Shared Governance Principles at UofL and in Academia

Members of the University of Louisville community share these core values [including]:

Leadership through shared governance

UofL Code of Conduct, BOT 11/12/09

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Shared Governance Principles
Workshop Outline

What is Shared Governance?
- In Academia and at UofL
- UofL organization according to The Redbook
- Principle of Jurisdiction
- Committees (How charges & appointments are made)

Personnel Policies and Procedures (PPP)
- Personnel reviews (annual, promotion, tenure, 5-year)
- Disciplinary reviews (a type of personnel review)
- Faculty Recruitment (includes personnel review)

Key features of Unit Bylaws and their approval

Group Discussion: Applying Bylaws in practice

Leadership through shared governance
Shared Governance Principles at UofL and in Academia

Part I
THE REDBOOK’S SHARED GOVERNANCE MODEL

Leadership through shared governance
What is Shared Governance?

The basic principle of Shared Governance:

*The Group that is most intimately aware of the specifics of an issue (i.e., an issue that resides within its “Jurisdiction”) is the best informed to make decisions on dealing with this issue*

The Administrator

- Normally implements the decisions of the Group
- Can veto group decisions, **but**
  needs to provide a clear justification to the Group
- Can have the veto reversed by the next-level Administrator (if the Group requests)

University governance as described in The Redbook, conforms to this Shared Governance model

*UofL endorses Shared Governance in its [Shared Governance Policy](#): (link to Provost webpage)*

*For more information in the [Shared Governance Reader](#), available from Faculty Council Website*

*Leadership through shared governance*
The Principle of Jurisdiction in Shared Governance

Jurisdiction: Except as otherwise provided by The Redbook, the Faculty of the Speed School of Engineering shall have general legislative powers over its own affairs including, but not limited to, admissions requirements, curricula, instruction, examination, personnel policy and procedures, organizational structure, and recommendations through the President to the Board of Trustees for the granting of degrees. --- Speed Bylaws

- This jurisdictional statement is nearly identical to statement in The Redbook
- The Redbook defines jurisdictions for Faculty, Students and Staff
- Each Group is given the Leadership Role in decisions within its jurisdiction
- The Faculty can assign specific Decisions to Administrators, Committees, etc.
- These Decisions can be specified in the Bylaws or assigned on a temporary ad hoc basis
- The Administrator can override a Faculty Decision, but
  - It is assumed that such decisions are infrequent, and
  - The Administrator will clearly justify why the Faculty decision is being overridden, and
- The Faculty can appeal the Administrator’s decision to the next level of Administration

Leadership through shared governance
Shared Governance Principles for Committees

In all cases not specified by these Bylaws, the Speed School Faculty and Committee Meetings shall be governed by ... Robert’s Rules of Order (Spd IX)

Robert’s Rules of Order describes how to set up and run Committees*

* Not all school’s have adopted Robert’s Rules—but still informative

If a Committee (e.g. ad hoc) is not specified in the Bylaws

- Both the charge and membership require Faculty approval
- The Committee Charge is always introduced and approved at a faculty meeting
- The Faculty may wish to assign the Chair (or other) to select Committee Members
- Committee appointments must be announced in a Faculty Meeting and added to the minutes before the Committee can begin its activities
- Non-Departmental Members of a committee require approval of the Faculty

Committees normally only recommend decisions to the Faculty. They have no decision making authority (unless specified by Faculty vote or Bylaws)

Leadership through shared governance
Shared Governance Principles at UofL and in Academia

Part II
PERSONNEL POLICIES & PROCEDURES (PPP)

Leadership through shared governance
Understanding Your Unit’s Bylaws

EXAMPLE: Speed Bylaws regarding Personnel Policies and Procedures (PPP)

Dean’s Duties and Responsibilities regarding PPP

Responsibilities, duties, and actions of the Dean shall be in keeping with the decisions, policies, and regulations adopted by ... and the Faculty of the Speed School. --- Article III

Recommending to the Office of the University Provost the appointment, tenure, promotion, retention, sabbatical leave, annual salary increase and retirement actions of any faculty members and administrative officers of the School --- Appendix I.A.9

Administering University and School personnel policies as developed according to The Redbook procedures. --- Appendix I.B.9

Conclusion

The faculty devise the Bylaws and PPP personnel policies
The Dean administers personnel policies, but does not develop them

Leadership through shared governance
Understanding Your Unit’s Bylaws (continued)

EXAMPLE: Speed Bylaws regarding Personnel Policies and Procedures (PPP)

**AP&P’s Charge**

The Administrative Plans and Policies Committee shall serve as an advisory body to the Dean and the Faculty on administrative and academic matters. (Article VI)

[AP&P functions] are to recommend to the Dean and faculty, courses of action on such matters including: Faculty Personnel Policies (Appendix III)

**Conclusions**

An AP&P vote on a personnel policy becomes a motion for a Faculty vote (since the faculty have jurisdiction on personnel policies and procedures).

The Dean can always choose to veto a Faculty vote, but can only develop an alternate policy by introducing a motion for faculty vote.

*Leadership through shared governance*
Disciplinary Reviews
Nationally Recognized Policies

**AAUP** Principles of Academic Freedom and Tenure (1940)
1. Termination for cause considered by both faculty committee and BOT
2. Faculty member can have an advisor as counsel

AAUP and **AACU** Procedural Standards in Faculty Dismissal Proceedings (1958)
1. Administrative officer first seeks a resolution with the faculty member in personal conference
2. Inquiry Committee elected by the faculty recommends if there should be a Formal Hearing
3. Hearing Committee decides if there are sufficient grounds for dismissal
4. The Governing Body (BOT) accepts or rejects the recommendation of the Hearing Committee
5. Confidentiality, protecting the reputation of all, is maintained until the final decision is reached

**UofL** and **Federal** Policy (CFR 42 part 93) on Research Misconduct (required of UofL by HHS)
1. All institutional members have a responsibility to report suspected research misconduct
2. Ombudsperson assesses if the allegation is sufficiently credible to be referred to Inquiry Committee
3. Inquiry Committee including individuals with the appropriate scientific expertise
4. Investigation Committee that can include members from the Inquiry Committee
5. The Deciding Officer (DO) can sanction guilty individuals based on the law and Redbook
6. Institution protects/restores reputation of the innocent. Sanctions for allegations made in bad faith

*American Association of University Professors
**American Association of Colleges & Universities (UofL is a member)

Leadership through shared governance
Robert’s Rules sections 61-63: Information on disciplinary hearings and disciplinary committees. Discipline related to member (i.e., Faculty) activities outside normal meetings.

- **Allegations of misconduct** (not informally resolved) require an investigation and hearing/trial either by the faculty as a whole or by a Disciplinary Committee.
- The committee usually recommends sanctions to the faculty body, rather than imposes sanctions.

Some Universities have one faculty committee each for
- Inquiry
- Allegation
- Determination of Sanctions

Comment: Redbook and unit documents are mute on Faculty Committee recommended sanctions.

Leadership through shared governance
Disciplinary Reviews
AAUP article on Termination and Discipline (2004)

AAUP policy encompasses academic due process:
- a statement of charges in reasonable particularity;
- opportunity for a hearing before a faculty hearing body;
- the right of counsel if desired; the right to present evidence;
- and opportunity to address the BOT

AAUP recommends that faculty committees consider all faculty disciplinary issues. Faculty participation helps to convince courts that due process was afforded and that the institution's decision was fairly decided.

The 1958 AAUP/AACU Statement ... has been incorporated into hundreds of faculty handbooks, ... it is "a necessary precondition of a strong faculty that it have first-hand concern with its own membership," including the appointment, promotion, and dismissal of their colleagues. ... [Also] the faculty must be willing to recommend the dismissal of a colleague when necessary."

Comment: Redbook and unit documents do not guarantee faculty body reviews as part of the process.

Leadership through shared governance
Disciplinary Reviews

AAUP article on **Termination and Discipline** (continued)

**Just Cause for Termination**: Demonstrated incompetence or dishonesty in teaching or research, to substantial and manifest neglect of duty, and to personal conduct which substantially impairs the individual’s fulfillment of his institutional responsibilities. *(Similar to Redbook 4.5.3.A.1)*

**Discipline short of Termination**: ... each institution develop and adopt an enumeration of sanctions short of dismissal ... These sanctions and the due-process procedures for complaint, hearing, judgment, and appeal should be developed initially by **joint faculty-administrative action**. *(Similar to UofL FAP, but not jointly developed.)*

**Counter-Example/Significance**: AAUP found that the UVA violated the academic due process rights of a tenured professor who had misused research funds. The Professor was afforded no opportunity to respond to each action before [the discipline] was imposed on him, and the administration did not consult with any faculty body before it acted. He was dismissed without cause demonstrated by the administration before a faculty body. The opportunity for a postdismissal hearing could not substitute for an appropriate [pre-dismissal] academic proceeding, and would have wrongly required Professor M to carry the burden of proof. *(Similarly, UofL FAP places the burden of proof on the Faculty Member. Grievance Hearing, can be the only faculty hearing, only after a disciplinary decision is rendered. Grievance Hearing decision is based on misapplication of rules, not merits of personnel decision.)*

**Leadership through shared governance**
1. The policy does not mention faculty oversight in disciplinary matters (i.e. Faculty Jurisdiction in personnel matters. Redbook 3.3.2). It reads as if a Chair can single-handedly determine if a faculty member has violated a policy or the code of conduct. **We recommend:**

   *A determination of a transgression, its severity, and means of remediation be performed in a review similar to any other faculty personnel review* (as in Redbook Ch. 4).

2. For a policy this significant to be most understandable and enforceable **we recommend:**

   *The policy be rewritten (per Recommendation 1) and approved for inclusion in Redbook Chapter 4. It could easily be added as new section 4.2.5 Disciplinary Investigations and Reviews.*

**UofL Guiding Principle:** All members of the UofL Community are expected to provide "Leadership through shared governance" Code of Conduct
3. The misleading title “faculty accountability” policy sends the message to the public that faculty do not understand their responsibilities to conduct themselves at the highest professional standards. We recommend:

   *The Policy be renamed Guidance to Faculty Supervisors on Progressive Disciplinary Procedures.*

4. The Faculty Senate Executive Committee, UofL Administration and the Board showed a lack of understanding of the Redbook by approving a policy without obtaining faculty approval (per the legislative/jurisdictional authority of the faculty over personnel policies, criteria, and procedures, Redbook 3.3.2). Of all required training at UofL, none is more important than training in its overriding policy -- The Redbook. We recommend:

   *UofL provides regular and repeated training on Redbook Rules and Principles to all faculty, administrators and BOT members.*

**UofL Guiding Principle:** All members of the UofL Community are expected to provide “Leadership through shared governance” Code of Conduct
Shared Governance Principles at UofL and in Academia

Part III
Key Features of Unit Bylaws and their Approval

Leadership through shared governance
Recommended Language for Bylaws

The Redbook requires that all Bylaws be consistent with The Redbook, School Bylaws, and UofL policies and Governing Documents, including (available as a single pdf file from FC):

- UofL Code of Conduct
- Speed Bylaws
- The Speed PPP document
- Robert’s Rules of Order (current) edition (per Speed Bylaws) *

*Available online from UofL Library*

*Most, but not all Schools incorporate RRoO in their bylaws*

Faculty Council, with a first draft by the Dean, developed a Bylaws Template in Word that is:

- Modeled on the language and organization of the Speed Bylaws
- Consistent with the UofL and Speed Governing Documents
- Describes the full range of options permitted by the Governing Documents
- Includes notes explaining rationale and justification for the language

Leadership through shared governance
Specific Requirements for Bylaws

Voting Rights/Privileges

Any Faculty Member with primary appointment in the Department (Spd II.A)
- Is a Voting Member of the Department
- Is also a Voting Member of Speed School
- Both tenure-track and term faculty* are Voting Members

Faculty members with secondary appointments in the Department
- Cannot represent the Department on Speed-wide committees
- Can vote in the Department only if permitted by the Bylaws

* With an initial 2 year term contract or on starting a second 1 year contract

Leadership through shared governance
Specific Requirements for Bylaws

Mission Statements

The Departmental Faculty (per Redbook) are required to develop a Mission Statement:
- Requires final approval by Dean
- It can be included in Bylaws (optional)
- If included in Bylaws it will require approval by a 2/3 vote

The Bylaws Template provides:
- Examples of some current UofL Mission Statements
- Department Mission Statement can be included in Bylaws (optional)
- If included in Bylaws it will require approval by a 2/3 vote

The Redbook provides guidance on the content of Mission Statements:
See the Ch. 4 Appendix: Minimum Guidelines for Faculty Personnel Reviews, Sec. 1.C.

Leadership through shared governance
Specific Requirements for Bylaws

Committees

The Departmental Faculty establishes the Committees that it deems necessary (Spd II.C.2)

- This includes both standing and ad hoc committees
- Add an appendix for each Standing Committee
- Add a policy on ad hoc committees (optional)
- A Departmental Faculty Affairs Committee is required (per Speed PPP Document)
- Committees can be added or dissolved at any time (but requires a 2/3 vote)

The Bylaws Template includes

- Generic template for Standing Committee Charges
- A template for developing a policy on ad hoc committees
Specific Requirements for Bylaws
Office of the Chair/Departmental Administration

Describe Office of the Chair including

- Appendix with the Responsibilities the Chair (See Bylaws Template for language similar to Dean’s Responsibilities in Spd Appendix I)
- Associate Chairs or Other Administrative Roles (Optional*)
- Term limits (Optional—See Bylaws Template for various considerations)

Chair description is proscribed by The Redbook (Sec. 3.3.5) in

- Methods of selection/election
- Annual Review: Includes input from administrators and faculty
- Five Year Review: Led by a committee established with the concurrence of the departmental faculty

* Typically, the Chair is permitted wide discretion in the preferred organization of the Office – following consultation with and advice from the faculty

Leadership through shared governance
The Bylaws Approval Process

The Department drafts a set of Bylaws

Department approves the Bylaws by a 2/3 vote of all faculty who are eligible to vote

AP&P reviews and Dean reviews and approves the Bylaws

Dean forwards a copy of the Bylaws to the Provost

If the Dean and Department cannot reach an agreement on the Bylaws, the Provost resolves

Note that Faculty Council has no specified role in the approval process, however with its overall role in representing Speed School in “all matters of faculty governance”, Faculty Council is available to provide advice and review at each stage of the review process described above; e.g.,

- Review of Bylaws Drafts from the Departments
- Responding to questions on the Bylaws from AP&P and the Dean
- Helping to resolve impasses between the Dean and Department on the Bylaws

Leadership through shared governance
Shared Governance Principles at UofL and in Academia

Part IV
Group Discussion: Case Studies

Leadership through shared governance
Group Discussion: Bylaws in Practice

Below are some issues that might arise in your Department or School. Consider how you might work to resolve these issues from the standpoint of a faculty member, the Chair, the Dean, the Provost. It might be useful to assign each group member to play one of these roles. Assuming there are some administrators in your group, it might be useful to reverse your roles, with a faculty member taking the role of an administrator and an administrator taking the role of a faculty member.

Consider these issues in your discussion:

- Which group (or groups) has primary “jurisdiction”?
- How would you propose resolving the issue?
- What rules and policies support your position?
- Are there other UofL offices and organizations that can help you resolve the issue?

**Issue 1:** The Dean announces that there is a new faculty line and that the preferred candidate can have a primary appointment in either of two departments. What are the concerns about such a search? How would your department, the other department and the Dean work to devise a search that satisfies your Bylaws and the principles of Shared Governance?
Group Discussion: Bylaws in Practice (continued)

**Issue 2:** The Chair sends an email to the Department announcing a new *ad hoc* committee to study ways to improve graduate recruitment.* There has been no previous Faculty discussion of this. Based on the Bylaws of your Department, is this appropriate? If not, how would you work to resolve this issue? (Also, if you’re the Dean or Provost, what are your thoughts on addressing the issue?)

**Issue 3:** While it may not directly affect you, you observe a Faculty Member, Chair or Dean who is clearly not following a specific UofL Policy (in the Bylaws, Redbook or Code of Conduct). What are your responsibilities and approaches to resolving the situation?

**Issue 4:** The Faculty asks the Chair to review the Department budget and expenditures, and discuss alternative spending plans. To what degree is this within the jurisdiction of the Faculty? What are the pros and cons of permitting this review? How would you from the Faculty’s, Chair’s or Dean’s perspective propose resolving the issue?

**Additional Issues:** Propose additional discussion topics for this or future workshops

* Or other topic of interest to your group
Shared Governance Principles at UofL and in Academia

Reference materials for further study

The PPT file for the presentation

The collected UofL and Speed School Governing Documents

A collection of Readings on Shared Governance
   including the Provost’s Brochure on Shared Governance

A template for Departmental Bylaws (specific to Speed School)

Available from Speed Faculty Council website:
https://engineering.louisville.edu/sites/faculty-governance/governance-training

Leadership through shared governance
Special note to Workshop Attendees
Your Voice Matters: Become a Leader in Shared Governance!

Now is a good time to become familiar with
- UofL Code of Conduct
- Your School’s Bylaws
- Your School’s Personnel document
- Robert’s Rules of Order (even if not part of your bylaws)

Especially review the Personnel/PPP document on
- Annual, Promotion and Period Career Review procedures
- Research, Service and Teaching requirements

Contact Your Faculty Council for any parts of your School’s Governing documents that
- You have questions about
- Appear to contradict the your School’s Bylaws
- That you feel could be improved

Leadership through shared governance
Shared Governance

Faculty Personnel Office
Office of the Provost
What Is Shared Governance?

Shared governance, sometimes also called collegial governance, is the set of principles and practices through which faculty and staff members participate in the important decisions regarding the operation of the university. Collegial governance is a system based on the idea that authority and responsibility are shared among colleagues, some of whom are primarily faculty members and some of whom are primarily administrators. Successful shared governance depends on the good faith consultation among these colleagues prior to decision-making; such consultation should also include staff members and students whenever policy or personnel decisions are likely to affect them and whenever policy or personnel documents do not explicitly exclude them.

The University of Louisville’s Commitment to Shared Governance

On July 23, 2001, the Board of Trustees endorsed a position paper on university governance that was produced by the Coalition of Senate and Faculty Leadership (COSFL) in the state of Kentucky. COSFL’s paper was itself an endorsement of the 1966 “Statement on Government of Colleges and Universities” jointly formulated by the American Association of University Professors (AAUP), the American Council on Education (ACE) and the Association of Governing Boards of Universities and Colleges (AGB). These documents establish that collegial governance should be characterized by the following principles:

- The recognition of and respect for the many and varied roles that members of the academic community perform
- The timely disclosure of information needed to participate meaningfully in the discourse that makes good policy and practice
- The opportunity for members of the academic community to provide input for decisions that will affect them before those decisions are made
- The principle of dissent, which makes it imperative that dissent from the majority view be respected by all

As a practical matter, shared governance in a complex institution is seldom practiced in the committee of the whole, but instead, the various stakeholders speak through groups or offices: governing boards, administrative officers, faculty, staff, and students and their representative bodies.

The Redbook and University Governance

The Redbook is the official statement of the organizational structure, governance rules and procedures, and the university-wide policies of the University of Louisville; the most up-to-date version can be found on the Provost’s website at http://louisville.edu/provost/redbook. The Redbook recognizes the complicated network of relationships between the Board of Trustees, the president and the executive vice president and university provost, vice presidents, deans, chairs and other administrators, faculty, staff and students, and establishes a system of shared governance. Further, The Redbook establishes the Faculty Senate (3.4.2), the Staff Senate (5.7.1) and the Student Government Associa-
tion (6.5) as the official representatives of the faculty, staff and student bodies, and each senate is responsible for eliciting and expressing the opinions of its constituency on matters of concern to the whole. The principle of administrative consultation with appropriate individuals, groups and organizations is explicit throughout The Redbook (e.g., 2.1.2.B, D, H, K {duties of the president}; 2.2.2, 3.2.1, 3.3.5 {appointments of provost and vice presidents, deans, and chairs}).

Shared Governance in the Units

The University of Louisville currently has 13 academic units in which faculty may hold appointments (e.g., Arts and Sciences, Medicine, Law; see The Redbook 3.1.1. for a complete list). The Redbook specifies that each unit’s faculty “shall have general legislative powers over all matters pertaining to its own personnel policies, criteria, and procedures, to its own meetings, and to the admission requirements, curricula, instruction, examinations, and recommendations to the Board of Trustees for granting degrees in its own academic unit” (3.3.2). Units must have by-laws detailing organizational and governance structures that are consistent with the provisions of shared governance specified in The Redbook (3.1.3) and personnel documents detailing criteria for faculty status and appointment, tenure and promotion reviews, annual reviews, and career reviews that are consistent with those specified in The Redbook. Personnel documents and by-laws should be published on each unit’s web site, but they are also available on the provost’s website at http://louisville.edu/provost/faculty-personnel/unit. Changes to unit personnel documents and by-laws are reviewed by the Faculty Senate and the provost’s office before they are forwarded to the president and Board of Trustees for approval.

As noted above, The Redbook 3.3.2 gives unit faculties legislative authority over personnel policies, governance and curriculum, among other things. Thus, unit faculty share responsibility for 1) academic matters, including academic planning, the approval of academic degree programs, curriculum decisions, admissions and graduation requirements, issues related to academic freedom and policies regarding student grievances about academic work; 2) personnel matters, including academic personnel decisions (appointment, tenure and promotion, dismissal of tenured faculty), establishing criteria for review of faculty and for distributing salary increases and participation in the grievance process; and 3) governance matters, including development and approval of unit by-laws and rules for meeting, and the establishment of standing committees and other procedures by which the unit will govern itself. While each unit is different in the procedures it establishes for governing itself, each must do so in ways consistent with the policies and procedures outlined in The Redbook.

