute about the sudden change imposed on his classroom, especially when his warning arrived about an hour before the monitor actually appeared. Once the findings were accepted by the Provost and this mode of discipline was assigned, there was no “confidentiality” remaining about the fact that such a process had occurred, and that it had resulted in discipline. Nor is the right to appeal that discipline, under faculty rules, limited by considerations of confidentiality. No one should have been surprised that students in the class, who had likewise not been part of any earlier inquiry, would express their views on what had happened, and would seek clarity on the nature of the complaints. Putting the onus of these events entirely on Professor Hindley is to shift responsibility away from others. Far from being required to remain silent, Professor Hindley was entitled to raise questions about the process and the standards, and so were his students.

The official definition of harassment, especially when based entirely on classroom speech, must now be carefully reexamined by faculty and campus bodies. We found previously that the Provost’s actions and words departed substantially from the full stated definitions. Her December 10 memo moves closer to the mark, but it also adds two further points of confusion. First is the suggestion that jokes, epithets, and like expressions are “examples” of harassing speech; and that an investigator need only list such examples to confirm a finding of discriminatory harassment. The *Non-discrimination Policy* says something quite different: that jokes, comments, and other verbal expressions are examples of speech which “may” constitute harassment, but only when the basic elements of harassment are in fact present (reasonableness of the reaction, pervasiveness of the offense, harmful impact on students’ educational opportunities), and only when there has been a fair and full investigation of the matter. A second confusion attaches to the Provost’s suggestion that it was Professor Hindley’s burden to produce “credible evidence” that his various statements were “relevant to his teaching of Latin American politics.” We reject the view that free expression could be sidelined once the HR investigator found that Professor Hindley’s statements “were not germane to the topic being discussed or explored in his class,” a judgment that could have been made, if at all, only by impartial academic peers. This narrow reading of academic freedom is not acceptable to the members of this subcommittee, and we are confident that it will be rejected by a wider group of faculty colleagues.

We conclude that the totality of these conditions, including the Provost’s response memo of December 10, violate Professor Hindley’s right to academic freedom as provided in

the Faculty Handbook (Section III.C.1.a.). In addition they constitute a threat to the academic freedom of other faculty and students, and we will urge the Faculty Senate to work with us on ways to address that threat.

II. Fair Procedure. In our earlier ruling we found that Professor Hindley’s right to receive “fair and equitable treatment” under university policies (Section III.C.1.c.) was also violated, and we reiterate that finding. We read the Provost’s December 10 response memo as an acknowledgment of procedural failings, mitigated, in her view, by the sincerity of the student complaint and the expected resistance by Professor Hindley. We are troubled, however, by new factual statements in her memo that go beyond the record that was provided to us in our earlier round of interviews. In particular her detailed information about two more students in Professor Hindley’s class (in addition to the one officially complaining student) goes beyond what the factual record actually shows. The version of the investigator’s report supplied to us contains only hearsay evidence about these two students. It does not say that they “suffered significant emotional trauma.” It certainly does not suggest that “each also expressed significant fear over even reporting Professor Hindley’s conduct...” In our interviews with the Provost and with others who shared her decision-making role, we asked quite specifically and repeatedly if there was any relevant information, external to the report written by the investigator, on which the Provost and her associates might have relied. The answer was unequivocally “no.” It is therefore disturbing to find the factual record augmented at this late stage, whatever the reasons may be. (Had we been told about these unreported facts, we might well have interviewed the HR investigator.) Our conclusion remains that the factual record in this case, even when limited to the documented written evidence, cannot properly support any finding about whether acts of discriminatory harassment occurred.

We repeat our earlier statements that the HR investigation in this case lacked requisite thoroughness, failed to consider appropriate “problem resolution” methods, did not afford Professor Hindley a meaningful opportunity to involve a colleague on his behalf, and violated step 5 of the *Non-discrimination Procedures* by failing to return to talk with Professor Hindley. It seriously misstates those *Procedures* to say that step 5 is discretionary on the part of the investigator, whenever she concludes that the evidence all points in the direction of guilt. No reading of the language in step 5 could possibly support this interpretation. Having studied the investigator’s report carefully, we believe more questions should have been raised about her interpretation of quotations she attributes to Professor Hindley. (The Provost treats these quotations as undisputed facts in her reply memo.) As we noted previously the investigator failed to give Professor Hindley a chance to respond to her interpretations, let alone to confirm whether these quotations were even accurate. At this late date, he still has not been given an accurate picture of the allegations or judgments contained in the investigator’s report.

III. Rights in the appeal process. We restate our finding that Professor Hindley was entitled to have his discipline suspended pending his appeal to this Committee. The Provost still has not provided us with legal authority that might excuse her failure to comply with this essential part of Handbook procedure. By contrast, we have cited regulations that specifically defer to faculty handbook procedures—regulations she acknowledges as binding on the university. The fact that she has not produced any

counter-authority, more than a month after our request, leads us to conclude that this violation cannot be excused by unsubstantiated claims of legal necessity.

There are other process rights that Professor Hindley was entitled to rely on, including the very jurisdiction of this Committee to hear his appeal. Because these matters relate to interpretations of the Faculty Handbook, we have decided to address them in a separate memo to the parties and to the Faculty Senate, setting out our interpretations, pursuant to our authority under the Handbook to interpret its provisions. We might add that the confusion surrounding the appeal process within the *Non-discrimination Procedures* continues to grow, with the latest theory that this special process should provide the first level of appeal, giving way to the Faculty Handbook for a second level. However, the *Non-discrimination Procedures* stipulate that the Provost's judgment in that appeal process is "final," once she has heard from her hand-picked "advisory committee," unless the case deals with termination.

Conclusion. It is a curious feature of the faculty dispute resolution process that the Provost, in cases of this sort, essentially becomes the final judge of her own actions. That is the way the rules are written. But this very fact imposes certain responsibilities on her, including responsibilities to listen carefully to what faculty committees are saying, and to maintain a cogent and constructive dialogue. This case raises serious problems that will require campus-wide discussion to repair, obligating all of us to show a positive spirit of cooperation and respect.

This ruling is reached unanimously by the appointed subcommittee.

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