What Is My Role in Shared Governance?

For shared governance to be successful, each member of the university community must understand his or her role, must know the policies outlined in The Redbook and unit by-laws and personnel documents, and must take responsibility for his or her part.

University administrators (the president and the provost, as well as vice presidents) provide leadership in their particular areas of responsibility. Typically, the president and the provost must make final decisions for which their offices have been delegated responsibility, but such actions are usually taken after consultation with various concerned individuals, groups or organizations. The president and provost regularly consult with the Faculty Senate, often through the executive committee, on academic and research matters, on economic welfare issues and on changes to administrative structures or policies. The president and provost also may appoint university-wide committees, which include faculty (and staff and students when appropriate), to address such matters.

Unit administrators (deans and divisional or departmental officers) likewise provide leadership and must make final decisions for which their positions have been delegated authority, but they should do so by working through the appropriate faculty committees within their
units, departments or divisions as outlined in their unit’s by-laws. Deans on Belknap Campus report directly to the executive vice president and university provost, while deans on the Health Sciences Campus report to the executive vice president for health affairs; divisional or departmental officers report to the dean of their unit. Faculty committees typically include elected members.

**Tenured faculty members** have a responsibility to serve on departmental, unit and university committees as either appointed or elected members. In such service, they are expected to voice their opinions honestly and to serve the best interests of the institution as a whole rather than their own personal interests. Faculty members are expected to understand the policies of the university, particularly those in *The Redbook*, and to participate in the governance of their units and the university at large. In particular, unit faculties have responsibility for academic matters, faculty personnel matters and governance.

**Probationary faculty members** are usually asked to serve on fewer committees than tenured faculty (and may actually be prohibited from serving on some committees, such as departmental or unit personnel committees), but they should be free to contribute to conversations on academic and governance matters. Since proficiency in service is a requirement of all those who expect to be tenured, probationary faculty should participate in some service and governance activities. They should consult with their chairs about service assignments.

**Term and part-time faculty members** may participate in some service and governance activities, depending on the unit’s by-laws and the individual faculty member’s contract or work assignment. Part-time faculty may be elected to the Faculty Senate.

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**The Role of the Faculty Senate**

As noted previously, the Faculty Senate, the Staff Senate and the Student Government Association are the official, elected representatives of the faculty, staff and students. The Faculty Senate is responsible for reviewing policies and documents that affect the faculty and making recommendations regarding these policies to the university administration. Similarly, a primary responsibility of the senate is eliciting and representing the opinions, suggestions and recommendations of the faculty on all matters of concern to the faculty as a whole; the senate responds to questions or issues that arise from individuals or groups of faculty members, particularly when those questions or issues apply to the faculty as a whole. The Faculty Senate also makes recommendations to the Board of Trustees about the establishment, suspension or termination of academic programs. Finally, the Faculty Senate and its executive committee respond to requests for consultation from the administration, Board of Trustees and others.

The Faculty Senate has 70 members, including 62 full-time faculty members who serve three-year terms and six part-time faculty members who serve one-year terms. The Staff Senate and Student Government Association each have one representative on the Faculty Senate.

**Good Faith and the Principle of Dissent**

Successful shared governance depends on all participants acting in good faith, with everyone having enough information to offer sound opinions. Shared governance is sometimes a slow process, and consultation with all concerned individuals, groups and organizations is not always possible, but every effort should be made by both administrators and faculty to share information in a timely fashion. Universities have a unique mission—the creation and dissemination of knowledge—and shared governance is a means of ensuring that academic decision-making on matters such as curriculum, the allocation of resources and the appointment, promotion and tenure of academic colleagues is largely independent of short-term managerial, political or financial concerns. The
American Federation of Teachers’ Higher Education Program and Policy Committee recently issued a statement in 2002 on the importance of shared governance and concluded that “Shared governance is vital to maintain the academic integrity of our colleges and universities, to prevent the pressures of commercialization from distorting the institution’s educational mission or eroding standards and quality, and to uphold the ideals of academic freedom and democratic practice.”

Finally, in a system of shared governance, respect for the diversity of opinion is of the utmost importance. The Board of Trustees, administrators, faculty, staff and students will not always be of one voice on matters of policy and practice, and dissent from the majority view must be respected by all involved. No stakeholder should fear retaliation for expressing dissent from the majority opinion or from the opinion of a superior.

Shared governance is happening at the University of Louisville. All of us must do our part to uphold the ideals of academic freedom and democratic practice inherent in a system of shared governance.

**Links to Works Cited**

“Statement on Government of Colleges and Universities.” American Association of University Professors

“Shared Governance in Colleges and Universities: A Statement by the Higher Education Program and Policy Council.” The American Federation of Teachers

The Redbook
http://louisville.edu/provost/redbook

Unit Personnel Documents and By-laws
http://louisville.edu/provost/faculty-personnel/unit
The Values and Principles of Shared Governance

By Enid Trucios-Haynes
Trustee and Chair of the Faculty Senate
July 19, 2018
Shared Governance as a Value

One of higher education’s most distinctive values is its commitment to shared governance. It is a fundamental principle of inclusion in key areas of institutional responsibility and decision making.

Governing boards hold ultimate authority for an institution, as defined in bylaws and other foundational documents, as well as state fiduciary principles.

Board authority is delegated to—or “shared with”—institutional leaders and faculty.

From the AGB Board of Directors’ Statement on Shared Governance (2017)
Why Shared Governance Matters

Universities have a unique mission – *the creation and dissemination of knowledge* – and shared governance ensures that decision-making affecting the academic mission is largely independent of short-term managerial, political, or financial concerns – UofL Provost’s Office

A sound system of institutional governance is a necessary condition for the protection of faculty rights and for the most productive exercise of essential faculty freedoms, including academic freedom - AAUP
Core Principles of Shared Governance

• Accountability, Transparency, and Disclosure

• Regular communication and shared data - creating a culture of evidence

From: Association of Governing Boards of Universities and Colleges (AGB)
Key Constructs of Good Governance

1. **Mechanisms of Shared Governance** - Regulations, Policies, Procedures created with the involvement of stakeholders

2. **Compliance** - Processes that demonstrate Accountability, Transparency, and Disclosure

3. **Outcomes (Performance)** - Data and a culture of evidence

From: Association of Governing Boards of Universities and Colleges (AGB)
Key Constructs of Good Governance

Mechanisms of Shared Governance - Regulations, Policies, Procedures created with the involvement of stakeholders

SACSCOC Principles of Accreditation:

• Faculty - CS 3.7.5: The institution publishes policies on the responsibility and authority of faculty in academic and governance matters

• Students - CS 3.9.1: The institution publishes a clear and appropriate statement of student rights and responsibilities and disseminates the statement to the campus community
Key Constructs of Good Governance

• Compliance - Processes that demonstrate Accountability, Transparency, and Disclosure
  • Through the Redbook, UofL has guidelines that support the responsibility and authority of faculty in academic and governance matters and the principle of consultation with staff and students

• Outcomes (Performance) – Sharing Data and Creating a Culture of Evidence
  • SACSCOC Principles of Accreditation
  • CR2.5: The institution engages in ongoing, integrated, and institution wide . . . evaluation processes that (1) incorporate a systematic review . . .

From: Association of Governing Boards of Universities and Colleges (AGB)
UofL Board of Trustees’ Position on University Governance – adopted July 23, 2001

• The Board endorsed a position paper of the Coalition of Senate and Faculty Leadership (COSFL) in the State of Kentucky

• COSFL’s paper was an endorsement of the 1966 “Statement on Government of Colleges and Universities” jointly formulated by the American Association of University Professors (AAUP), the American Council on Education (ACE) and the Association of Governing Boards of Universities and Colleges (AGB)

• These documents establish the core principles of collegial (shared) governance
Principles of Shared Governance at UofL

• Recognition of and respect for the many and varied roles that members of the academic community perform

• Timely disclosure of information needed to participate meaningfully in the discourse that makes good policy and practice

• Opportunities for members of the academic community to provide input for decisions that will affect them before decisions are made

• Respect for the principle of dissent - it is imperative that dissent from the majority view is respected by all
Good Faith and the Principle of Dissent at UofL

• Successful shared governance depends on all participants acting in good faith with everyone having enough information to offer sound opinions

• Respect for the diversity of opinion is of utmost importance

• Trustees, administrators, faculty, staff, and students will not always share one voice on matters of policy and practice, and dissent from the majority view must be respected by all involved

• No stakeholder should fear retaliation for expressing dissent from the majority opinion or from the opinion of a superior.
The Role of Faculty in Decisions Allocating Financial Resources

• Allocating resources among competing demands is the responsibility of the governing board, the president and administration, and the faculty

• Each have a voice in the determination of short and long range priorities

• Each should receive appropriate analyses of past budgetary experience, reports on current budgets and expenditures, and short and long range budgetary projections

• Decisions having an university-wide impact necessarily affect the educational mission of the university and require consultation before decisions are made
The Redbook at UofL

• The official statement of the organizational structure, governance rules and procedures, and university-wide policies

• Establishes the Faculty Senate (3.4.2), the Staff Senate (5.7.1) and the Student Government Association (6.5) as the official representatives of the faculty, staff, and student bodies

• The principle of administrative consultation with appropriate individuals, groups and organizations is explicit throughout The Redbook
Preface

Proquest Search Timeline:
- Mid-February – Search committee meets to review the finalist pool and recommend a small group for airport or skype interviews (approximately 10 candidates).
- Late February – Search committee conducts airport interviews of finalists and creates a shortlist of 3-5 individuals to bring to UofL for campus interviews.
- March/April – On-campus interviews with candidates.
- April – Final search committee meeting to go through campus feedback, discuss the finalists, and develop a recommendation to the president. President Bendapudi will ask the committee for an unranked list of the strengths and weaknesses of any candidates that the committee feels are viable choices.

Call for Faculty Senate Representation:
Please contact Senate Chair Krista Wallace-Boaz if you are interested in being nominated to the following workgroups:

- Shared Governance Workgroup
- Strategic Plan Implementation Sub Committees

**Shared Governance Workgroup:**
This workgroup will be co-chaired by Michael Wade Smith (President’s Office), John Smith (Staff Senate Chair) and Krista Wallace-Boaz (Faculty Senate Chair). Topics of the workgroup include:
- Reaffirmation of the University of Louisville’s commitment to Shared Governance
- Shared Governance Best Practices (Policy/Procedures)
- Recommendations to further strengthen Shared Governance Governance and Consultation in policy, budget (prior to Board approval), Communication: Timing, method, order of events

ULAA Bylaws

Revised bylaws were approved by ULAA and the Board of Trustees.

Board of Trustees
Statement on Government of Colleges and Universities

The statement that follows is directed to governing board members, administrators, faculty members, students, and other persons in the belief that the colleges and universities of the United States have reached a stage calling for appropriately shared responsibility and cooperative action among the components of the academic institution. The statement is intended to foster constructive joint thought and action, both within the institutional structure and in protection of its integrity against improper intrusions.

It is not intended that the statement serve as a blueprint for governance on a specific campus or as a manual for the regulation of controversy among the components of an academic institution, although it is to be hoped that the principles asserted will lead to the correction of existing weaknesses and assist in the establishment of sound structures and procedures. The statement does not attempt to cover relations with those outside agencies that increasingly are controlling the resources and influencing the patterns of education in our institutions of higher learning: for example, the United States government, state legislatures, state commissions, interstate associations or compacts, and other interinstitutional arrangements. However, it is hoped that the statement will be helpful to these agencies in their consideration of educational matters.

Students are referred to in this statement as an institutional component coordinate in importance with trustees, administrators, and faculty. There is, however, no main section on students. The omission has two causes: (1) the changes now occurring in the status of American students have plainly outdistanced the analysis by the educational community, and an attempt to define the situation without thorough study might prove unfair to student interests, and (2) students do not in fact at present have a significant voice in the government of colleges and universities; it would be unseemly to obscure, by superficial equality of length of statement, what may be a serious lag entitled to separate and full confrontation.

The concern for student status felt by the organizations issuing this statement is embodied in a note, “On Student Status,” intended to stimulate the educational community to turn its attention to an important need.
This statement was jointly formulated by the American Association of University Professors, the American Council on Education (ACE), and the Association of Governing Boards of Universities and Colleges (AGB). In October 1966, the board of directors of the ACE took action by which its council “recognizes the statement as a significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations,” and “commends it to the institutions which are members of the Council.” The Council of the AAUP adopted the statement in October 1966, and the Fifty-third Annual Meeting endorsed it in April 1967. In November 1966, the executive committee of the AGB took action by which that organization also “recognizes the statement as a significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations,” and “commends it to the governing boards which are members of the Association.” (In April 1990, the Council of the AAUP adopted several changes in language in order to remove gender-specific references from the original text.)

1. Introduction

This statement is a call to mutual understanding regarding the government of colleges and universities. Understanding, based on community of interest and producing joint effort, is essential for at least three reasons. First, the academic institution, public or private, often has become less autonomous; buildings, research, and student tuition are supported by funds over which the college or university exercises a diminishing control. Legislative and executive governmental authorities, at all levels, play a part in the making of important decisions in academic policy. If these voices and forces are to be successfully heard and integrated, the academic institution must be in a position to meet them with its own generally unified view. Second, regard for the welfare of the institution remains important despite the mobility and interchange of scholars. Third, a college or university in which all the components are aware of their interdependence, of the usefulness of communication among themselves, and of the force of joint action will enjoy increased capacity to solve educational problems.

2. The Academic Institution: Joint Effort

   a. Preliminary Considerations

The variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others. The relationship calls for adequate communication among these components, and full opportunity for appropriate joint planning and effort.

Joint effort in an academic institution will take a variety of forms appropriate to the kinds of situations encountered. In some instances, an initial exploration or recommendation will be made by the president with consideration by the faculty at a later stage; in other instances, a first and essentially definitive recommendation will be made by the faculty, subject to the endorsement of the president and the governing board. In still others, a substantive contribution can be made when student leaders are responsibly involved in the process. Although the variety of such approaches may be wide, at least two general conclusions regarding joint effort seem clearly warranted: (1) important areas of action involve at one time or another the initiating capacity and decision-making participation of all the institutional components, and (2) differences in the weight of each voice, from one point to the next, should be
determined by reference to the responsibility of each component for the particular matter at hand, as developed hereinafter.

b. Determination of General Educational Policy

The general educational policy, i.e., the objectives of an institution and the nature, range, and pace of its efforts, is shaped by the institutional charter or by law, by tradition and historical development, by the present needs of the community of the institution, and by the professional aspirations and standards of those directly involved in its work. Every board will wish to go beyond its formal trustee obligation to conserve the accomplishment of the past and to engage seriously with the future; every faculty will seek to conduct an operation worthy of scholarly standards of learning; every administrative officer will strive to meet his or her charge and to attain the goals of the institution. The interests of all are coordinate and related, and unilateral effort can lead to confusion or conflict. Essential to a solution is a reasonably explicit statement on general educational policy. Operating responsibility and authority, and procedures for continuing review, should be clearly defined in official regulations.

When an educational goal has been established, it becomes the responsibility primarily of the faculty to determine the appropriate curriculum and procedures of student instruction.

Special considerations may require particular accommodations: (1) a publicly supported institution may be regulated by statutory provisions, and (2) a church-controlled institution may be limited by its charter or bylaws. When such external requirements influence course content and the manner of instruction or research, they impair the educational effectiveness of the institution.

Such matters as major changes in the size or composition of the student body and the relative emphasis to be given to the various elements of the educational and research program should involve participation of governing board, administration, and faculty prior to final decision.

c. Internal Operations of the Institution

The framing and execution of long-range plans, one of the most important aspects of institutional responsibility, should be a central and continuing concern in the academic community.

Effective planning demands that the broadest possible exchange of information and opinion should be the rule for communication among the components of a college or university. The channels of communication should be established and maintained by joint endeavor. Distinction should be observed between the institutional system of communication and the system of responsibility for the making of decisions.

A second area calling for joint effort in internal operation is that of decisions regarding existing or prospective physical resources. The board, president, and faculty should all seek agreement on basic decisions regarding buildings and other facilities to be used in the educational work of the institution.

A third area is budgeting. The allocation of resources among competing demands is central in the formal responsibility of the governing board, in the administrative authority of the president, and in the educational function of the faculty. Each component should therefore have a voice in the determination of short- and long-range priorities, and each should receive appropriate analyses of past budgetary
experience, reports on current budgets and expenditures, and short- and long-range budgetary projections. The function of each component in budgetary matters should be understood by all; the allocation of authority will determine the flow of information and the scope of participation in decisions.

Joint effort of a most critical kind must be taken when an institution chooses a new president. The selection of a chief administrative officer should follow upon a cooperative search by the governing board and the faculty, taking into consideration the opinions of others who are appropriately interested. The president should be equally qualified to serve both as the executive officer of the governing board and as the chief academic officer of the institution and the faculty. The president’s dual role requires an ability to interpret to board and faculty the educational views and concepts of institutional government of the other. The president should have the confidence of the board and the faculty.

The selection of academic deans and other chief academic officers should be the responsibility of the president with the advice of, and in consultation with, the appropriate faculty.

Determinations of faculty status, normally based on the recommendations of the faculty groups involved, are discussed in Part 5 of this statement; but it should here be noted that the building of a strong faculty requires careful joint effort in such actions as staff selection and promotion and the granting of tenure. Joint action should also govern dismissals; the applicable principles and procedures in these matters are well established.1

d. External Relations of the Institution

Anyone—a member of the governing board, the president or other member of the administration, a member of the faculty, or a member of the student body or the alumni—affects the institution when speaking of it in public. An individual who speaks unofficially should so indicate. An individual who speaks officially for the institution, the board, the administration, the faculty, or the student body should be guided by established policy.

It should be noted that only the board speaks legally for the whole institution, although it may delegate responsibility to an agent. The right of a board member, an administrative officer, a faculty member, or a student to speak on general educational questions or about the administration and operations of the individual’s own institution is a part of that person’s right as a citizen and should not be abridged by the institution.2 There exist, of course, legal bounds relating to defamation of character, and there are questions of propriety.

3. The Academic Institution: The Governing Board

The governing board has a special obligation to ensure that the history of the college or university shall serve as a prelude and inspiration to the future. The board helps relate the institution to its chief community: for example, the community college to serve the educational needs of a defined population area or group, the church-controlled college to be cognizant of the announced position of its denomination, and the comprehensive university to discharge the many duties and to accept the appropriate new challenges which are its concern at the several levels of higher education.

The governing board of an institution of higher education in the United States operates, with few exceptions, as the final institutional authority. Private institutions are established by charters; public institutions are
established by constitutional or statutory provisions. In private institutions the board is frequently self-perpetuating; in public colleges and universities the present membership of a board may be asked to suggest candidates for appointment. As a whole and individually, when the governing board confronts the problem of succession, serious attention should be given to obtaining properly qualified persons. Where public law calls for election of governing board members, means should be found to ensure the nomination of fully suited persons, and the electorate should be informed of the relevant criteria for board membership.

Since the membership of the board may embrace both individual and collective competence of recognized weight, its advice or help may be sought through established channels by other components of the academic community. The governing board of an institution of higher education, while maintaining a general overview, entrusts the conduct of administration to the administrative officers—the president and the deans—and the conduct of teaching and research to the faculty. The board should undertake appropriate self-limitation.

One of the governing board’s important tasks is to ensure the publication of codified statements that define the overall policies and procedures of the institution under its jurisdiction.

The board plays a central role in relating the likely needs of the future to predictable resources; it has the responsibility for husbanding the endowment; it is responsible for obtaining needed capital and operating funds; and in the broadest sense of the term it should pay attention to personnel policy. In order to fulfill these duties, the board should be aided by, and may insist upon, the development of long-range planning by the administration and faculty. When ignorance or ill will threatens the institution or any part of it, the governing board must be available for support. In grave crises it will be expected to serve as a champion. Although the action to be taken by it will usually be on behalf of the president, the faculty, or the student body, the board should make clear that the protection it offers to an individual or a group is, in fact, a fundamental defense of the vested interests of society in the educational institution.

4. The Academic Institution: The President

The president, as the chief executive officer of an institution of higher education, is measured largely by his or her capacity for institutional leadership. The president shares responsibility for the definition and attainment of goals, for administrative action, and for operating the communications system that links the components of the academic community. The president represents the institution to its many publics. The president’s leadership role is supported by delegated authority from the board and faculty.

As the chief planning officer of an institution, the president has a special obligation to innovate and initiate. The degree to which a president can envision new horizons for the institution, and can persuade others to see them and to work toward them, will often constitute the chief measure of the president’s administration.

The president must at times, with or without support, infuse new life into a department; relatedly, the president may at times be required, working within the concept of tenure, to solve problems of obsolescence. The president will necessarily utilize the judgments of the faculty but may also, in the interest of academic standards, seek outside evaluations by scholars of acknowledged competence.

It is the duty of the president to see to it that the standards and procedures in operational use within the college or university conform to the policy established by the governing board and to the standards of sound academic practice. It is also incumbent on the president to ensure that faculty views, including dissenting
views, are presented to the board in those areas and on those issues where responsibilities are shared. Similarly, the faculty should be informed of the views of the board and the administration on like issues.

The president is largely responsible for the maintenance of existing institutional resources and the creation of new resources; has ultimate managerial responsibility for a large area of nonacademic activities; is responsible for public understanding; and by the nature of the office is the chief person who speaks for the institution. In these and other areas the president’s work is to plan, to organize, to direct, and to represent. The presidential function should receive the general support of board and faculty.

5. The Academic Institution: The Faculty

The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty. It is desirable that the faculty should, following such communication, have opportunity for further consideration and further transmittal of its views to the president or board. Budgets, personnel limitations, the time element, and the policies of other groups, bodies, and agencies having jurisdiction over the institution may set limits to realization of faculty advice.

The faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.

Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgments. Likewise, there is the more general competence of experienced faculty personnel committees having a broader charge. Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status, as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.

The faculty should actively participate in the determination of policies and procedures governing salary increases.

The chair or head of a department, who serves as the chief representative of the department within an institution, should be selected either by departmental election or by appointment following consultation with members of the department and of related departments; appointments should normally be in conformity with department members’ judgment. The chair or department head should not have tenure in office; tenure as a faculty member is a matter of separate right. The chair or head should serve for a stated term but without prejudice to reelection or to reappointment by procedures that involve appropriate faculty consultation. Board, administration, and faculty should all bear in mind that the department chair or head has a special obligation to build a department strong in scholarship and teaching capacity.
Agencies for faculty participation in the government of the college or university should be established at each level where faculty responsibility is present. An agency should exist for the presentation of the views of the whole faculty. The structure and procedures for faculty participation should be designed, approved, and established by joint action of the components of the institution. Faculty representatives should be selected by the faculty according to procedures determined by the faculty.5

The agencies may consist of meetings of all faculty members of a department, school, college, division, or university system, or may take the form of faculty-elected executive committees in departments and schools and a faculty-elected senate or council for larger divisions or the institution as a whole.

The means of communication among the faculty, administration, and governing board now in use include: (1) circulation of memoranda and reports by board committees, the administration, and faculty committees; (2) joint ad hoc committees; (3) standing liaison committees; (4) membership of faculty members on administrative bodies; and (5) membership of faculty members on governing boards. Whatever the channels of communication, they should be clearly understood and observed.

On Student Status

When students in American colleges and universities desire to participate responsibly in the government of the institution they attend, their wish should be recognized as a claim to opportunity both for educational experience and for involvement in the affairs of their college or university. Ways should be found to permit significant student participation within the limits of attainable effectiveness. The obstacles to such participation are large and should not be minimized: inexperience, untested capacity, a transitory status which means that present action does not carry with it subsequent responsibility, and the inescapable fact that the other components of the institution are in a position of judgment over the students. It is important to recognize that student needs are strongly related to educational experience, both formal and informal.

Students expect, and have a right to expect, that the educational process will be structured, that they will be stimulated by it to become independent adults, and that they will have effectively transmitted to them the cultural heritage of the larger society. If institutional support is to have its fullest possible meaning, it should incorporate the strength, freshness of view, and idealism of the student body.

The respect of students for their college or university can be enhanced if they are given at least these opportunities: (1) to be listened to in the classroom without fear of institutional reprisal for the substance of their views, (2) freedom to discuss questions of institutional policy and operation, (3) the right to academic due process when charged with serious violations of institutional regulations, and (4) the same right to hear speakers of their own choice as is enjoyed by other components of the institution.

Notes

1. See the 1940 “Statement of Principles on Academic Freedom and Tenure,” AAUP, Policy Documents and Reports, 11th ed. (Baltimore: Johns Hopkins University Press, 2015), 13–19., and the 1958 “Statement on Procedural Standards in Faculty Dismissal Proceedings,” ibid., 91–93. These statements were jointly adopted by the Association of American Colleges (now the Association of American Colleges and Universities) and the American Association of University Professors; the 1940 “Statement” has been endorsed by numerous learned and scientific societies and educational associations. Back to text
2. With respect to faculty members, the 1940 “Statement of Principles on Academic Freedom and Tenure” reads: “College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution” (ibid., 14). Back to text

3. Traditionally, governing boards developed within the context of single-campus institutions. In more recent times, governing and coordinating boards have increasingly tended to develop at the multi-campus regional, systemwide, or statewide levels. As influential components of the academic community, these supra-campus bodies bear particular responsibility for protecting the autonomy of individual campuses or institutions under their jurisdiction and for implementing policies of shared responsibility. The American Association of University Professors regards the objectives and practices recommended in the “Statement on Government” as constituting equally appropriate guidelines for such supra-campus bodies, and looks toward continued development of practices that will facilitate application of such guidelines in this new context. [Preceding note adopted by the AAUP’s Council in June 1978.] Back to text

4. With regard to student admissions, the faculty should have a meaningful role in establishing institutional policies, including the setting of standards for admission, and should be afforded opportunity for oversight of the entire admissions process. [Preceding note adopted by the Council in June 2002.] Back to text

5. The American Association of University Professors regards collective bargaining, properly used, as another means of achieving sound academic government. Where there is faculty collective bargaining, the parties should seek to ensure appropriate institutional governance structures which will protect the right of all faculty to participate in institutional governance in accordance with the “Statement on Government.” [Preceding note adopted by the Council in June 1978.] Back to text

Report Category: Standing Committee and Subcommittee Reports  College and University Government

Tags: Faculty Senates  American Council on Education  Association of Governing Boards of Universities and Colleges
Shared Governance in Colleges and Universities

A Statement by the Higher Education Program and Policy Council

Aft Higher Education
AFT Higher Education
SANDRA FELDMAN, President
EDWARD J. McELROY, Secretary-Treasurer
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RAYMOND SPOTO, The Association of University of Wisconsin Professionals
LOUIS STOLLAR, United College Employees of the Fashion Institute of Technology
MITCHELL VOGEL, University Professionals of Illinois
NICHOLAS YOVNELLO, Council of New Jersey State College Locals

STAFF:
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For a number of years, we have been hearing calls for a new, more “efficient” way of administering our institutions of higher education. It is said that:

- times have changed;
- colleges and universities ought to be run more like businesses;
- the rapid technological changes taking place—computerization, the Internet, Web-based courses—require adaptability;
- the marketplace of higher education is rapidly changing, with wholly online institutions and for-profit universities creating competitive challenges to our traditional ways;
- faculty are too slow to make decisions to adapt to change and cling to outmoded models of deliberation and reflection when action is required;
- faculty resist efforts to keep the curriculum up to date and inappropriately inject politics—multiculturalism, liberalism—into it; and
- the tenure system stands as an obstacle to greater accountability and improved performance.

Because an ever-growing number of board members and administrators with this mindset have reached positions of responsibility on campus, a direct assault is being launched on the practice of shared governance in higher education. There is a feeling among political leaders, boards of governors (regents or trustees) and top administrators (chancellors, presidents and the like) that any sharing of authority impedes their “right” to make the big decisions. They believe that they know what is best and that faculty and staff should step aside and let the managers take charge.

The American Federation of Teachers, on the other hand, believes this is exactly the wrong way to run a successful college or university. **We believe that all college and university employees—top tenured faculty, junior faculty, temporary and part-time/adjunct faculty, graduate teaching and research assistants, professional staff with and without faculty rank, the classified and support staff that keep the educational enterprise going—should have a guaranteed voice in decision-making, a role in shaping policy in the areas of their expertise.**

1Throughout this document, terms such as “faculty,” “professional staff” and “staff” (which includes classified and support staff as well as professionals) will be used to refer to the wide variety of college and university employees listed above. The broad range of job titles, nomenclature and ranking systems at each institution makes it impossible to use more specific or uniform terminology.
What Is Shared Governance? Why Is It Important?
Shared governance is the set of practices under which college faculty and staff participate in significant decisions concerning the operation of their institutions. Colleges and universities are very special types of institutions with a unique mission—the creation and dissemination of ideas. For that reason, they have created particular arrangements to serve that mission best. For example, academic tenure protects the status, academic freedom and independent voice of scholars and teachers. Shared governance, in turn, arose out of a recognition that:

- academic decision-making should be largely independent of short-term managerial and political considerations;
- faculty and professional staff are in the best position to shape and implement curriculum and research policy, to select academic colleagues and judge their work; and
- the perspective of all front-line personnel is invaluable in making sound decisions about allocating resources, setting goals, choosing top officers and guiding student life.

It is widely understood that broad participation in decision-making increases the level of employee investment in the institution's success. As a result, organizational theorists for many years have recommended shared decision-making as a key strategy to improve productivity in all kinds of organizations. In higher education, due to the high turnover rate of top administrators, the faculty and staff are often in the best position to provide the institutional history so valuable to institutional planning. Without that institutional history, institutions are apt to repeat past failures.

Why Is Shared Governance Under Attack?
Until recently, top college administrators, boards of trustees and political leaders could be counted on to recognize and defend the right of individual faculty and staff members and their representative assemblies to participate in the design and implementation of the educational goals and policies of the institution. But no longer. Why?

Increasing numbers of public officials, institutional board members and administrators have come to view higher education as a multi-billion-dollar industry, with money and power to be amassed and used for purposes remote from core academic values such as contemplation, reflection, neutrality, objectivity and critical thinking. To exploit the commer-
cial and political potential of this industry, they seek to run our colleges more on a “corporate-tized” business model. The corporate model is characterized by commercializing and breaking apart the elements that make higher education great.

The corporatized college president has become the CEO, no longer the academic leader. The agendas of the top administrators in public colleges often are informed by political considerations, not academic ones. The educational mission is seen as just one aspect of a multi-faceted “business” in which the institution is engaged, which may include job training, entertainment, sports, housing, health care, and private corporate research and development. Under the guise of efficiency and confidentiality, top administrators are being recruited by professional search firms with a diminished faculty role in their selection. The voice of the faculty and staff is relegated to an advisory role rather than that of a full partner in the institution's success.

The Real Crisis In Shared Governance
The corporatized model of college governance has engendered a real crisis in higher education. It threatens the integrity of the key educational and research functions that faculty and staff perform, through:

- outsourcing jobs essential to instruction, including the design of courses and introduction of computer-based teaching elements;
- redirecting the teaching of courses from full-time dedicated professionals to exploited part-time and temporary faculty, graduate teaching and research assistants, with low pay, little security and no academic freedom;
- re-orienting the curriculum toward business-oriented coursework, including more courses designed to “train” students for the “real-world.” Traditionally “academic” courses are pressured to be more “practical,” and generally there is less concern for a broad-based liberal arts curriculum intended to help students develop and mature intellectually into critically thinking democratic citizens;
- buying and selling “courseware,” through the appropriation of computer-based intellectual property for purposes of commercial exploitation;
- developing for-profit teaching and/or research subsidiaries of colleges and universities, which are out of the reach of public scrutiny; and
- forming commercial consortia with other universities and private investors.

Increased workloads, restrictive tenure standards, pressures to incorporate new technologies in teaching and demoralization resulting from top-level assertions of power have had the predictable, if perverse, effect of decreasing the willingness of faculty and staff to participate in the shared governance of their institutions.

The erosion of shared governance imperils the elements that produce quality education and scholarship. Shared governance is like the system of checks and balances in state and federal government. Excessive power and control concentrated in any one level of the institu-
tion virtually guarantees that there will be a distorted perspective on crucial aspects of the academic enterprise. When politicians, boards and administrators seek to “corporatize” higher education, they hurt the recipients of educational value, namely students and the public.

**Shared Governance Should Be Strengthened and Expanded**
The interdependence among constituent groups at all levels of the college requires complex coordination, excellent communication among the levels, and appropriate joint planning and execution. Faculty and administrators depend on a wide variety of specialist co-workers to perform their academic functions. In the increasingly complex world of higher education, many of the traditional duties of those holding faculty rank have been reassigned or shared with other professionals. For instance, many groups of specialists assist in key ways:

- student counselors provide academic and career guidance;
- information technologists help enhance teaching, learning and research; and
- laboratory managers and assistants maintain and teach scientific work in laboratories.

Part-time/adjunct faculty used to be literally adjunct to the central instructional function, but they have become indispensable and ubiquitous, though overused and exploited, in many colleges. Classified and support staff, traditionally not represented at the table, also deserve representative participation in making decisions related to their areas of expertise.

Employees of all kinds have long sought vehicles for effective voice in workplace decisions, often through unions and professional associations. In some states and institutions, staff members without faculty rank have been explicitly included—sometimes mandated by statute—in representative decision-making and planning committees, task forces and assemblies. At hundreds of institutions, academic and classified staff have expressed their right to be heard through engagement in collective bargaining. In still other cases, their voice is ignored. When their influence is denied a place in policy making, the institution and its students suffer.
Six Principles of Shared Governance

The following are six basic principles of shared governance that should be observed in establishing, maintaining and strengthening our institutions.

**Faculty and professional staff set academic standards and curriculum**
Faculty and professional staff, particularly those directly involved in teaching and conducting research, should have the lead role in determining the content of the curriculum, degree and certificate requirements, standards of instruction, student achievement standards, grading, and all matters relating to student progress in academic programs. To fulfill this responsibility effectively, faculty and professional staff must be given access to information and resources. Their judgments should be subject to overrule only rarely, with compelling reasons provided in writing and with an opportunity for response by the faculty and professional staff.

**Faculty and professional staff require academic freedom**
Faculty and professional staff must be able to exercise independent academic judgment in the conduct of their teaching and research. Administrators should not interfere in these matters except in proven cases of academic incompetence or wrongdoing. A strong tenure system is the bulwark of protecting academic freedom against intimidation and arbitrary dismissal. Beyond that, protections of free expression should be extended to all staff to ensure openness, objectivity and creativity.

**Faculty and professional staff should have primacy in decisions on academic personnel and status**
Faculty should have the primary role in interviewing and recommending candidates for academic appointment to the faculty, for tenure and promotion, research support, sabbaticals, and other incentives and measures of academic quality. Similarly, professional staff should have the primary role in interviewing and recommending candidates for appointment to their ranks, for advancement in academic status and promotion and for other incentives and measures of professional quality. Administrative overrule of these decisions should be rare and for compelling reasons, given in writing, and be subject to individual and collective response.

**Participation in shared governance should be expanded**
A well-functioning college or university is one that ensures that all faculty and all staff—from full professors to adjunct lecturers, from librarians to departmental support staff—
have suitable arrangements for their voices to be heard and given proper weight in deci-
sions that affect the mission and operation of the institution. For example, all faculty and
staff should play a direct and prominent role in developing and advising on institutional
budgets. All faculty and staff should have a leading role on institutional committees, task
forces and decision-making bodies that affect their work and are within their areas of
expertise, including search committees for choosing presidents and administrators.

Given the growing interdependence among faculty, staff, students, administrators and insti-
tutional boards, all of those who aid in the design and/or implementation of the academic
mission of the college or university have a stake in shared governance. While full-time fac-
culty have traditionally been able to claim a central role along with top administrators and
boards, a number of trends, accelerating since the last quarter of the twentieth century,
favor the expansion of governance roles to other staff. For instance, the increased special-
ization of traditional academic functions, away from active faculty involvement and toward
professional and technical personnel, necessitates the inclusion of these experts into appro-
priate roles in shared governance. Similarly, the enlargement of the role of non-tenure-track
and part-time/adjunct faculty, as well as of graduate employees (teaching and research
assistants) calls for the development of appropriate means and mechanisms to draw them
into shared governance.

The forms of shared governance and degrees of participation will vary according to the par-
ticular institutional arrangements currently in place, but each group whose work con-
tributes to the academic enterprise should be involved in a manner appropriate to its insti-
tutional function and responsibilities.

**Unions, representative assemblies and faculty senates all can have significant roles in shared governance**

The organizational forms of shared governance differ among institutions, depending on
institutional history, norms and customs. In many institutions, these forms are called sen-
ates or assemblies, though these terms are not definitive, for faculty senates may include or
exclude administrators, non-teaching professionals, non-tenure-track and part-time faculty.

In many colleges and universities, faculty and staff have turned to collective bargaining, both
as a way to increase the influence of their voices, to provide institutional means for their
voices to be heard and represented in the absence of pre-existing roles for them in shared gov-
ernance, or to support and bolster the existing structures of shared governance. Unionization
is a basic democratic right of all employees. Higher education unions are democratically
elected representatives of these employees with a legitimate role in shared governance.

A standard management tactic, however, is to attempt to convince faculty and staff—espe-
ially during campaigns to establish collective bargaining—that the existence of a faculty or
staff union will destroy the “collegiality” of the shared governance process. In particular, the
argument goes, the union will take over the powers and responsibilities of the faculty senate
or whatever the governance body is called.
The position of the American Federation of Teachers has always been that the functions of the union and the governance bodies complement, rather than compete with, each other. Despite predictions by opponents of unionization that the presence of a faculty or staff union would destroy the shared governance body and shatter collegiality, this observation is unfounded. In fact, the opposite is often true.

Unions and collective bargaining do not and should not supplant effective structures of shared governance, i.e., those structures that derive their legitimacy from genuine representation of faculty and staff. When faculty and staff choose unions and collective bargaining, they do so because a clear majority believe that the existing structure is not sufficient to guarantee full and true collegiality—the kind that comes from working with top administrators and board members as equal partners on the basis of legally enforceable rights and responsibilities.

Specifically, collective bargaining strengthens collegiality by establishing and enforcing contractual ground rules supporting it. Typically, committee procedures developed in the institution’s shared governance traditions have been incorporated into union contracts, strengthening the senate’s (or other body’s) role and preserving collegial practices. One can think of it in the following way: the union itself is one form of shared governance, but one that is able to create the conditions under which other shared governance mechanisms like the faculty senate can operate successfully and without administrative interference. In the end, we believe that the strongest shared governance systems are based on sound collective bargaining contracts that clearly delineate an active role for faculty and staff at the institution.

On a college-by-college basis, it is important that the respective roles of the union and the shared governance structures be understood mutually. There is no one template for shared governance for all institutions of higher education, nor should there be. Differences among colleges will be based, among other things, on the federal, state and local legal mandates governing particular colleges and universities, on the requirements of applicable labor laws, on institutional traditions, on the terms of the collective bargaining agreement and on the institution’s circumstances of labor-management relations.

Accrediting agencies should support fully the concept of shared governance in their standards

Regional and specialized accrediting agencies, whose role it is to establish standards for higher education institutions, should guarantee that enforceable shared governance procedures are not only included in written institutional policies, but also are practiced in reality. For instance, as institutions shift more course work into a distance education medium, accrediting agencies should ensure that faculty and staff remain as deeply involved in setting curriculum and academic standards as they are in traditional courses and that their teaching continues to be protected by academic freedom.
Conclusion

In whatever shared governance structures exist or are created, faculty and staff must have representatives of their own choosing. They must respect the rights of other participants in shared governance.

Institutional structures of shared governance should be constructed to incorporate the views of faculty and staff at all levels of decision-making. The institution's administrators must provide the participants in shared governance time, encouragement and the information necessary to be effective.

Shared governance is vital to maintain the academic integrity of our colleges and universities, to prevent the pressures of commercialization from distorting the institution's educational mission or eroding standards and quality, and to uphold the ideals of academic freedom and democratic practice. Strengthening shared governance is the responsibility of all colleges and universities, and a priority of our union.
**SHARED DECISION-MAKING BEST PRACTICES**

**WHICH FACULTY DECISIONS ARE SHARED?**

There are many potential topics for shared decision-making in departments. Some of the most common, and most challenging, include:

- Recommending faculty hires to Dean
- Suggesting Chair appointments to Dean
- Adopting/amending bylaws
- Tenure and promotion deliberation process
- Electing faculty to committees
- Changing curricula
- Recommending office space/lab allocations
- Merit deliberations

Faculty can be involved in many other different kinds of decisions, such as identifying speakers to invite to campus, student awards, ensuring faculty and student success, and other activities.

**WHAT PROBLEM DO WE WANT TO SOLVE?**

In many departments, faculty actively discuss and make decisions together through voting or consensus. But decision-making can be fraught, and many departments continue to use decision-making models premised on less diverse faculty bodies.

Members of groups that are underrepresented in the field – by gender, race/ethnicity, sexuality, gender identity, first-generation status, religion, ability status, etc. – often have less influence in decision-making, even in consensus models. Speaking up publicly can be difficult, especially when rank plays into decision-making. For example, Professors may have greater influence in decision-making; tenure track faculty may also have greater influence or voting privileges than non-tenure track faculty. Yet, hiring decisions may matter a great deal to more junior faculty who may be living with a new colleague for more years.

The goal of shared decision-making is for faculty to trust one another and work together to make decisions. Consensus, trust, and communication are key.

**WHAT DOES THE MSP CONTRACT REQUIRE?**

- Units should follow departmental bylaws for decision-making and votes; bylaws must be voted on by faculty members in the unit.
- Some votes (such as appointing a new Chair/Head) are advisory to the Dean, but the faculty must approve the search committee’s recommendation.
- Only bargaining unit faculty (in MSP) can deliberate and vote on personnel decisions such as tenure and promotion; Chairs/Heads weigh in separately.

**WHAT OTHER PRINCIPLES DOES MSP RECOMMEND?**

- All faculty with 50% or greater appointments should be eligible for committee service, invited to faculty meetings, and given full voting rights as defined in bylaws (e.g. “at rank and above”).
- Departmental PCs ideally will be informed by input from the greater faculty. DPC of the whole (e.g. DPC made up of all faculty or all tenured faculty) might require attendance (e.g. eligible voters must have reviewed the materials and participated in the discussion to vote).
- Any important votes – hiring, chair selection, etc., should be conducted through secret ballot.
- Bylaws should be adopted or amended through 2/3rds or greater votes.
- Faculty retain voting rights while on leave, but are not required to attend meetings or vote when on leave.
- Remote participation (such as Zoom) should be allowed in meetings and voting.

*This resource is based on presentations made by James Allan, Itai Sher, and Eve Weinbaum.*
**How do modified consensus models work?**

There are many different strategies. The College of Information and Computer Sciences at UMass Amherst, a unit with around 70 faculty members, follows these strategies:

- Most decisions are made by the faculty as a whole under the assumption of collegiality and the ability to come to some consensus.
- Consensus is operationalized as a 2/3rds vote in favor of any proposal (formally making this a supermajority rather than consensus model).
- The department uses anonymous IClickers (checked out from the library) to record votes.
- Some decisions require weekly or biweekly meetings.
- Decisions may be piloted through an elected “executive committee.”
- Committee appointments reflect faculty preferences, except elected Executive and Personnel committees.

**How should faculty hiring decisions be structured?**

- Faculty should vote on recommended fields for hires; recruitment committees should be diverse by rank and other factors, but include faculty members with relevant expertise.
- Recruitment committee should be responsible for reading files and selecting a long short-list; in some departments, faculty members are allowed to weigh in on those top candidates.
- When short-list candidates are brought to campus, all faculty members should be allowed to view job talk, review materials, meet candidates, and engage in deliberations about which candidates should be hired.
- Allowing faculty to discuss and vote on their top candidates can help guarantee that they have wide support. Only faculty who engage in the hiring process should vote.

**When should departments use majority voting?**

If there are two choices – Yes and No – or Candidate A or B – majority voting works well. Some departments expect 50% for hiring NTT or untenured faculty, and 66% for hiring tenured faculty.

**When should departments use other approaches?**

If there are multiple choices, e.g. four job candidates, majority voting can be less effective at identifying those with the most support. Ranked-choice voting or Condorcet voting take into account the full complexity of how multiple candidates are ranked, and only require one ballot to do so.

**Ranked-choice voting models use ranked lists to determine who has the most support.**

- Ask faculty members to rank A, B, C, and D, as 1st, 2nd, 3rd, and 4th choice (faculty can leave out any candidates that are not acceptable).
- If any candidate wins a majority of votes, that candidate is the top choice. If not, eliminate the candidate with fewest first choice votes, e.g. for all ballots that voted for B first, apportion their second-choice votes to A, C, and D. If any candidate wins a majority of the votes, that candidate is the top choice.
- If still no winner, eliminate candidate with next fewest first choice votes, e.g. if C had the next fewest votes, take all ballots that voted for C first and apportion their second or third choice votes to A and D.
- Winner receives majority of votes. This can be used to identify the order for cascading offers.

**Condorcet voting models use ranked lists to run head-to-head votes for each candidate against each candidate.**

- Ask faculty members to rank A, B, C, and D, as 1st, 2nd, 3rd, and 4th choice (faculty can leave out any candidates that are not acceptable).
- Use ballots to run vote for A against B; A against C; A against D. (We can tell who a voter prefers in a head-to-head election from their ranking.)
- Use ballots to run vote B against C; B against D.
- Use ballots to run vote C against D.
- If a candidate wins all matches, they are the winner. If not, use another method (such as ranked choice).

**For more information**

MSP, Fairvote, UMass ADVANCE

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NPD Dialogue (p/bl/et/blogid=1003)

Shared Governance: What it Is and Is Not

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Shared governance pioneer Tim Porter-O’Grady defines shared governance as “a structural model through which nurses can express and manage their practice with a higher level of professional autonomy.” (2003). When originally introduced in the 1970s and 1980s, shared governance waxed and waned in its popularity. Today, it has become the preferred leadership model for transformational leaders throughout healthcare. Despite its rise in popularity, challenges still remain regarding what shared governance is and more importantly, what it is not.

Shared governance is a structure and process for partnership, equity, accountability, and ownership. It puts the responsibility, authority, and accountability for practice-related decisions into the hands of the individuals who will operationalize the decision. I often hear people say they have shared governance. They then go on to share an example, that for me, is clearly participatory leadership. There is no doubt that clarity about the difference between participatory management and shared governance is needed as organizations implement or strengthen their shared governance culture. Let’s take a closer look at the difference through the following example.

A group of staff is asked to trial several versions of the same product. The group completes this trial by comparing the various products, and then they forward their feedback to leadership. Leadership reviews the staff feedback and makes the final decision on what will be purchased. Leadership may or may not take into account staff feedback, yet, the staff did have the opportunity to participate in the product decision. This is clearly participatory management.
Using a shared governance approach, let’s re-run the same scenario. A group of staff is asked to trial several versions of the same product and identify the product to be purchased. Leadership articulates the parameters or criteria that must be met by the product for it to be purchased. These parameters often include things such as budget amount, vendors in the organization’s buying group, quantity needed, etc. Upon completion of the trial, staff forwards their feedback to leadership. In addition to this feedback, staff informs leadership that the product they have chosen meets all the articulated parameters/criteria. Upon receiving this information, leadership thanks the group and proceeds to order the product identified by the shared decision-making staff group. Because of the articulated parameters/criteria, the response from leadership in a shared governance culture would be “thank you,” and the purchase is processed through the system. This is true shared governance... leadership shared the parameters/criteria, and staff made the decision.

**Participatory Management**

**Goals**
Leaders request input from staff to determine goals; use of input is optional.

**Use of input**
Leader is not required to use staff input.

**How decisions are made**
Final decision lies with leader, who may accept or reject staff input.

**Leadership style**
Hierarchical leader

**Level at which decisions are made**
Centralized decision making

**Shared Governance**

**Goals**
Staff are given the responsibility, authority, and accountability to determine what goals to pursue.

**Use of input**
Staff obtains input from colleagues and others.

**How decisions are made**
Leaders clearly articulate the guidelines for the decision (e.g., “We have $10,000 to spend on xx”) and staff make autonomous decisions that stay within the guidelines.

**Leadership style**
Servant leader

**Level at which decisions are made**
Decentralized decision making

So just what IS shared governance? Shared governance IS

- a model that ensure that decisions are made by the people working at the point of care,
- a leadership development strategy,
- a way to identify future positional leader,
- a tenant of professional practice; or
- a key expression of organizational culture.

Shared governance IS NOT

- the replacement or elimination of positional leadership;
- a strategy to support downsizing of leadership;
- self-governance; or
- abdication of leadership responsibilities. (adapted from Guanci and Medeiros, 2018)
All involved in shared governance must have clarity that there are structures, processes, and outcomes that leadership will continue to have responsibility for, such as regulatory requirements, immediate safety concerns, performance management, and operations decisions such as hiring, salary, staffing, etc. Decisions related to practice are the ones that should be decided in a shared decision-making model.

Time spent implementing, strengthening, and/or deepening a shared governance culture is time well spent. The ROI will be seen in the outcomes of shared governance work, including improved patient experience, clinical outcomes, and staff engagement.

What has been your experience with shared governance?

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The commitment to shared governance is too often a mile wide and an inch deep. Board members, faculty leaders, and presidents extol the value of shared governance, but it frequently means something different to each of them. When that is the case, at the first bump in the road, participants can become frustrated, sometimes walking away from a commitment to do the hard work of good governance. Worse yet, when that happens, there may be mutual recriminations that can cripple the institution for years. Much has been written on the benefits of shared governance, but less has been written on practical steps to take to make shared governance work.
Effective and responsive governance is vitally important during times of change in higher education. Sharing governance in the face of sweeping and transformative change can help shift the thinking of boards, faculty, and staff from protecting yesterday’s parochial interests to aligning efforts to address tomorrow’s realities. When efforts are aligned, solutions are often more thoughtful and implementation time is faster.

The trends pressuring many colleges and universities are numerous, and they demand unprecedented cooperation and collaboration among boards, administrators, and presidents. They include:

- Heightened competition from institutions delivering online and non-traditional types of higher education that require faculty and boards to develop timely, unified, and mission-sensitive responses;
- The drumbeat of calls for stronger student outcomes, including better graduation rates and placement rates, which requires building consensus among the board, administration, and faculty; and
- Affordability and accessibility issues that require all within the institution to better focus on doing their part to create the best value for an increasingly diverse set of students.

The Association of Governing Boards of Universities and Colleges has called for “integral leadership” from leaders of colleges and universities. Recently, in a publication called *Top 10 Strategic Issues for Boards, 2013–2014*, AGB provided this compelling definition of integral leadership:

“To accomplish these goals, many governing boards have moved to a model of integral leadership—**collaborative but decisive leadership** that can energize the vital partnership between boards and presidents.
Integral leadership links the president, faculty, and board in a well-functioning partnership purposefully devoted to a well-defined, broadly affirmed institutional vision.”

The bolded phrases in this definition are areas enhanced and strengthened through strong systems of sharing governance. Effective shared governance increases collaboration, creates useful links between constituencies, and builds needed partnerships.

But it can do so much more. When shared governance is viewed as more than a set of boundaries and rules of engagement, it can create a system where the integral leaders move beyond the fragmentation of traditional governance. They move to shared responsibility for identifying and pursuing an aligned set of sustainable strategic directions. And though it may take time to develop these priorities, once they’re identified, each constituency can be more decisive in implementing tactics to advance them.

There are five best practices that cut across various types of institutions, whether public or private, unionized or non-unionized, four-year colleges or community colleges, traditional or specialized. Although these types of institutions are different in many ways, including how boards and faculties are structured, they still have much in common. Each board has similar fiduciary and supervisory duties, and each faculty has substantial responsibility for the curriculum. And every institution sometimes experiences a degree of tension between faculty members and board members.

The five practices below, when deliberately followed, create the alignment in which administrators, board members, and faculty members become integral leaders.

1. Actively engage board members, administrators, and faculty leaders in a serious discussion of what shared governance is (and
Faculty members and trustees tend to disagree on how to define shared governance and what to expect from it. Faculty members often view it as equal rights to governance. That is the most literal view of the word “shared” in shared governance—as in “share and share alike.” While this view might be attractive in theory, it is problematic in practice. Faculty members do not have veto power over decisions that are within the primary fiduciary and oversight responsibilities of the board. Similarly, although boards are ultimately, as fiduciaries, responsible for the academic quality of their institutions, trustees should only rarely exercise any power they have to veto core academic decisions.

Likewise, board members and administrators sometimes view shared governance as the obligation to consult with faculty before decisions are made, particularly those directly influencing the academic program. But faculty members often expect more than mere consultation prior to implementation of a decision. They expect to be at the table at key junctures in the decision-making process, instead of appearing for a pro forma consultation after the decision is made. Faculty members tend to view accountability differently than do board members, seeing it as steadfast adherence to a collegial process with wide participation, while board members tend to value process less and judge accountability by strong outcomes. Boards lose credibility with the faculty if they shortcut agreed-upon processes.

Board leaders, faculty leaders, and presidents should openly discuss how they view shared governance. How does each constituency define shared governance and how significant are the differences?

The first step to having a meaningful discussion of expectations is for the president, faculty leaders, and board leaders to state publicly their support for shared governance. At the same time, leaders should make it clear that shared governance is not a sword for gaining the upper hand in policy debates. Rather, it’s a system for building communication, respect, and trust—with an eye toward developing integral leaders at all levels.

For institutions that enjoy effective shared governance, faculty
leaders and board leaders should seek agreement on each of these five fundamental propositions:

- Shared governance is a central value of integral leadership that requires continued hard work, open communication, trust, and respect.
- The faculty has the central role in setting academic policy, and the board should hold faculty leaders responsible for ensuring academic quality.
- While board members have fiduciary responsibility for many of the business and financial decisions of the college, they should consider the views of the faculty before making important decisions.
- In cases of disagreement between faculty and board members about decisions where both have responsibilities (e.g., tenure and retrenchment), faculty handbooks and other governing documents should clearly state how disagreements are addressed and by whom.
- The most important aspect of shared governance is developing systems of open communication where faculty members, board members, and administrators work to align and implement strategic priorities.

Though all constituencies may not agree on the details, it is hard to disagree with the spirit of these five propositions and underlying principles. Once constituencies are in general agreement on these propositions, the way is paved to develop a commonly understood view of shared governance and a culture of shared mutual responsibility for the welfare of the institution.

2. Periodically assess the state of shared governance and develop an action plan to improve it.

Shared governance at most institutions is far from perfect, because it is difficult, messy, and imprecise work. The first step to improvement is to develop an accurate assessment of the state of shared governance at the institution. That can be done in different ways. Some institutions may want to develop formal surveys. Others may want more informal discussions through an appointed task force or discussions at board meetings and retreats.
The following questions get to the heart of the “health” of shared governance:

- What does each constituency expect from effective shared governance? What are the benchmarks of good governance? How do these definitions and expectations differ?
- Do faculty members believe that the board and administration are transparent about important college matters? Do board members believe the administration and the faculty are transparent in sharing information about student learning outcomes, how the outcomes are assessed, and how the curriculum supports student achievement?
- Do the faculty and board believe they receive sufficient information from the administration to participate in making good decisions? Is the information presented in an easily understandable form?
- Do faculty members believe that the structure of faculty governance will facilitate shared governance?
- Does the board believe that its own structure encourages sharing governance with faculty?
- Do faculty members understand how board decisions are made and vice versa?
- Is it clear who makes what decisions, who is to be consulted, and who must approve?
- How well are faculty members informed about how the board works and vice versa?
- Is there shared agreement on the strategic priorities of the college?
- In an open-ended question, what suggestions do those who complete the survey have for improving shared governance?

Board members and administrators must be thick-skinned when asking for a candid assessment from faculty members. When members of the faculty, administrators, and board members discuss these questions, each usually progresses toward a more mutual expectation of shared governance. In the process, each gains the trust of the other, strengthening the social capital that will move the institution ahead in difficult times.

As a way of drawing these discussions to a conclusion, the president should consider appointing an ad hoc task force or working group to
create strategies for improving shared governance by building trust, open communication, and ways to resolve differences amicably.

3. Expressly support strong faculty governance of the academic program.

If a faculty can’t effectively govern itself, it will be too fragmented, or even dysfunctional, to meaningfully and responsibly share in the governance of the institution. A faculty that is able to take strong, unified, and even bold collective action can help move from shared governance to shared responsibility.

Robert Zemsky, the founding director of the Institute for Research on Higher Education, recently put it this way: “I would start by having faculty relearn the importance of collective actions—to talk less about shared governance, which too often has become a rhetorical sword to wield against an aggrandizing administration, and to talk instead about sharing responsibility for the work to be done together.”

While boards and administrations shouldn’t, and really can’t, establish structures that ensure the faculty functions well, they can take several simple steps to encourage effective faculty governance:

- Boards and presidents should reward strong faculty governance by stating the importance of the faculty making appropriate and timely decisions, and valuing those actions. Board chairs should do that at board and committee meetings when faculty members are in attendance, and presidents should make such acknowledgments at faculty meetings and at general “state of the college” addresses.
- Boards should give legitimacy to faculty leaders by inviting them to the table at crucial junctures in a decision-making process. That may include invitations to board committee meetings, full board meetings, and board retreats.
- Board leaders, the president, and the chief academic officer should meet annually with faculty leaders, aside from normal board meetings and faculty meeting times. Doing so allows for a full and open exchange of ideas.
- Presidents should include faculty leaders in leadership programs, particularly in internal programs that the institution
maintains for administrators. Many faculty members have no leadership training and little experience. Supporting faculty leadership development also may have the benefit of grooming the next dean, provost, or even president.

- Board members should avoid circumventing faculty leaders by giving undue attention to those who express individual concerns not widely held by other members of the faculty. When seeking to understand the sense of the faculty, trustees should rely on elected faculty leadership, not that one professor who seeks to get around the faculty governance process by filing a special brief with the board.

Strong faculty leadership, combined with an effective board and integral presidential leadership, leads to a nimble system of shared governance that addresses challenges and seizes opportunities in a timely way.

4. **Maintain a steadfast commitment to three-way transparency and frequent communication.**

Effective shared governance depends on three-way transparency. The faculty can’t adequately participate in governance if they do not have the information from which to develop informed positions. Board members can’t appropriately exercise their general oversight of the institution’s academic program if the faculty withholds important facts about the value of the program. And presidents who withhold information from either of the other constituencies as a way of consolidating their power or dividing and conquering are not integral leaders.

Best practices for sharing information with the faculty include:

- Prepare and distribute a simple one-page chart describing who makes which decisions. The chart should describe different decisions across the vertical axis and decision makers (e.g., faculty senate, the president, the board, the executive committee) across the horizontal axis. Within each of the boxes, the role of the respective decision makers is listed (e.g., consultation, recommendation, making initial decisions, approving of decision, acting as appellate body). The chart should pay special attention to the budget process and faculty
tenure and promotion.

- Share board and committee agendas with the faculty and other members of the community before board meetings. Include a summary of actions taken by the board shortly after the meeting.

- Clearly communicate decisions being considered by the board and the president’s executive cabinet, why those decisions are before the board or the president’s cabinet, the timetable for the decision, and the extent of the faculty’s opportunity to participate in the decision-making process. Give faculty leaders an opportunity to discuss their views.

- Conduct periodic faculty forums with key decision makers presenting. The board chair could present on how the board makes decisions. The chief financial officer could present on how budgets are developed.

- Encourage faculty leaders to observe board meetings and committee meetings, where appropriate.

5. Develop deliberate ways to increase social capital between board members and members of the faculty.

As board members, faculty members, and administrators work together, they will naturally develop social capital. But social capital also can be developed and deepened outside of the formal shared-governance process. Consider these possible practices:

- With faculty members’ permission (and not regularly), consider inviting board members to a faculty meeting, followed by a reception. Board members usually are impressed with the quality of deliberation at these meetings, just as faculty members usually are impressed with the quality of deliberation at board meetings.

- If the institution has a required first-year book to read, consider providing the book to the board with an opportunity before or after the board meeting to discuss the book with members of the faculty.

- Seat board members and faculty members in the same area at athletic events, concerts, and other special occasions, and at board meetings and dinners where both are present.

- Publish trustee and faculty leadership biographies. Let faculty members know that board members may be available as guest
lecturers in classes that touch on their areas of expertise.
- Invite a board member to participate in part of a study-abroad program or field trip for students.
- Invite board members to celebrations of student and faculty scholarship.
- Hold a reception during each board meeting on campus to give the community the chance to get to know the board, and vice versa.

Following such practices can help institutions build the trust and respect needed to sustain shared governance through good and bad times. In doing so, the institution moves from the traditional approach of shared governance to the more dynamic approach of shared responsibility.
Hurricane Katrina, in September 2005, shut down the Tulane campus for five months.
Over the course of my career, I’ve observed two speeds of governance: foot-on-the-brake for everyday business and pedal-to-the-metal for existential decisions. I’ve also grappled with how to honor the process of shared governance without slowing decision-making to a crawl, especially in situations that require immediate action. A first step is to make sure that everyone understands that the sharing in “shared governance” isn’t equally distributed, nor does it imply decision-making authority. That authority is held by the president and the board, the ones who are accountable for both results and shortcomings.

I used to say that when Hurricane Katrina nearly destroyed Tulane University, in the fall of 2005, it was the temporary suspension of shared governance that allowed us to recover. Our renewal plan, which involved tremendous institutional restructuring in a short time, precluded the lengthy deliberations prescribed by normal governance procedures. But with the benefit of hindsight and another decade of experience in university leadership, I’ve come to realize that what occurred after Katrina was not, in fact, the suspension of shared governance, but rather the emergence of a more effective and unencumbered version of shared governance.

Specifically, the Faculty Advisory Committee, a subgroup of elected representatives that assumes the University Senate’s powers and responsibilities when the Senate cannot function, was key to what happened in the five crucial months when Tulane was closed after the hurricane — when schools were consolidated, several programs eliminated, and a number of staff and faculty positions terminated. The committee members’ commitment to partnering with the administration and the governing board, their constructive critiques of the proposals, and their role as representatives of the full Senate were essential to the renewal plan itself, as well as to its acceptance by the Tulane community.

A transformation as swift and sweeping as the one we underwent generally seems unthinkable in higher education. What made it possible was not only a crisis that forced us to reimagine what Tulane could be, but also a leaner, expedited shared governance that was able to rapidly enact the decisive changes. That is, shared governance is not an
impediment to action — an idea I may have unwittingly communicated in my description of our exceptional governance situation after Katrina — but a competitive advantage, one that differentiates institutions of higher education from many other organizations in both the for-profit and nonprofit sectors.

What does this mean for shared governance at colleges in “normal” times? Crises are energizing — there’s nothing like a hurricane to bring everyone together — but the current climate of uncertainty and upheaval in higher education, with public approval declining, financial stresses increasing, and social issues playing out on campuses, poses its own set of existential challenges. How can colleges generate the sense of purpose, urgency, and unity that follows on the heels of a Katrina, even without Katrina?

The best model, I believe, is a university senate — composed of elected representatives and chaired by a president genuinely open to rational persuasion and debate — that brings together diverse constituents, including faculty, staff, and students, encourages spirited dialogue, and provides a direct line to the institution’s leadership, including its governing board. I would also recommend the creation of an executive committee of the senate, which under ordinary circumstances would periodically interact with trustees to confer on substantive issues regarding the college’s future, but which would also have the authority to act quickly should the need arise.

Defining and communicating “the need” is a crucial element. Though some people may not perceive the gravity of a developing reputational or fiscal crisis, such threats warrant an all-hands-on-deck mentality, and it’s the president’s responsibility to evoke a sense of urgency by making the crisis real for everyone. A crisis narrative, when based on facts and conveyed effectively by a leader, can generate the sense of coherent purpose that pulls the community together and spurs people to action with or without a bona fide crisis.

While not without its critics, Arizona State University is one of those institutions that have undergone a major transformation, in the face of financial pressures, based on the perceived need to change and a strong vision of the future. Under the leadership of Michael Crow and with increasing buy-in from faculty members and administrators over the years, ASU has consolidated academic departments into large units, formed public-
private partnerships, and expanded online offerings in an effort to embody the "New American University."

Another way to create a sense of communal purpose and a basis for action is through initiatives that encourage reflection about roles and responsibilities. For example, Gustavus Adolphus College hosted a series of open meetings with the theme of "working together on working together." Another example is Fort Lewis College, where a yearlong process of revising its mission statement involved everyone from administrators to students. Even in a noncrisis situation, a continuing conversation about mission and meaning can elicit enthusiasm, commitment, and esprit d'corps.

**A crisis narrative, when based on facts and conveyed effectively by a leader, can generate the sense of coherent purpose that pulls the community together.**

To help colleges survive and thrive in a rapidly evolving environment, we must create space for change through effective decision-making. A new model of shared governance that is inclusive but also nimble and flexible will be necessary.

Faculty and staff members and students will need to understand and accept their roles as advisers, as opposed to decision makers; an executive committee will need to be prepared to step up when the going gets tough and time is of the essence; trustees will need to do justice to the great responsibility they’ve been entrusted with; and the president, who is both leader and follower, will need to hold the conductor’s baton and help everyone keep the tempo. That kind of equilibrium will put us at a competitive advantage during these uncertain times.

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We welcome your thoughts and questions about this article. Please email the editors or submit a letter for publication.
At a recent conference of college administrators, several of us had an impromptu discussion over lunch about the meaning of “shared governance.” The consensus? That term is often invoked but much misunderstood by both faculty members and many administrators.

“Some of my faculty believe that shared governance literally means that a committee votes on some new plan or proposal and that’s it—it gets implemented,” said a seasoned department head. “There is no sense of sharing, of who is sharing what with whom.”

A dean chimed in that a faculty leader at her institution actually told her that shared governance means that professors, who are the “heart of the university,” delegate the governance of their universities to administrators, whose role is to provide a support network for the faculty. “He said, in all seriousness, that faculty have the primary role of governing the university and that administrators are appointed to spare them from the more distasteful managerial labor,” said the dean with incredulity.

That may be a more commonly held notion in academe than it at first appears. I know several faculty senators at one institution who regularly refer to faculty as “governance,” as in “You’re administration, and we’re governance.” That expression reveals a deep misunderstanding of the mechanism of shared governance—and presupposes an inherently adversarial relationship.

The phrase shared governance is so hackneyed that it is becoming what some linguists call an “empty” or “floating” signifier, a term so devoid of determinate meaning that it takes on whatever significance a particular speaker gives it at the moment. Once a term arrives at that point, it is essentially useless.

Shared governance is not a simple matter of committee consensus, or the faculty’s engaging administrators to take on the dirty work, or any number of other common misconceptions. Shared governance is much more complex; it is a delicate balance
between faculty and staff participation in planning and decision-making processes, on the one hand, and administrative accountability on the other.

The truth is that all legal authority in any university originates from one place and one place only: its governing board. Whether it is a private college created by a charter, or a public institution established by law or constitution, the legal right and obligation to exercise authority over an institution is vested in and flows from its board. Typically, the board then formally delegates authority over the day-to-day operation of the institution (often in an official “memorandum of delegation”) to the president, who, in turn, may delegate authority over certain parts of university management to other university officials—for example, granting authority over academic personnel and programs to the provost as the chief academic officer, and so on.

Over time, the system of shared governance has evolved to include more and more representation in the decision-making process. The concept really came of age in the 1960s, when colleges began to liberalize many of their processes. In fact, an often-cited document on the subject, “Statement on Government of Colleges and Universities,” was issued jointly by the American Association of University Professors, the American Council on Education, and the Association of Governing Boards of Universities and Colleges in the mid-60s. That statement attempted to affirm the importance of shared governance and state some common principles.

The fact that the primary organization championing faculty concerns, the body devoted to preparing future academic administrators, and the association promoting best practices in serving on governing boards together endorsed the statement illustrates that university governance is a collaborative venture.

“Shared” governance has come to connote two complementary and sometimes overlapping concepts: giving various groups of people a share in key decision-making processes, often through elected representation; and allowing certain groups to exercise primary responsibility for specific areas of decision making.
To illustrate the first notion of how shared governance works, I’d like to revisit a 2007 column, “But She Was Our Top Choice,” in which I discussed the search process for academic administrators and attempted to explain why hiring committees are commonly asked to forward an unranked list of “acceptable” candidates. I wrote that shared governance, especially in the context of a search for a senior administrator, means that professors, staff members, and sometimes students have an opportunity to participate in the process—unlike the bad old days when a university official often would hire whomever he (and it was invariably a male) wanted, without consulting anyone.

“Shared” means that everyone has a role: The search committee evaluates applications, selects a shortlist of candidates, conducts preliminary interviews, contacts references, chooses a group of finalists to invite to campus, solicits input about the candidates from appropriate stakeholders, and determines which of the finalists are acceptable. Then it’s up to the final decision maker, who is responsible for conducting background checks and entering into formal negotiations with the front-runner, and who is ultimately held responsible for the success (or failure) of the appointment.

“Shared” doesn’t mean that every constituency gets to participate at every stage. Nor does it mean that any constituency exercises complete control over the process. A search cannot be a simple matter of a popular vote because someone must remain accountable for the final decision, and committees cannot be held accountable. Someone has to exercise due diligence and contact the front-runner’s current and former supervisors to discover if there are any known skeletons that are likely to re-emerge. If I am the hiring authority and I appoint someone who embezzled money from a previous institution, I alone am responsible. No committee or group can be held responsible for such a lack of due diligence.

That’s a good example of shared governance as it daily plays out in many areas of university decision making. No one person is arbitrarily making important decisions
absent the advice of key constituents; nor is decision making simply a function of a group vote. The various stakeholders participate in well-defined parts of the process.

The second common, but overlapping, concept of shared governance is that certain constituencies are given primary responsibility over decision making in certain areas. A student senate, for example, might be given primary (but not total) responsibility for devising policies relevant to student governance. The most obvious example is that faculty members traditionally exercise primary responsibility over the curriculum. Because professors are the experts in their disciplines, they are the best equipped to determine degree requirements and all the intricacies of a complex university curriculum. That is fitting and proper.

But even in this second sense of shared governance—in which faculty members exercise a great deal of latitude over the curriculum—a committee vote is not the final word. In most universities, even curricular changes must be approved by an accountable officer: a dean or the university provost, and sometimes even the president. In still other institutions, the final approval rests with the board itself, as it does for many curricular decisions in my own university and state.

Clearly, when it comes to university governance, “shared” is a much more capacious concept than most people suspect. True shared governance attempts to balance maximum participation in decision making with clear accountability. That is a difficult balance to maintain, which may explain why the concept has become so fraught. Genuine shared governance gives voice (but not necessarily ultimate authority) to concerns common to all constituencies as well as to issues unique to specific groups.

The key to genuine shared governance is broad and unending communication. When various groups of people are kept in the loop and understand what developments are occurring within the university, and when they are invited to participate as true partners, the institution prospers. That, after all, is our common goal.
We welcome your thoughts and questions about this article. Please email the editors or submit a letter for publication.
1940 Statement of Principles on Academic Freedom and Tenure

with 1970 Interpretive Comments

In 1915 the Committee on Academic Freedom and Academic Tenure of the American Association of University Professors formulated a statement of principles on academic freedom and academic tenure known as the 1915 Declaration of Principles, which was officially endorsed by the Association at its Second Annual Meeting held in Washington, D.C., December 31, 1915, and January 1, 1916.

In 1925 the American Council on Education called a conference of representatives of a number of its constituent members, among them the American Association of University Professors, for the purpose of formulating a shorter statement of principles on academic freedom and tenure. The statement formulated at this conference, known as the 1925 Conference Statement on Academic Freedom and Tenure, was endorsed by the Association of American Colleges (now the Association of American Colleges and Universities) in 1925 and by the American Association of University Professors in 1926.

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges agreed on a restatement of the principles that had been set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate interpretations of the 1940 Statement from the experience gained in implementing and applying it for over thirty years and of adapting it to current needs.

The committee submitted to the two associations for their consideration Interpretive Comments that are included below as footnotes to the 1940 Statement. These interpretations were adopted by the Council of the American Association of University Professors in April 1970 and endorsed by the Fifty-Sixth Annual Meeting as Association policy.

1. The Introduction to the Interpretive Comments notes: In the thirty years since their promulgation, the principles of the 1940 “Statement of Principles on Academic Freedom and Tenure” have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance, understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that association either alone or in conjunction with the Association of American
The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.3

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

### Academic Freedom

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.4 Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.5

3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.6

4. Second 1970 comment: The intent of this statement is not to discourage what is “controversial.” Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.

5. Third 1970 comment: Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 “Statement,” and we do not now endorse such a departure.

6. Fourth 1970 comment: This paragraph is the subject of an interpretation adopted by the sponsors of the 1940 “Statement” immediately following its endorsement:

If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher’s fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure. In pressing such charges, the administration should remember that teachers are citizens and should be...
**Academic Tenure**

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

1. The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.
2. Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution, it may be agreed in writing that the new appointment is for a probationary period of not more than four years, even though thereby the person’s total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

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7. Fifth 1970 comment: The concept of “rank of full-time instructor or a higher rank” is intended to include any person who teaches a full-time load regardless of the teacher’s specific title. [For a discussion of this question, see the “Report of the Special Committee on Academic Personnel Ineligible for Tenure,” AAUP Bulletin 52 (September 1966): 280–82.]

8. Sixth 1970 comment: In calling for an agreement “in writing” on the amount of credit given for a faculty member’s prior service at other institutions, the “Statement” furthers the general policy of full understanding by the professor of the terms and conditions of the appointment. It does not necessarily follow that a professor’s tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution. [For a more detailed statement on this question, see “On Crediting Prior Service Elsewhere as Part of the Probationary Period,” Policy Documents and Reports, 167–68.]

9. Seventh 1970 comment: The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 “Statement” with respect to the termination of service of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

The general principle of notice contained in this paragraph is developed with greater specificity in the “Standards for Notice of Nonreappointment,” endorsed by the Fiftieth Annual Meeting of the American Association of University Professors (1964) (Policy Documents and Reports, 99). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

1. Not later than March 1 of the first academic year of service, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.
3. During the probationary period a teacher should have the academic freedom that all other members of the faculty have.¹⁰
4. Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompanied by an advisor of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher’s own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.¹¹
5. Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

Endorsers

Note: Groups that changed names subsequent to endorsing the statement are listed under their current names.

Association of American Colleges and Universities..................................................1941
American Association of University Professors..........................................................1941
American Library Association (adapted for librarians)..............................................1946
Association of American Law Schools..........................................................1946
American Political Science Association.............................................................1947
American Association for Higher Education and Accreditation..........................1950
American Association of Colleges for Teacher Education........................................1950
Eastern Psychological Association............................................................................1950
Southern Society for Philosophy and Psychology..................................................1953
American Psychological Association........................................................................1961
American Historical Association............................................................................1961
Modern Language Association................................................................................1962
American Economic Association............................................................................1962
Agricultural and Applied Economic Association....................................................1962
Midwest Sociological Society.................................................................................1963
Organization of American Historians.......................................................................1963
Society for Classical Studies.....................................................................................1963
American Council of Learned Societies................................................................1963
American Sociological Association........................................................................1963

². Not later than December 15 of the second academic year of service, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.
³. At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and of individuals, are described in the “Statement on Recruitment and Resignation of Faculty Members,” Policy Documents and Reports, 153–54, as endorsed by the Association of American Colleges and the American Association of University Professors in 1961.

10. Eighth 1970 comment: The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher’s academic performance during probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the “Recommended Institutional Regulations on Academic Freedom and Tenure,” Policy Documents and Reports, 79–90, prepared by the American Association of University Professors.

11. Ninth 1970 comment: A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the “Statement on Procedural Standards in Faculty Dismissal Proceedings,” Policy Documents and Reports, 91–93, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 “Statement” is silent.

The “Statement on Procedural Standards in Faculty Dismissal Proceedings” provides: “Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member’s continuance. Unless legal considerations forbid, any such suspension should be with pay.” A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of “moral turpitude” identifies the exceptional case in which the professor may be denied a year’s teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year’s teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.
American Dialect Society
University Film and Video Association
American Society of Plant Biologists
American Association for Chinese Studies
Eastern Finance Association
Society of Christian Ethics
Phi Beta Kappa Society
Association for Social Economics
American Finance Association
John Dewey Society
American Academy of Religion
American Association of Colleges of
Council on Social Work Education
College Theology Society
American Mathematical Society
Southern States Communication
American Catholic Historical Association
American Catholic Philosophical Association
Association for Education in Journalism and Mass Communication
Western History Association
Mountain-Plains Philosophical Conference
Society of American Archivists
Southeastern Psychological Association
Southern States Communication Association
American Mathematical Society
Association for Slavic, East European, and Eurasian Studies
College Theology Society
Council on Social Work Education
American Association of Colleges of Pharmacy
American Academy of Religion
Association for the Sociology of Religion
American Society of Journalism School Administrators (now merged with the Association of Schools of Journalism and Mass Communication)
John Dewey Society
South Atlantic Modern Language Association
American Finance Association
Association for Social Economics
Phi Beta Kappa Society
Society of Christian Ethics
American Association of Teachers of French
Eastern Finance Association
American Association for Chinese Studies
American Society of Plant Biologists
University Film and Video Association
American Dialect Society
American Speech-Language-Hearing Association
Association of Social and Behavioral Scientists
College English Association
National College Physical Education Association for Men
American Real Estate and Urban Economics Association
Council for Philosophical Studies
History of Education Society
American Musicological Society
American Association of Teachers of Spanish and Portuguese
Texas Community College Teachers Association
College Art Association of America
Society of Professors of Education
American Anthropological Association
Association of Theological Schools
Association of Schools of Journalism and Mass Communication
Academy of Legal Studies in Business
Americans for the Arts
New York State Mathematics Association of Two-Year Colleges
College Language Association
Pennsylvania Historical Association
American Philosophical Association
American Classical League
American Comparative Literature Association
Rocky Mountain Modern Language Association
Society of Architectural Historians
American Statistical Association
American Folklore Society
Association for Asian Studies
Linguistic Society of America
African Studies Association
American Institute of Biological Sciences
North American Conference on British Studies
Sixteenth-Century Society and Conference
Texas Association of College Teachers
Association for Jewish Studies
Association for Spanish and Portuguese Historical Studies
Western States Communication Association
Texas Association of Colleges for Teacher Education
Metaphysical Society of America
American Chemical Society
Texas Library Association
American Society for Legal History
Iowa Higher Education Association
American Physical Therapy Association
North Central Sociological Association........1980
Dante Society of America.......................1980
Association for Communication
Administration.................................1981
National Communication Association..........1981
American Association of Physics Teachers......1982
Middle East Studies Association...............1982
National Education Association................1985
American Institute of Chemists.................1985
American Association of Teachers
of German.......................................1985
American Association of Teachers of Italian...1985
American Association for Clinical
Chemistry..........................................1988
Council for Chemical Research.................1988
Association for the Study of Higher
Education..........................................1988
American Psychological Association...........1989
Association for Psychological Science.........1989
University and College Labor Education
Association........................................1989
Society for Neuroscience........................1989
Renaissance Society of America................1989
Society of Biblical Literature...................1989
National Science Teachers Association........1989
Medieval Academy of America...................1990
American Society of Agronomy.................1990
Crop Science Society of America................1990
Soil Science Society of America................1990
International Society of Protistologists......1990
Society for Ethnomusicology....................1990
American Association of Physicists
in Medicine.......................................1990
Animal Behavior Society.........................1990
Illinois Community College Faculty
Association.........................................1990
American Society for Theatre Research........1990
National Council of Teachers of English.......1991
Latin American Studies Association...........1992
Society for Cinema and Media Studies.........1992
American Society for Eighteenth-Century
Studies............................................1992
Council of Colleges of Arts and Sciences.....1992
American Society for Aesthetics.................1992
Association for the Advancement
of Baltic Studies................................1994
American Council of Teachers of Russian....1994
Council of Teachers of Southeast
Asian Languages..................................1994
American Association of Teachers of Arabic...1994
American Association of Teachers of
Japanese............................................1994
Academic Senate for California
Community Colleges...............................1996
National Council for the Social Studies......1996
Council of Academic Programs in
Communication Sciences and Disorders .....1996
Association for Women in Mathematics.......1997
Philosophy of Time Society....................1998
World Communication Association.............1999
The Historical Society................................1999
Association for Theatre in Higher Education...1999
National Association for Ethnic Studies........1999
Association of Ancient Historians...............1999
American Culture Association...................1999
American Conference for Irish Studies..........1999
Society for Philosophy in the
Contemporary World............................1999
Eastern Communication Association...........1999
Association for Canadian Studies
in the United States.............................1999
American Association for the History of
Medicine............................................2000
Missouri Association of Faculty Senates......2000
Association for Symbolic Logic.................2000
American Society of Criminology...............2001
American Jewish Historical Society...........2001
New England Historical Association...........2001
Society for the Scientific Study of Religion...2001
Society for German-American Studies.........2001
Society for Historians of the Gilded Age and
Progressive Era..................................2001
Eastern Sociological Society....................2001
Chinese Historians in the United States........2001
Community College Humanities
Association..........................................2002
Immigration and Ethnic History Society......2002
Society for Early Modern Catholic Studies...2002
Academic Senate of the California State
University..........................................2004
Agricultural History Society....................2004
National Council for Accreditation
of Teacher Education............................2005
American Council on the Teaching
of Foreign Languages............................2005
Society for the Study of Social Biology.......2005
Society for the Study of Social Problems......2005
Association of Black Sociologists..............2005
Dictionary Society of North America...........2005
Society for Buddhist-Christian Studies........2005
Society for Armenian Studies....................2006
Society for the Advancement of
Scandinavian Study.............................2006
American Physiological Society ..................2006
National Women's Studies Association ..........2006
National Coalition for History .....................2006
Society for Military History .......................2006
Society for Industrial and Applied
Mathematics ........................................2006
Association for Research on Ethnicity and
Nationalism in the Americas ...................2006
Society of Dance History Scholars ..............2006
Association of Literary Scholars, Critics,
and Writers ...........................................2006
National Council on Public History .............2006
College Forum of the National Council of
Teachers of English ................................2006
Society for Music Theory .........................2006
Society for Historians of American
Foreign Relations ....................................2006
Law and Society Association .....................2006
Society for Applied Anthropology ...............2006
American Society of Plant Taxonomists .......2006
Society for the History of Technology .........2006
German Studies Association ......................2006
Association of College and Research
Libraries ..............................................2007
Czechoslovak Studies Association ...............2007
American Educational Studies Association ...2007
Southeastern Women's Studies Association ...2009
American Academy for Jewish Research ......2014
American Association for Ukrainian
Studies ..................................................2014
American Association of Italian Studies ......2014
American Theatre and Drama Society ........2014
Central European History Society ..............2014
Central States Communication Association ..2014
Chinese Language Teachers Association ......2014
Coordinating Council for Women
in History .............................................2014
Ecological Society of America ....................2014
Institute for American Religious and
Philosophical Thought .............................2014
Italian American Studies Association .........2014
Midwestern Psychological Association .........2014
Modern Greek Studies Association ..........2014
National Association of Professors
of Hebrew ..............................................2014
National Council of Less Commonly
Taught Languages .....................................2014
Population Association of America .............2014
Society for Italian Historical Studies ..........2014
Society for Psychophysiological Research ....2014
Society for Romanian Studies ....................2014
Society for Textual Scholarship ..................2014
Society for the History of Children and
Youth .....................................................2014
Society for the Psychological Study
of Social Issues ........................................2014
Society for the Study of the Multi-Ethnic
Literature of the United States ..................2014
Society of Civil War Historians ...................2014
Society of Mathematical Psychology ...........2014
Sociologists for Women in Society ...............2014
Urban History Association .......................2014
World History Association .......................2014
American Educational Research
Association .............................................2014
Labor and Working-Class History
Association .............................................2014
Paleontological Society ............................2014
Statement on Procedural Standards in Faculty Dismissal Proceedings

The following statement was prepared by a joint committee representing the Association of American Colleges (now the American Association of Colleges and Universities) and the American Association of University Professors and was approved by these two associations at their annual meetings in 1958. It supplements the 1940 Statement of Principles on Academic Freedom and Tenure by providing a formulation of the “academic due process” that should be observed in dismissal proceedings. The exact procedural standards here set forth, however, “are not intended to establish a norm in the same manner as the 1940 Statement of Principles on Academic Freedom and Tenure, but are presented rather as a guide. . . .”

The governing bodies of the American Association of University Professors and the Association of American Colleges, meeting respectively in November 1989 and January 1990, adopted several changes in language in order to remove gender-specific references from the original text.

Introductory Comments

Any approach toward settling the difficulties which have beset dismissal proceedings on many American campuses must look beyond procedure into setting and cause. A dismissal proceeding is a symptom of failure; no amount of use of removal process will help strengthen higher education as much as will the cultivation of conditions in which dismissals rarely, if ever, need occur.

Just as the board of control or other governing body is the legal and fiscal corporation of the college, the faculty is the academic entity. Historically, the academic corporation is the older. Faculties were formed in the Middle Ages, with managerial affairs either self-arranged or handled in course by the parent church. Modern college faculties, on the other hand, are part of a complex and extensive structure requiring legal incorporation, with stewards and managers specifically appointed to discharge certain functions.
Nonetheless, the faculty of a modern college constitutes an entity as real as that of the faculties of medieval times, in terms of collective purpose and function. A necessary precondition of a strong faculty is that it have first-hand concern with its own membership. This is properly reflected both in appointments to and in separations from the faculty body.

A well-organized institution will reflect sympathetic understanding by trustees and teachers alike of their respective and complementary roles. These should be spelled out carefully in writing and made available to all. Trustees and faculty should understand and agree on their several functions in determining who shall join and who shall remain on the faculty. One of the prime duties of the administrator is to help preserve understanding of those functions. It seems clear on the American college scene that a close positive relationship exists between the excellence of colleges, the strength of their faculties, and the extent of faculty responsibility in determining faculty membership. Such a condition is in no way inconsistent with full faculty awareness of institutional factors with which governing boards must be primarily concerned.

In the effective college, a dismissal proceeding involving a faculty member on tenure, or one occurring during the term of an appointment, will be a rare exception, caused by individual human weakness and not by an unhealthful setting. When it does come, however, the college should be prepared for it, so that both institutional integrity and individual human rights may be preserved during the process of resolving the trouble. The faculty must be willing to recommend the dismissal of a colleague when necessary. By the same token, presidents and governing boards must be willing to give full weight to a faculty judgment favorable to a colleague.

One persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member. Despite the 1940 *Statement of Principles on Academic Freedom and Tenure* and subsequent attempts to build upon it, considerable ambiguity and misunderstanding persist throughout higher education, especially in the respective conceptions of governing boards, administrative officers, and faculties concerning this matter. The present statement assumes that individual institutions will have formulated their own definitions of adequate cause for dismissal, bearing in mind the 1940 *Statement* and standards that have developed in the experience of academic institutions.

This statement deals with procedural standards. Those recommended are not intended to establish a norm in the same manner as the 1940 *Statement of Principles on Academic Freedom and Tenure*, but are presented rather as a guide to be used according to the nature and traditions of particular institutions in giving effect to both faculty tenure rights and the obligations of faculty members in the academic community.

**Procedural Recommendations**

1. *Preliminary Proceedings Concerning the Fitness of a Faculty Member.* When reasons arise to question the fitness of a college or university faculty member who has tenure or whose term appointment has not expired, the appropriate administrative officers should ordinarily discuss the matter with the faculty member in personal conference. The matter may be terminated by mutual consent at this point; but if an adjustment does not result, a standing or ad hoc committee elected by the faculty and charged with the function of rendering confidential advice in such situations should informally inquire into the situation, to effect an adjustment, if possible, and, if none is effected, to determine whether in its view formal proceedings to consider the faculty member’s dismissal should be instituted. If the committee
recommends that such proceedings should be begun, or if the president of the institution, even after considering a recommendation of the committee favorable to the faculty member, expresses the conviction that a proceeding should be undertaken, action should be commenced under the procedures that follow. Except where there is disagreement, a statement with reasonable particularity of the grounds proposed for the dismissal should then be jointly formulated by the president and the faculty committee; if there is disagreement, the president or the president’s representative should formulate the statement.

2. **Commencement of Formal Proceedings.** The formal proceedings should be commenced by a communication addressed to the faculty member by the president of the institution, informing the faculty member of the statement formulated, and also informing the faculty member that, at the faculty member’s request, a hearing will be conducted by a faculty committee at a specified time and place to determine whether he or she should be removed from the faculty position on the grounds stated. In setting the date of the hearing, sufficient time should be allowed the faculty member to prepare a defense. The faculty member should be informed, in detail or by reference to published regulations, of the procedural rights that will be accorded. The faculty member should state in reply whether he or she wishes a hearing, and, if so, should answer in writing, not less than one week before the date set for the hearing, the statements in the president’s letter.

3. **Suspension of the Faculty Member.** Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member’s continuance. Unless legal considerations forbid, any such suspension should be with pay.

4. **Hearing Committee.** The committee of faculty members to conduct the hearing and reach a decision should be either an elected standing committee not previously concerned with the case or a committee established as soon as possible after the president’s letter to the faculty member has been sent. The choice of members of the hearing committee should be on the basis of their objectivity and competence and of the regard in which they are held in the academic community. The committee should elect its own chair.

5. **Committee Proceeding.** The committee should proceed by considering the statement of grounds for dismissal already formulated, and the faculty member’s response written before the time of the hearing. If the faculty member has not requested a hearing, the committee should consider the case on the basis of the obtainable information and decide whether the faculty member should be removed; otherwise, the hearing should go forward. The committee, in consultation with the president and the faculty member, should exercise its judgment as to whether the hearing should be public or private. If any facts are in dispute, the testimony of witnesses and other evidence concerning the matters set forth in the president’s letter to the faculty member should be received.

The president should have the option of attendance during the hearing. The president may designate an appropriate representative to assist in developing the case; but the committee should determine the order of proof, should normally conduct the questioning of witnesses, and, if necessary, should secure the presentation of evidence important to the case.

The faculty member should have the option of assistance by counsel, whose functions should be similar to those of the representative chosen by the president. The faculty member should have the additional procedural rights set forth in the 1940 *Statement of Principles on Academic Freedom and Tenure*, and should have the aid of the committee, when needed, in securing the attendance of witnesses. The faculty member or the faculty member’s counsel and the representative designated by
the president should have the right, within reasonable limits, to question all witnesses who testify orally. The faculty member should have the opportunity to be confronted by all adverse witnesses. Where unusual and urgent reasons move the hearing committee to withhold this right, or where the witness cannot appear, the identity of the witness, as well as the statements of the witness, should nevertheless be disclosed to the faculty member. Subject to these safeguards, statements may, when necessary, be taken outside the hearing and reported to it. All of the evidence should be duly recorded. Unless special circumstances warrant, it should not be necessary to follow formal rules of court procedure.

6. **Consideration by Hearing Committee.** The committee should reach its decision in conference, on the basis of the hearing. Before doing so, it should give opportunity to the faculty member or the faculty member’s counsel and the representative designated by the president to argue orally before it. If written briefs would be helpful, the committee may request them. The committee may proceed to decision promptly, without having the record of the hearing transcribed, where it feels that a just decision can be reached by this means; or it may await the availability of a transcript of the hearing if its decision would be aided thereby. It should make explicit findings with respect to each of the grounds of removal presented, and a reasoned opinion may be desirable. Publicity concerning the committee’s decision may properly be withheld until consideration has been given to the case by the governing body of the institution. The president and the faculty member should be notified of the decision in writing and should be given a copy of the record of the hearing. Any release to the public should be made through the president’s office.

7. **Consideration by Governing Body.** The president should transmit to the governing body the full report of the hearing committee, stating its action. On the assumption that the governing board has accepted the principle of the faculty hearing committee, acceptance of the committee’s decision would normally be expected. If the governing body chooses to review the case, its review should be based on the record of the previous hearing, accompanied by opportunity for argument, oral or written or both, by the principals at the hearing or their representatives. The decision of the hearing committee should either be sustained or the proceeding be returned to the committee with objections specified. In such a case the committee should reconsider, taking account of the stated objections and receiving new evidence if necessary. It should frame its decision and communicate it in the same manner as before. Only after study of the committee’s reconsideration should the governing body make a final decision overruling the committee.

8. **Publicity.** Except for such simple announcements as may be required, covering the time of the hearing and similar matters, public statements about the case by either the faculty member or administrative officers should be avoided so far as possible until the proceedings have been completed. Announcement of the final decision should include a statement of the hearing committee’s original action, if this has not previously been made known.

Report Category: Committee Reports  Academic Freedom, Tenure, and Due Process

Tags: Academic Freedom  Association of American Colleges and Universities
Termination & Discipline (2004)

Faculty Termination & Disciplinary Issues
Presentation to 14th Annual Legal Issues in Higher Education Conference, University of Vermont
By Donna R. Euben, AAUP Counsel
October 24, 2004

I. The Status Of Faculty

There are three professions which are entitled to wear the gown: the judge, the priest, and the scholar. This garment stands for its bearer’s maturity of mind, his independence of judgment, and his direct responsibility to his conscience and his god. It signifies the inner sovereignty of those three interrelated professions: they should be the very last to allow themselves to act under duress and yield to pressure . . . . [T]he judges are the court, the ministers together with the faithful are the church, and the professors together with students are the university . . . they are those institutions themselves, and therefore have prerogative rights to and within their institution which ushers, sextons and beadles, and janitors do not have.—E. K. Kantorowicz (quoted in Henry Rosovsky, The University: An Owner’s Manual 164–65 (1990)).

Because faculty are the institution themselves, they should have a significant role in the governance of their academic institution. The faculty have primary responsibility for aspects of the educational process, such as curriculum and methods of instruction. See NLRB v. Yeshiva University, 444 U.S. 672 (1980) (finding that professors at that particular university were managerial and therefore not covered by the National Labor Relations Act, and explaining that “the business of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions”); see also AAUP, Statement on Government of Colleges and Universities, AAUP Policy Documents and Reports 217 (9th ed. 2001) ("Redbook") ("The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instructions, research, faculty status, and those aspects of student life which relate to the educational process.").

In light of these and other responsibilities, professors are not treated like most other employees. Faculty tend not to be “employees at will,” a term which denotes an employment relationship that lacks specific duration or
protection from arbitrary dismissal. The appointment of an employee at will can be terminated for "bad reason, good reason, or no reason at all," so long as the reason is not illegal. Rather, two types of legal employment relationships tend to exist between faculty and their institutions: continuous tenure and term contracts.

A. Tenured Faculty

Tenured appointments are ongoing, extending beyond the period indicated in the annual salary letter. Tenure is a presumption of competence and continuing service that can be overcome only if specified conditions are met.

The 1940 *Statement of Principles on Academic Freedom and Tenure* ("1940 Statement") and other AAUP policy documents, notably the *Recommended Institutional Regulations* ("RIR"), speak to the termination of tenured appointments. The 1940 *Statement* was formulated in conjunction with the Association of American Colleges (now called the Association of American Colleges and Universities) and has been endorsed by over 185 professional and scholarly groups. "Probably because it was formulated by both administrators and professors, all of the secondary authorities seem to agree it [the 1940 *Statement*] is the most widely-accepted academic definition of tenure." *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978). The 1940 *Statement* provides: "After the expiration of a probationary period, teachers . . . should have permanent or continuous tenure, and their service should be terminated only for adequate cause . . . or under extraordinary circumstances because of financial exigencies."

Professor William Van Alstyne explains:

Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, *tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause*. . . . [T]enure is translatable as a statement of formal assurance that . . . the individual's professional security and academic freedom will not be placed in question without the observance of *full academic due process*.—W. Van Alstyne, "Tenure: A Summary, Explanation, and 'Defense,'" *AAUP Bulletin* 57:329 (1971).

*See also* Joseph C. Beckham, *Faculty/Staff Nonrenewal and Dismissal for Cause in Institutions of Higher Education* 5 (College Administration Publications, 1998) ("Dismissal for Cause") ("Tenure is a protection against arbitrary dismissal which requires an institution to justify 'adequate' cause for the adverse employment decision.")

B. Faculty With Term Contracts

A large number of faculty members have "term contracts," which are generally for one semester or one year. Faculty members who have term contracts can include individuals on probation for tenure; visiting faculty; and strictly temporary part-time instructors. Such faculty ordinarily have a protected property right to continued employment during the life of their contract, and a concurrent right to due process protections if they are subject
II. The Legal Employment Relationship Between Faculty And Administrations

The sources of legal protections for faculty—tenured and non-tenured—may be grounded in the U.S. Constitution, contractual obligations, state law, and academic custom.

A. Constitutional Law

The federal constitution was largely designed to regulate the exercise of governmental power only. Therefore, as a matter of law, the constitutional restrictions pertaining to due process apply to public employers, such as state colleges and universities, and do not generally limit private employers, such as private colleges, from infringing on professors' due process rights. However, the due process rights of faculty members at private institutions are often protected by contracts. (See below).

B. Contractual Obligations

Internal sources of contractual obligations for public and private sector institutions may include institutional rules and regulations, letters of appointment, faculty handbooks, and, where applicable, collective bargaining agreements. Grounds for dismissal and discipline as well as due process rights are often explicitly incorporated into faculty handbooks, which are sometimes held to be legally binding contracts. See, e.g., Greene v. Howard University, 412 F.2d 1128 (D.C. Cir. 1969) (ruling faculty handbook to "govern the relationship between faculty members and the university"); American Ass'n of University Professors, Bloomfield College Chapter v. Bloomfield College, 129 N.J. Super. 249, 252 (N.J. Super. Ct. Ch. Div. 1974), appeal after remand, 346 A.2d 615 (N.J. Super. 1975) (finding faculty handbook "an essential part of the contractual terms governing the relationship between college and faculty"). See generally Faculty Handbooks As Enforceable Contracts: A State Guide (3rd ed.).

C. State Law

Some states have specific statutes applicable to public colleges and universities that address grounds for dismissal as well as due process protections. For example, a New Jersey statute provides: "No professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher or other persons employed in a teaching capacity in any State college, county college or industrial school who is under tenure during good behavior and efficiency shall be dismissed or subject to reduction of salary, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause." The statute provides for written charges, a hearing, the right to counsel, and the right to subpoena witnesses. N.J.S.A. 18A:6-18; see also Cohen v. Board of Trustees of University of Medicine & Dentistry of New Jersey, 867 F.2d 1455, 1460-61 (3rd Cir. 1989) (tenure contractual terms delineated in New Jersey statutes).

D. Academic Custom and Usage

Where documents are ambiguous, courts sometimes look to "academic custom," "academic usage" or "academic common law." The 1940 Statement constitutes a "professional 'common' or customary law of academic freedom

The U.S. Court of Appeals for the District of Columbia Circuit in Greene v. Howard University observed:

Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context.—412 F.2d at 1135

See also Perry v. Sindermann, 408 U.S. 593, 601 (1972) (just as there may be a "common law of a particular industry or of a particular plan," so there may be an "unwritten 'common law' in a particular university" so that even though no explicit tenure system exists, the college may "nonetheless . . . have created such a system in practice"); Browzin v. Catholic University of America, 527 F.2d 843, 848 n. 8 (D.C. Cir. 1975) (finding that jointly issued statements of AAUP and other higher education organizations, such as the 1940 Statement, "represent widely shared norms within the academic community" and, therefore, may be relied upon to interpret academic contracts); Krotkoff v. Goucher College, 585 F.2d 675, 678-79 (4th Cir. 1978) (academic custom and usage as demonstrated by AAUP's 1940 Statement added an implied "financial exigency" limitation to the tenure contract).

III. Dismissal For Cause Of Faculty

One of the most contentious issues in higher education involves efforts to terminate the tenured appointments of faculty members and term appointments of faculty members before their expiration. In such situations, significant academic due process protections attach. Generally accepted dismissal procedures are delineated in the 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings, which is discussed below.

Dismissal is different from nonreappointment and nonrenewal. Nonreappointment and nonrenewal involve not retaining a nontenured faculty member beyond the expiration of the current term of appointment. Dismissal involves breaking an appointment. Generally accepted procedural protections for nontenured faculty are set forth in AAUP's Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, which is discussed further below.

Distinguishing between dismissal and nonrenewal of faculty is critical in determining what, if any, due process protections attach. A Virginia Supreme Court case, Fun v. Virginia Military Institute, 427 S.E.2d 181 (Va. 1993), highlights the importance of using these terms correctly. In Fun, the administration's letter to a faculty member notified him that his appointment would not be renewed but, in so doing, made "no reference to nonrenewal, but 'refer[red] instead to 'regulations for dismissal'." The court found a question of fact existed about whether the nonrenewed professor was legally entitled to the due process procedures for dismissed faculty. As a legal matter, absent evidence of illegal discrimination or violation of protected constitutional rights or failure to follow contractual obligations, the nonrenewal of a faculty member's appointment does not usually trigger legal due process protections.
A. What is "Just Cause"?

Adequate cause has been defined as:

a basis on which a faculty member, either with academic tenure or during a term appointment, may be dismissed. The term refers especially to demonstrated incompetence or dishonesty in teaching or research, to substantial and manifest neglect of duty, and to personal conduct which substantially impairs the individual’s fulfillment of his institutional responsibilities. —*Faculty Tenure: Commission on Academic Tenure* 256 (Keast, ed., 1973) ("Faculty Tenure").

While AAUP provides extensive advice on the procedural protections to be afforded faculty who face dismissal for cause, the identification of the substantive grounds for the dismissal of faculty is left primarily to individual campuses. The 1958 *Statement* observes:

One persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member. Despite the 1940 *Statement of Principles on Academic Freedom and Tenure*, and subsequent attempts to build upon it, considerable ambiguity and misunderstanding persist throughout higher education, especially in respective conceptions of governing boards, administrative officers, and faculties concerning this matter. The present statement assumes that individual institutions will have formulated their own definitions of adequate cause for dismissal, bearing in mind the 1940 *Statement* and standards which have developed in the experience of academic institutions.

As one scholar explains AAUP policy:

[T]he particular standards of "adequate cause" to which the tenured faculty is accountable are themselves wholly within the prerogative of each university to determine through its own published rules, save only that those rules not be applied in a manner which violates the academic freedom or the ordinary personal civil liberties of the individual. An institution may provide for dismissal for "adequate cause" arising from failure to meet a specified norm of performance or productivity, as well as from specified acts of affirmative misconduct. In short, there is not now and never had been a claim that tenure insulates any faculty member from a fair accounting of his professional responsibilities within the institution, which counts upon his service. —William Van Alstyne, "Tenure: A Summary, Explanation, and 'Defense'," *AAUP Bulletin* 57:328 (1971).

RIR 5(a) acknowledges that "adequate cause" is an appropriate standard under which to dismiss faculty so long as it is "related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers." See AAUP, "Academic Freedom and Tenure: University of Virginia," *Academe: Bulletin of the American Association of University Professors* 60 (Nov.-Dec. (2001) (finding that complaints against professor, which involved mishandling of research funds, were "related, directly and substantially" to his fitness in his
professional capacity as a researcher) ("Academe"). The 1940 Statement provides that tenured faculty members whose appointments are terminated for cause will receive at least one year of notice or severance salary unless the grounds for dismissal involve moral turpitude:

The concept of moral turpitude identifies the exceptional case in which the professor may be denied a year’s teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year’s teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.

What conduct constitutes just cause should be sensitive to the nature of higher education. Professors Barbara Lee and William Kaplin suggest that "[i]nstitutions should not comfortably settle for the bald adequate-cause standard. Good policy and (especially for public institutions) good law should demand more." Accordingly, such definitions "should be sufficiently clear to guide the decision-makers who will apply them and to forewarn the faculty members who will be subject to them"—Kaplin & Lee, The Law of Higher Education 277-78 (3rd ed. Jossey-Bass).

Sound institutional policies often incorporate AAUP recommended policies and procedural standards. One commentator has observed that "[p]ublic institutions have successfully overcome a vagueness challenge to 'adequate cause' standards by adopting the AAUP Statement on Professional Ethics and incorporating the statement in the faculty handbook." Dismissal for Cause at 15. In Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984), for example, a federal appellate court rejected a professor's challenge to his dismissal, which was based on the sexual advances he made to male students. The administration claimed that the incorporation in the university’s faculty handbook of the Statement on Professional Ethics, which prohibits exploitation of students and promotes the professor's proper role as counselor, properly provided a basis for the professor's dismissal. The court rejected the argument of the faculty member, finding that the grounds for dismissal were not unconstitutionally vague, and opining that the institution did not need to list every type of impermissible conduct, so long as the grounds for dismissal were consistent with reasonable professional standards that were understood by the faculty.

Failure to clearly define adequate cause may lead courts to invalidate particular actions or other severe sanctions. See, e.g., Tuma v. Board of Nursing, 593 P.2d 711 (Idaho 1979) (invalidating suspension for "unprofessional conduct"); Davis v. Williams, 598 F.2d 916 (5th Cir. 1979) (invalidating regulation prohibiting "conduct prejudicial to good order"). But see Ohio Dominican College v. Krone, 560 N.E.2d 1340 (Ohio App. 1990) (state court declined to discuss whether the institution's standard of dismissal for "grave cause" was vague).

B. Substantive Grounds for Dismissal

Dismissal should, of course, be a "last resort." Brian Brooks, "Adequate Cause for Dismissal: The Missing Element in
Academic Freedom," 22 J. Coll. & Univ. L. 331, 353 (Fall 1995) ("Adequate Cause"). The substantive grounds for dismissal for cause generally include incompetence, neglect of duty, insubordination, and immoral or unethical conduct. Dismissal for Cause at 21; Adequate Cause at 331; Robert M. Hendrickson, "Removing Tenured Faculty For Cause," 44 Educ. L. Rptr. 483, 491 (1998); Timothy B. Lovain, "Grounds for Dismissing Tenured Postsecondary Faculty For Cause," 10 J. of Coll. & Univ. L. 419, 422 (Winter 1983).

Courts tend to look favorably upon opportunities provided to faculty to "remediate" their perceived deficiencies before dismissal. As one commentator observes:

When a person who once proved himself to be competent is eventually judged to be incompetent, there is no winner. The university has lost a valuable asset in the form of an active, competent professor (remember, he was once judged competent) and the professor has lost his livelihood. Therefore, whenever possible, action should be taken to restore the faculty member to his former position of competence. Such action may take many forms. If the professor is simply not "participating," informing him of the eventual result of that course of action may remedy the problem. The teacher may suddenly teach and the scholar may suddenly publish. When the problem involves the quality of the teaching or scholarship, then the remedial actions will need to be more aggressive. Specific weaknesses and areas for improvement should be identified. The professor should be given a timetable for compliance. Assistance might also be provided in the form of leave, a sabbatical or a decreased class load so that the professor can devote his time to the recommended improvements. The essential point is that the focus should be on rehabilitation not on dismissal. —Adequate Cause at 353

See also Dismissal for Cause at 48 (observing that "a plan of remediation and a reasonable period of time to address deficiencies may be warranted" depending on the faculty conduct at issue).

1. Immoral Behavior

One commentator has observed that "[j]udicial decisions do not provide a precise definition of immorality in the context of higher education." Dismissal for Cause at 35. In the end, allegations of immoral behavior must be understood in the context of higher education. See, e.g., Texton v. Hancock, 359 So.2d 895 (Fla. App. 1978) (where professor was dismissed for immorality, and the charges included using profanity in the classroom and drinking heavily in a student's home, the court found insufficient grounds for dismissal because "Ms. Texton's conduct must be judged in the context of her more liberal, open, robust college surroundings"). Immoral behavior as grounds for dismissal of faculty members tends to cover sexual misconduct, harassment, and dishonesty. Plagiarism is a typical basis for academic dishonesty. See, e.g., Agarwal v. Regents of the University of Minnesota, 788 F.2d 504 (8th Cir. 1986) (upholding university's dismissal of faculty member for the immoral conduct of plagiarizing a laboratory manual); Yu v. Peterson, 13 F.3d 1413 (10th Cir. 1993) (upholding termination of faculty member appointment at University of Utah because of plagiarism found by faculty committee, which determined that Dr. Yu "knowingly held out the disputed paper as his own work, with knowledge that it included extensive duplications or close
paraphrasing of the co-authored report”).

2. Neglect of Duty

Neglect of duty, which is sometimes alleged to constitute insubordination, involves the failure of faculty members to carry out their professional obligations. As numerous courts have noted, definitions of these terms in the higher education context are “rather meager.” See *Botts v. Shepherd College*, 569 S.E.2d 456 (W. Va. 2002). See, e.g., *Stastny v. Board of Trustees of Central Wash. Univ.*, 647 P.2nd 496 (Wash. App. 1982) (upholding termination of tenured faculty member for unapproved leaves of absences, including a trip to Israel during the beginning of the semester, after repeated “liberal grants of absences,” because professor’s conduct “directly related substantially” to his fitness as a faculty member); *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987) (remanding case for further proceedings in breach-of-contract action by professor who challenged his dismissal for "neglect of professional responsibilities"); *Prebble v. Broderick*, 535 F.2d 605 (10th Cir. 1976) (upholding dismissal of tenured faculty member for neglect of duty, which involved professor’s failure to teach eight days of scheduled classes in one semester). But see *Trimble v. Southern West Virginia Community and Technical College*, 549 S.E.2d 294 (W. Va. App. 2001) (ruling that administration violated West Virginia constitution when it “immediately terminated . . . a tenured public higher education teacher, who has a previously unblemished record . . . for an incident of insubordination that is minor in its consequences,” specifically the professor’s failure to submit his syllabi using new campus software”). See generally Annotation, "What Constitutes 'Insubordination' as Grounds for Dismissal of Public School Teachers," 78 ALR 3rd 83 (1977 & Supp. 2003).

3. Incompetence

Efforts to dismiss faculty for incompetence generally rely heavily on the evaluations of peers in determining whether a professor is no longer competent to carry out his or her duties. AAUP policy provides that in pre-termination hearings involving dismissals for incompetence, “the testimony will include that of qualified faculty members from this or other institutions of higher education.” RIR 5(c)(12), Redbook at 27. See, e.g. *Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. Ct. App. 1986) (upholding dismissal where professor failed to cover relevant topics in the course syllabus, organized lectures poorly, failed to attend class regularly, and failed to provide students the opportunities to meet with him one-on-one); *King v. University of Minnesota*, 774 F.2d 224 (8th Cir. 1985) (upholding dismissal of tenured faculty member based, in part, on the evaluations of colleagues and consecutive department chairs about his poor teaching, research and service, that he often had teaching assistant substitute teach, and that he failed to grade 16 of 22 students in one course).

4. Ethical Misconduct

AAUP’s *Statement on Professional Ethics* provides that faculty should "avoid any exploitation, harassment, or discriminatory treatment of students," and that "professors do not discriminate or harass colleagues. They respect and defend the free inquiry of associates." Redbook at 133-34. See, e.g., *Korf v. Ball State University*, 726 F.2d 1222 (7th Cir. 1984) (upholding dismissal of faculty member for violation of professional ethics based on AAUP’s
Statement; *Filippo v. Bongiovanni*, 961 F.2d 1125 (3rd Cir. 1992) (upholding dismissal by Rutgers University of a tenured chemistry professor, relying in part on the university's adoption of AAUP's professional ethics statement to find the professor had "exploited, threatened and been abusive" to "visiting Chinese scholars brought to the University to work with him on research projects"); *Yao v. Board of Regents of The University of Wisconsin System*, 649 N.W.2d 356 (Wis. App. 2002) (upholding board's decision to dismiss professor for "intentionally tampering with a colleague's laboratory materials").

**C. Procedural Protections in a Dismissal for Cause**

1. **Due Process under the Law**

Tenured appointments or appointments with fixed terms are entitled to due process legal protections in public colleges and universities. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Wieman v. Updegraff*, 344 U.S. 183 (1952). The U.S. Supreme Court in *Roth*, 408 U.S. at 564, spoke to the property interests of faculty members:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and support claims of entitlement to those benefits.

When an institution's decision implicates property interests, constitutional due process provides for certain procedural safeguards before a final decision, specifically notice and an opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). Due process protections at private institutions are often dictated by contractual and, in some instances, state law.

The extent of legal due process required to faculty members tends to vary by jurisdiction, including the degree to which a formal pre-termination hearing is legally required. See generally *The Law of Higher Education* at 288-95. One federal appellate court set forth its views as to minimum legal procedural safeguards in the academy:

> These safeguards may include (1) written notice of the grounds for termination; (2) disclosure of the evidence supporting termination; (3) the right to confront witnesses; (4) an opportunity to be heard in person and to present witnesses and documentary evidence; (5) a neutral and detached hearing body; and (6) a written statement by the fact finders as to the evidence relied upon.

— *Chung v. Park*, 514 F.2d 382 (3rd Cir. 1975)

See also *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1227-28 (5th Cir. 1985) (a hearing should be before "a tribunal that possesses some academic expertise and apparent impartiality toward the charges"); *But see Hulen v. Yates*, 322 F.3d 1229 (10th Cir. 2003) (ruling that professor's due process rights were not violated when he received no "formal [evidentiary] hearing" before "being laterally transferred" to a different academic department, because the Tenth Circuit interprets *Loudermill*, providing for "not very stringent" pre-termination
hearings"); *McDaniels v. Flick*, 59 F.3d 446 (3rd Cir. 1995) (ruling that due process rights afforded to tenured professor need not follow all six steps in *Chung v. Park* before termination of tenured appointment).

Dismissed faculty members often challenge their dismissal on procedural grounds. Accordingly, administrators at public institutions would be well advised to provide more (*Chung*) not fewer (*McDaniels*) procedural protections, not only because greater due process often ensures a more considered decision, but also because affording such procedural protections communicates to courts that significant due process protections were afforded and that, therefore, the internal decision should be respected. *See The Law of Higher Education* at 175-78 (Supp. 2000).

Faculty participation in dismissal procedures often helps institutions defend their dismissal decisions in court. In *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987), the federal appellate court remanded a dismissal case for further examination of "neglect of professional responsibilities," finding that the administration's dismissal decision was suspect because, in part, it rejected the faculty committee's determination in favor of the professor. The faculty committee had found that while failure to teach an assigned course might justify dismissal, mitigating circumstances in this case—the failure of the administration to deal with a disruptive student—dictated otherwise. *See also Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976) (faculty committee rejected professor's argument that his failure to report and account for research funds was a protest of the university's accounting policy, and the federal district court relied on that faculty committee decision to affirm the professor's dismissal); *Filippo v. Bongiovanni*, 961 F.2d 1125 (3rd Cir. 1992) (report of faculty committee, which found professor to have violated AAUP's ethics statement, relied on by court in upholding institution's decision to dismiss tenured faculty member).

**NOTE:** Constitutional due process protections would not generally attach to the nonrenewal of a faculty member's contract, unless, for example, proper notice is not provided. *See, e.g.*, *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969) (ruling that failure to provide timely notice of nonrenewal meant that administration was required to establish just cause for the termination of an appointment because the faculty member had a legitimate expectation of another annual contract); *Soni v. Board of Trustees of University of Tennessee*, 513 F.2d 347 (6th Cir. 1975) (ruling that a nonrenewed nontenured professor of mathematics had a property interest because he had been told that he could expect his contract to be renewed and he had exercised voting and retirement plan privileges).

**2. Academic Due Process**

AAUP recognizes that "[t]he governing board of an institution of higher education in the United States operates, with few exceptions, as the final institutional authority." *Statement on Government of Colleges and Universities, Redbook* at 217, 220; *see also* 1958 *Statement, Redbook* at 13–14 (acknowledging that board of trustees has final decisionmaking authority regarding dismissal of faculty). Nevertheless, faculty are generally regarded as having a primary role to play in determining faculty status, including dismissal. *See Statement on Government of Colleges and Universities, Redbook* at 221.
The concept of "academic due process" entails more than the legal barebones procedural requirements described above. "Academic due process, an internal institutional procedure, is to be distinguished from due process of law." *Faculty Tenure at 255–56.* Academic due process is "a system of procedures designed to produce the best possible judgments in those personnel problems of higher education which may yield a serious adverse decision about a teacher." Joughin, "Academic Due Process," *Academic Freedom: The Scholar's Place in Modern Society* 146 (Oceanna Publications 1964); see also *Statement on Government of Colleges and Universities, Redbook* at 217, 219 ("Joint action [with administration and faculty] should also govern dismissals . . . "). One court opined that "[t]he serious consequences of a 'just cause' dismissal are one reason why university regulations prescribe a rigorous process when accusations . . . are made." Yoo, 649 N.W.2d 356.

As one scholar observed:

> Tenure is translatable principally as a statement of formal assurance that thereafter the individual's professional security and academic freedom will not be placed in question without the observance of full academic due process. This accompanying complement of academic due process merely establishes that a fairly rigorous procedure will be observed whenever formal complaint is made that dismissal is justified on some stated ground of professional irresponsibility . . . . —William Van Alstyne, "Tenure: A Summary, Explanation, and 'Defense,'" *AAUP Bulletin* 57:328 (1971)

AAUP policy encompasses the following components of academic due process: a statement of charges in reasonable particularity; opportunity for a hearing before a faculty hearing body; the right of counsel if desired; the right to present evidence and to cross-examine; record of the hearing; and opportunity to appeal to the governing board.

The 1958 Statement, which was jointly drafted and approved by AAUP and AACU and has been incorporated into hundreds of faculty handbooks, observes that it is "[a] necessary precondition of a strong faculty that it have first-hand concern with its own membership," including the appointment, promotion, and dismissal of their colleagues. At the same time, "[t]he faculty must be willing to recommend the dismissal of a colleague when necessary."

The 1958 *Statement* further provides that "[t]he faculty member should have the option of assistance by counsel . . . ." *Redbook* at 13. Please note that the law may vary by jurisdiction about the right to have legal representation at a termination hearing. *See, e.g., Frumkin v. Board of Trustees, 626 F.2d 19* (6th Cir. 1980) (allowing counsel to be present and advise, but prohibiting counsel from cross-examining witnesses); *Chan v. Miami Univ., 652 N.E.2d 644, 649* (Ohio 1995) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skills in the science of the law.").

In 2001, an AAUP investigating committee concluded that the University of Virginia administration had violated the academic due process rights of a tenured professor who had misused research funds. The AAUP found:
Professor McCarthy was afforded no opportunity to respond to each action in 1998 before [the discipline] was imposed on him, and the administration did not consult with any faculty body before it acted as it did. He was dismissed without adequate cause having been demonstrated by the administration before a faculty body. He received no severance salary. The opportunity for a postdismissal hearing could not substitute for an appropriate [pre-dismissal] academic proceeding, and, in any event, would have wrongly required Professor McCarthy to carry the burden of proof. —AAUP, "Academic Freedom and Tenure: the University of Virginia," *Academe* 60 (Nov.-Dec. 2001)

See also AAUP, "Academic Freedom and Tenure: Macomb County Community College (Michigan): A Report on Disciplinary Suspension," *AAUP Bulletin* 369 (Winter 1976) (finding as violative of AAUP-supported principles the institution’s "official policy . . . on disciplinary suspension [that] permits the administration unilaterally to suspend, without prior demonstration of adequacy of cause, a faculty member who might be viewed as insubordinate").

The AAUP’s *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* provides guidance on appropriate academic due process protections for nontenured faculty. The statement explains that nontenured faculty "cannot . . . be dismissed before the end of a term appointment except for adequate cause that has been demonstrated through academic due process—a right they share with tenured members of the faculty." In such situations, the administration should provide the faculty member with adequate notice of nonreappointment with, upon request, a written explanation for the decision, and the opportunity to appeal the decision to a faculty body on grounds that the decision was based upon an impermissible consideration or inadequate consideration.

IV. Sanctions Less Than Dismissal For Cause

The notion of "progressive discipline" is not a term that one sees in many faculty handbooks. *But see Trimble v. West Virginia Board of Directors*, 549 S.E. 2d 294 (W. Va. 2001) (college "should not have fired [tenured professor] before resorting to other progressive disciplinary measures" under West Virginia constitution). Nevertheless, there are sanctions less severe than dismissal that may be appropriate in dealing with particular faculty matters that do not rise to just cause. The Commission on Academic Tenure observed in 1973 that it was

manifestly insufficient to have a disciplinary system which assumes that only those offenses which warrant dismissal should be considered seriously. Faculty members are from time to time guilty of offenses of lesser gravity. There should be a way of recognizing these and imposing appropriate sanctions. And it is equally insufficient to make do only with disciplinary procedures designed for capital offenses. Simpler procedures—though assuring due process in the particular context—are obviously required for offenses for which sanctions short of dismissal are contemplated. —*Faculty Tenure* at 76.

Accordingly, the commission recommended as follows:

[T]hat each institution develop and adopt an enumeration of sanctions short of dismissal that may be
applied in cases of demonstrated irresponsibility or professional misconduct for which some penalty short of dismissal should be imposed. These sanctions and the due-process procedures for complaint, hearing, judgment, and appeal should be developed initially by joint faculty-administrative action. —Id.

Some institutions have clear policies that cover sanctions other than dismissal, such as those at Michigan State University, "Policy and Procedure for Implementing Disciplinary Action Where Dismissal Is Not Sought" ("Disciplinary action may include but is not limited to reprimand, suspension with or without pay, reassignment of duties, foregoing salary increase and/or benefit improvements, and mandatory counseling and/or monitoring of behavior and performance. Suspension without pay may not exceed six months."); University of New Mexico, Appendices II and III (incorporating AAUP's procedural protections); Northwestern University (discussing suspensions and minor sanctions), http://www.northwestern.edu/provost/faculty/handbook.pdf.

A. AAUP Policy

In 1971, a special joint subcommittee of the AAUP considered the question of sanctions short of dismissal, and enumerated the following lesser sanctions:

(1) oral reprimand, (2) written reprimand, (3) a recorded reprimand, (4) restitution (for instance, payment for damage due to individuals or to the institution), (5) loss of prospective benefits for a stated period (for instance, suspension of "regular" or "merit" increase in salary or suspension of promotion eligibility), (6) a fine, (7) reduction in salary for a stated period, (8) suspension from service for a stated period, without other prejudice. —Faculty Tenure at 75-77.

AAUP RIR 7 distinguishes between "major" and "minor" sanctions, categorizing suspension as major and reprimand as minor. AAUP regulations 5 and 7 provide that major sanctions should not be imposed until after a hearing in which the same procedures apply as in a dismissal case, which include written notice of the charges, a hearing before a faculty committee in which the administration bears the burden of proof, right to counsel, cross-examination of adverse witnesses, a record of the hearing, and a written decision. Redbook at 27. Immediate suspension with pay, pending a hearing, is appropriate under AAUP policy if an individual poses a threat of immediate harm to him or herself or others. RIR 5(c)(1), Redbook at 25. Moreover, Regulation 5(c) of the Association's Recommended Institutional Regulations states that the administration, before suspending a faculty member, will consult with an appropriate faculty committee concerning the "propriety, the length, and other conditions" of the suspension.

The AAUP further provides that an institution may impose a minor sanction after providing the individual notice, and that the individual professor has the right to seek review by a faculty committee if he or she feels that a sanction was unjustly imposed.

B. Case Law
Below are some higher education faculty cases involving sanctions, excluding dismissal. As noted above, like the legal claims of faculty threatened with dismissal, litigation arising from the imposition of sanctions flow from a number of legal sources, including the constitutional law for public institutions, contractual obligations at private and public sector institutions (faculty handbooks, letters of appointment, collective bargaining agreements), and regulations and statutes (internal and external).

1. Warning or Reprimand

In *Hall v. Board of Trustees of State Institutions of Higher Learning*, 712 So.2d 312 (Miss. S.Ct. 1998), the University of Mississippi issued a written reprimand to a nontenured professor of medicine who in responding to a student's question about interpreting mammograms, touched the student's breasts. The Mississippi Supreme Court ruled that the written reprimand did not violate the professor's due process rights, but required that the document be maintained in a separate file. *Butts v. Shepherd College*, 569 S.E.2d 456 (W. Va. 2002) (ruling that professor's refusal to obey supervisor's order to release student grades to supervisor was not grounds for reprimand); *Powell v. Ross*, 2004 U.S. Dist. LEXIS 3601 (W.D. Wis., Feb. 27, 2004) (rejecting professor's defamation claim arising in part from recommendation of administrator that chancellor issue "a strong letter of reprimand" and place it in professor's personnel file). See also AAUP, "Academic Freedom and Tenure: Tulane University," AAUP Bulletin 424, 430 (1970) (acknowledging faculty committee's recommendation as proper for reprimand as opposed to dismissal for professor's interference with on-campus ROTC drill).

2. Public Censure

See, e.g, *Newman v. Burgin*, 930 F.2d 955 (1st Cir. 1991) (upholding the public censure of a faculty member for plagiarism by the University of Massachusetts, Boston administration after an investigation and hearing by a faculty committee). But see *Booher v. Northern Kentucky University*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky., July 22, 1998) (holding that departmental censure of faculty member in response to his comments to the media about a controversial university art exhibit provided a basis for professor's First Amendment retaliation claim, and noting that the censure could affect the professor's "ability to engage in the department's system of governance; [to] participate in departmental decision-making; and [to select . . . his teaching assignments"); *Meister v. Regents of the University of California*, 78 Cal.Rptr.2d 913 (Cal. App. 6 Dist. 1998) (finding by arbitrator that professor's reputation had been injured by circulation of letter of censure, which was recommended by campus committee, for the professor's unauthorized circulation of a confidential planning document).

3. Departmental Reassignment

On occasion an institution decides to transfer a faculty member from one academic department to another where significant problems exist in the former department, and the faculty member has claimed that the transfer amounts to a sanction that should not have been affected without due process. *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134 (4th Cir. 1990) (upholding transfer of tenured professor from one department to another, and finding no property interest in a particular position); *Maples v. Martin*, 858 F.2d 1546
(11th Cir. 1988) (Auburn University's professors' property interests not violated when engineering professors were transferred from mechanical engineering to other engineering departments with no reduction in salary or rank). But see Hulen v. Yates, 322 F.3d 1229 (10th Cir. 2003) (ruling that professor "had a property interest in his departmental assignment based upon the terms and conditions of his appointment" and therefore basic due process attached to his transfer from one academic department to another).

4. Actions on Salary for Disciplinary Reasons

a. One-time denial of a salary increase. Depending on the facts and circumstances, AAUP might view a one-time denial of a salary increase to be a minor sanction. See, e.g., Harrington v. Harris, 118 F.3d 359 (5th Cir. 1997), cert. denied, 522 US. 1016 (1997) (dean’s denial of pay increases to white law professors did not constitute adverse employment action); Wirsing v. Board of Regents of University of Colorado, 739 F. Supp. 551 (D. Colo. 1990), aff’d, 945 F.2d 412 (10th Cir. 1991) (table), cert. denied, 503 U.S. 906 (1992) (university did not violate tenured professor’s rights by denying her a merit increase when she refused to distribute standardized teacher evaluation forms to her class on academic freedom grounds). But see Power v. Summer, 226 F.3d 815 (7th Cir. 2000) (ruling that administration violated the First Amendment rights of three professors by awarding them merit increases of only $400 instead of $1,000 because they were outspoken on issues of faculty salaries). For a discussion of the Vincennes University case, see Donna R. Euben, "Judicial Forays into Merit Pay,” 89 Academe 70 (Jul.-Aug. 2003).

b. Long-term salary increase denial. See, e.g., Vaughn v. Sibley, 709 So.2d 482 (Ala. Civ. App. 1997) (finding that University of Alabama at Birmingham violated the rights of an associate professor of mathematics by denying him any salary increase from 1982 through at least 1994 [and maybe 1997, the date of the court decision], because the administration either had to follow its salary policy and pay the professor the minimum salary, or it had to file an exception to exclude him from the established salary range).

c. Salary Reduction. See, e.g., Williams v. Texas Tech University Health Sciences Center, 6 F.3d 290 (5th Cir. 1993), cert. denied, 510 U.S. 1194 (1994) (tenured professor sued, claiming that he should have been provided a hearing before the medical school reduced his compensation from $68,000 to $46,500 because he failed to generate as much grant money as had been expected; court ruled that the professor’s interest in a specific salary level did not outweigh the administration’s interest in making budget any decisions for educational programs, and that the professor had received six months’ notice and the opportunity to seek additional funding.) For a discussion of efforts to reduce salaries in medical schools, see Donna R. Euben, "Doctors in Court? Salary Reduction Litigation", 85 Academe 87 (Nov.-Dec. 1999). State law may permit salary reduction. As previously noted, state law governing the salaries of public employees may provide particular protections. For example, a New Jersey statute provides that no tenured professor in a public college may be "subject to reduction of salary, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause." N.J.S.A. 18A:6-18.

5. Fines or Restitution.

An administration might seek reimbursement, restitution or a fine from a faculty member. Please note that such
fines may raise issues under the Fair Labor Standards Act.

6. Suspension

There are a variety of suspensions, including paid suspensions, unpaid suspensions, and immediate (paid and unpaid) suspensions.

a. Paid Suspensions. See, e.g., Edwards v. California University of Pennsylvania, 156 F.3d 488 (3rd Cir. 1998), cert. denied, 525 U.S. 1143 (1999) (while tenured professor was being investigated for the use of inappropriate language in the classroom, he was suspended with pay; court found that suspension did not violate his constitutional rights).

b. Unpaid Suspensions. For the AAUP, a suspension pending a faculty hearing should be with pay. If an administration instead of moving to dismiss a faculty member, intends to suspend with or without pay, that action should be preceded by a hearing with the same procedural protections as afforded in a dismissal case. See, e.g., Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir.), cert. denied, 534 U.S. 951 (2001) (Macomb Community College professor initially put on leave without pay while sexual harassment investigation pending; he was later put on indefinite leave with pay); Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994) (involving professor who was suspended without pay for one year for violating institution’s sexual harassment policy; the trial court ruled that professor was entitled to preliminary injunction on his First Amendment and due process claims).

c. Immediate Suspensions. AAUP’s RIR 5 provides that an institution may suspend a professor when immediate harm to the individual or others is threatened pending an ultimate determination of the individual’s status. RIR 5 further provides that, before suspending a faculty member, the administration should consult with a faculty committee concerning the propriety, length, and other conditions of the suspension. The threat of physical harm can certainly warrant suspension, but so can harm to the educational process (e.g., a faculty member who refuses to evaluate the work of most of her students). Such suspensions should be with pay, and they can remain in effect during an investigation and disciplinary proceedings. In Gilbert v. East Strousberg University, 520 U.S. 924 (1997), the U.S. Supreme Court ruled that due process rights were not violated when an administration suspended a tenured public employee without pay and failed to provide a pre-suspension hearing. The Court’s reasoning was based, in part, that drug-related felony charges were pending against the police officer. As commentators have noted, the Gilbert decision is not generally applicable to the due process protections afforded suspended faculty members, “[u]nless a college could demonstrate that it needed to remove a tenured faculty member quickly because he or she was a potential threat to the health or safety of others, or because the faculty member had committed some act that rendered him or her unfit to continue teaching pending a disciplinary hearing.” The Law of Higher Education 179-80 (Supp. 2000).

7. "Demotion" in Rank

The AAUP generally views reductions in faculty rank, such as from associate to assistant professor, as an
inappropriate sanction, except in situations where the promotion is obtained by fraud or dishonesty. Compare Kirschenbaum v. Northwestern University, 728 N.E.2d 752 (Ill. App. Ct. 1999) (finding that administration did not breach medical professor’s tenure contract when it changed his status from "full-time" to "contributed service") with Klinge v. Ithaca College, 167 Misc. 2d 458 (N.Y. Sup. Ct. 1995), aff'd as modified by 652 N.Y.S.2d 377 (N.Y. App. Div. 1997) (ruling that factual issue for jury existed regarding whether tenure breached for professor who was found guilty of plagiarizing when he was demoted from full to associate professor, his salary reduced, and his academic duties restricted).

8. Modified Teaching Assignments

Some institutions modify teaching assignments as a form of discipline. See, e.g., McCellan v. Board of Regents of the State University, 921 S.W.2d 684 (Tenn. 1996) (barring professor for three years from teaching the only section of a required course after he made inappropriate sexual comments to female students about EKGs). But see Levenstein v. Salafasky, 164 F.3d 389 (7th Cir. 1998) (noting that professor was "effectively deprived of a property interest in a job" by university decision to forbid professor from seeing patients and an assignment of reviewing old medical files). Please note that "shadow sections"—courses taught by other instructors to compensate for perceived problems in the teaching of the original professor—may violate a public university professor’s constitutionally protected interests. See, e.g., Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991), aff’d in relevant part, 966 F.2d 85 (2d Cir. 1992).

9. Class Monitoring

If periodic monitoring is deemed necessary discipline, primary responsibility should be in the hands of faculty.

10. Mandatory Counseling

Some administrations have required that faculty undergo counseling. Generally such discipline implicates a number of legal concerns, including free expression, academic freedom, and privacy. See e.g., Bauer v. Sampson, 261 F.3d 775 (9th Cir. 2001) (community college violated rights of outspoken professor by requiring him to meet with anger management counselor); Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996), cert. denied, 520 U.S. 1140 (1997) (English professor who used vivid sexual imagery in class ordered to attend sexual harassment seminar); Silva v. University of New Hampshire, 999 F. Supp. 293 (D.N.H. 1994) (English professor who was found guilty of sexual harassment was suspended from teaching for one year and required to obtain a "counseling evaluation" and, if prescribed, attend counseling); Powell v. Ross, 2004 U.S. Dist. LEXIS 3601 (W.D. Wis., Feb. 27, 2004) (rejecting professor's defamation claim arising in part from recommendation that professor attend sexual harassment training to identify his "problem areas"). See generally Jonathan Knight, "The Misuse of Mandatory Counseling," The Chronicle of Higher Education (Nov. 17, 1995) ("No single punishment is appropriate for all sexual-harassment cases, but it is the faculty member's misconduct, not his ideas, that should be punished . . . ").
V. Practical Suggestions

- When faced with a "problem professor," consider a range of sanctions, not only dismissal.
- Focus on misconduct, not opinions or speech or popularity of faculty member.
- Explore informal resolutions if at all feasible; a negotiated settlement may serve all parties' interests.
- Ensure that faculty committees consider all faculty disciplinary issues. As noted earlier, such faculty participation provides further evidence to courts that due process was afforded and may encourage them to defer to the institution's decision.
- When moving to dismiss faculty, apply policies in a consistent and non-discriminatory fashion, and observe all notice and severance pay requirements.
- Follow institutional policies carefully to ensure the provision of adequate due process protections to faculty members designated for discipline or release.
- Advise faculty committees on their role in handling faculty discipline.
Policy Responding to Allegations of Research Misconduct

University of Louisville

Policy Name
Responding to Allegations of Research Misconduct

Effective Date
October 21, 2002

Policy Number
RES-1.04

Policy Applicability
See B.Scope

Policy Statement
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Appendix B: Research Integrity Ombudsperson Responsibilities

In case of any conflict between the Approved Policy and 42 CFR Part 93, the regulation shall prevail.

I. Introduction

A. General Policy

The University of Louisville is committed to the highest standards of integrity in all its research endeavors and will not tolerate conduct that imperils this mission by violating those standards. This commitment governs the conduct of faculty members, staff, and students engaged in scholarly and scientific research activities. This policy and procedures promote these objectives by establishing a framework of methods and principles for assessing, and conducting inquiries and investigations regarding allegations or incidents of “research misconduct.”

B. Scope

This policy is intended to carry out University of Louisville’s responsibilities under the Public Health Service (PHS) Policies on Research Misconduct, 42 CFR Part 93.[1] This policy applies to allegations of research misconduct (fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results) involving:

- An individual who, at the time of the alleged research misconduct, was employed by, was an agent of, or was affiliated by contract or agreement with this institution;¹ This includes any person paid by, under the control of, or affiliated with the University, and including but not limited to individuals involved in research (including those involved in the design, conduct, reporting, or management of research) for which the University is responsible, scientists, physicians, nurses, trainees, technicians, undergraduate and graduate students, gratis faculty who conduct research, fellows and residents, guest researchers, collaborators, and research support staff; and

- (1) PHS support biomedical or behavioral research, research training or activities related to that research or research training, such as the operation of tissue and data banks and the dissemination of research information, (2) applications or proposals for PHS support for biomedical or behavioral research, research training or activities related to that research or research training, or (3) plagiarism of research records produced in the course of PHS supported research, research training or activities
related to that research or research training. This includes any research proposed, performed, reviewed, or reported, or any research record generated from that research, regardless of whether an application or proposal for PHS funds resulted in a grant, contract, cooperative agreement, or other form of PHS support.\textsuperscript{2}

This policy and the associated procedures do not apply to order of authorship, authorship credit or collaboration disputes and apply only to allegations of research misconduct that occurred within six years of the date the institution or HHS received the allegation, subject to the subsequent use, health or safety of the public, and grandfather exceptions in 42 CFR § 93.105(b). They do not apply to other types of violations of University research policy or misconduct in research.

This policy and associated procedures will be followed when the University receives an allegation of possible misconduct. The Executive Vice President for Research must approve any significant variation in procedure prior to its initiation. Any change from normal procedures must ensure fair treatment to the subject of the inquiry or investigation.

This policy and procedures are intended to protect the rights and reputations of those alleged to have committed research misconduct and those who make such allegations, while at the same time ensuring that the substance of all allegations will be assessed fairly and conscientiously. Because the integrity of all research is of paramount concern to the University, those with knowledge of possible acts of research misconduct are encouraged to report. Protections, especially against retaliation, will be provided to those who make allegations in good faith.

These policies and procedures also provide for reporting research misconduct investigations and institutional actions to the U. S. Office of Research Integrity, and for cooperating with the Office of Research Integrity in its review of institutional actions and reports.

All individuals involved -- whether making allegations or the object of allegations, or otherwise participating in inquiries and investigations -- are cautioned to familiarize themselves with the specific requirements promulgated by federal agencies, especially the National Institutes of Health/Office of Research Integrity (NIH/ORI) and the National Science Foundation (NSF), responsible for oversight of the research misconduct assessment process. These requirements, which may apply to certain determinations made under these policies and procedures (e.g. evidentiary standards, bases for findings and conclusions, etc.), can be found at:

NIH/ORI: https://ori.hhs.gov/research-misconduct-0


II. Definitions
A. **Allegation** means a disclosure of possible research misconduct through any means of communication. The disclosure may be by written or oral statement or other communication to an institutional or HHS official.⁶

B. **Business Day** means a day in which the Institution is operating, regardless of whether classes are in session.[²]

C. **Complainant** means a person who in good faith makes an allegation of research misconduct.⁴

D. **Conflict of interest** in the context of research misconduct proceedings means the real or apparent possibility that the interests of one person may compromise or affect the interests of another person due to prior or existing personal, familial, financial, or professional relationships.

E. **Deciding Official** (DO) means the institutional official who makes final determinations on allegations of research misconduct and any institutional administrative actions. The Executive Vice President for Research and Innovation at the University of Louisville is the Deciding Official for purposes of these “Policies and Procedures For Responding To Allegations of Research Misconduct” and for purposes of satisfying federal PHS (ORI) policy requirements established in 42 CFR Part 93 for the handling of allegations or instances of research misconduct.

F. **Evidence** means any document, tangible item, or testimony offered or obtained during a research misconduct proceeding that tends to prove or disprove the existence of an alleged fact.⁵

G. **Good faith** as applied to a complainant or witness, means having a belief in the truth of one’s allegation or testimony that a reasonable person in the complainant’s or witness’s position could have based on the information known to the complainant or witness at the time. An allegation or cooperation with a research misconduct proceeding is not in good faith if it is made with knowing or reckless disregard for information that would negate the allegation or testimony. Good faith as applied to a committee member means cooperating with the purpose of helping an institution meet its responsibilities under 42 CFR Part 93. A committee member does not act in good faith if his/her acts or omissions on the committee are dishonest or influenced by personal, professional, or financial conflicts of interest with those involved in the research misconduct proceeding.⁶

H. **HHS** means the United States Department of Health and Human Services.

I. **Inquiry** means preliminary information-gathering and preliminary fact-finding that meets the criteria and follows the procedures of 42 CFR §§ 93.307-93.309.⁷ It is intended to allow a careful look into a situation without tainting reputations of possibly innocent individuals.
J. **Inquiry Committee** refers to the three- (3)-person committee that is charged with conducting an inquiry. The *Research Integrity Ombudsperson*, shall make the appointments, in consultation with other institutional officials as appropriate.

K. **Institutional member** means a person who is employed by, is an agent of, or is affiliated by contract or agreement with an institution. Institutional members may include, but are not limited to, officials, tenured and untenured faculty, teaching and support staff, researchers, research coordinators, clinical technicians, postdoctoral and other fellows, students, volunteers, agents, and contractors, subcontractors, and sub-awardees, and their employees.³

L. **Investigation** means the formal development of a factual record and the examination of that record leading to a decision not to make a finding of research misconduct or to a recommendation for a finding of research misconduct which may include a recommendation for other appropriate actions, including administrative actions.⁹ An investigation is a formal examination and evaluation of all relevant facts to determine if misconduct has occurred, and, if so, to determine the responsible person and the seriousness of the misconduct. There are generally three aspects to an investigation: the gathering and reviewing of evidence and testimony (which may include a hearing); the formulation of findings of fact and conclusions regarding the commission of research misconduct; the preparation of a written report.

M. **Investigation Committee** refers to the five-(5)-member committee that is charged with conducting an investigation. The *Research Integrity Ombudsperson* shall make the appointments, in consultation with other institutional officials as appropriate. One of the five Investigation Committee members may be appointed from another institution.

N. **Office of Research Integrity** or ORI means the office to which the HHS Secretary has delegated responsibility for addressing research integrity and misconduct issues related to PHS supported activities.¹⁰

O. **Preliminary assessment and review** refers to an informal assessment or review of facts to determine only whether an allegation or set of circumstances has sufficient evidence to support an inquiry into research misconduct. The assessment or review, which may take place, if at all, prior to the initiation of an inquiry, will usually be conducted by the *Research Integrity Ombudsperson*, in consultation with such others as he or she may believe appropriate. A preliminary assessment or review should be conducted only to determine whether to proceed with an inquiry, not to substitute for an inquiry, and should be conducted in such a manner as not to compromise the integrity of any subsequent inquiry.

P. **Preponderance of the evidence** means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.¹¹
Q. **Public Health Service** or **PHS** means the unit within HHS that includes the Office of Public Health and Science and the following Operating Divisions: Agency for Healthcare Research and Quality, Agency for Toxic Substances and Disease Registry, Centers for Disease Control and Prevention, Food and Drug Administration, Health Resources and Services Administration, Indian Health Service, National Institutes of Health, and the Substance Abuse and Mental Health Services Administration, and the offices of the Regional Health Administrators.\(^{12}\)

R. **PHS support** means PHS funding, or applications or proposals therefore, for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training, that may be provided through: PHS grants, cooperative agreements, or contracts or subgrants or subcontracts under those PHS funding instruments; or salary or other payments under PHS grants, cooperative agreements or contracts.\(^{13}\)

S. **Records of research misconduct proceedings** means: (1) the research records and evidence secured for the research misconduct proceeding pursuant to this policy and 42 CFR §§ 93.305, 93.307(b), and 93.310(d), except to the extent the Research Integrity Ombudsperson determines and documents that those records are not relevant to the proceeding or that the records duplicate other records that have been retained; (2) the documentation of the determination of irrelevant or duplicate records; (3) the inquiry report and final documents (not drafts) produced in the course of preparing that report, including the documentation of any decision not to investigate, as required by 42 CFR § 93.309(c); (4) the investigation report and all records (other than drafts of the report) in support of the report, including the recordings or transcripts of each interview conducted; and (5) the complete record of any appeal within the institution from the finding of research misconduct.\(^{14}\)

T. **Research** means a systematic investigation designed to develop or contribute to knowledge, and includes both sponsored research and non-sponsored research, that involves use of University personnel, patients, students, facilities or resources, or the expenditure of University or affiliated corporation funds. The term includes clinical and health-related research, and behavioral and social science research, and encompasses basic and applied research and product development.

U. **Research Integrity Ombudsperson** means the institutional official responsible for: (1) assessing allegations of research misconduct to determine if they fall within the definition of research misconduct, are covered by 42 CFR Part 93, and warrant an inquiry on the basis that the allegation is sufficiently credible and specific so that potential evidence of research misconduct may be identified; and (2) overseeing inquiries and investigations; and (3) the other responsibilities described in this policy. **Associate Research Integrity Ombudsperson** means the individual, selected in the same manner as the Research Integrity Ombudsperson
and similarly qualified, who assumes the Research Integrity Ombudsperson’s responsibilities in the event he or she is unavailable or recused.

V. **Research misconduct** means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. *Fabrication* is making up data or results and recording or reporting them. *Falsification* is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record. *Plagiarism* is the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.\(^{15}\) Plagiarism also means the substantial unattributed copying of another’s ideas, processes, results, or words. Substantial unattributed copying of another’s ideas, processes, results, or words means the unattributed verbatim or nearly verbatim copying of sentences and paragraphs, style or structure which materially mislead the audience regarding the contributions of the author. Plagiarism does not include authorship or credit disputes, including those among former collaborators who have gone their separate ways but may make use of commonly developed concepts, methods, descriptive language, or other products of the former joint effort. Research misconduct does not include honest error or differences of opinion.\(^{15}\)

W. **Research misconduct proceeding** means any actions related to alleged research misconduct that is within 42 CFR Part 93, including but not limited to, allegation assessments, inquiries, investigations, ORI oversight reviews, hearings and administrative appeals.\(^{16}\)

X. **Research record** means the record of data or results that embody the facts resulting from scientific inquiry, including but not limited to, research proposals; grant or contract applications, whether funded or not; grant or contract progress and other reports; laboratory notebooks; notes; correspondence; videos; photographs; X-ray film; slides; biological materials; computer files and printouts; manuscripts and publications; equipment use logs; laboratory records both physical and electronic; laboratory procurement records; animal facility records; human and animal subject protocols; consent forms; medical charts; patient research files; abstracts, theses, oral presentations, internal reports, and journal articles, and any documents and materials provided to HHS or an institutional official by a respondent in the course of the research misconduct proceeding.\(^{17}\) The record of data or results may be any data, document, computer file, computer diskette, or any other written or non-written account or object that reasonably may be expected to provide evidence or information regarding the proposed, conducted, or reported research that constitutes the subject of an allegation of scientific misconduct.

Y. **Respondent** means the person(s) against whom an allegation of research misconduct is directed or who is the subject of a research misconduct proceeding.\(^{18}\)
Z. **Retaliation** means an adverse action taken against a complainant, witness, or committee member by this institution or one of its institutional members in response to (1) a good faith allegation of research misconduct; or (2) good faith cooperation with a research misconduct proceeding.\(^{19}\)

AA. **Sequestration of records** means the location, collection, inventorying, and securing of research records and other relevant documents and materials for the purpose of preventing loss, alteration, or fraudulent creation of records.

### III. Rights and Responsibilities

**Research Integrity Ombudsperson**

The Executive Vice President for Research will appoint the Research Integrity Ombudsperson who will have primary responsibility for implementation of the institution’s policies and procedures on research misconduct. The Research Integrity Ombudsperson will be an institutional official who is well qualified to administer the procedures and is sensitive to the varied demands made on those who conduct research, those who are accused of research misconduct, those who make good faith allegations of research misconduct, and those who may serve on inquiry and investigation committees.

All parties participating in an inquiry and / or investigation of research misconduct have a shared responsibility to maintain confidentiality in order to protect the reputations of all parties involved. This responsibility is shared among the complainant, respondent, ombudsperson(s), inquiry / investigation committee members, witnesses, advisor(s), institutional officials and support staff involved in the proceedings.

A detailed listing of the responsibilities of the Research Integrity Ombudsperson is set forth in Appendix A. These responsibilities include the following duties related to research misconduct proceedings:

- Consult confidentially with persons uncertain about whether to submit an allegation of research misconduct;
- Receive allegations of research misconduct;
- Assess each allegation of research misconduct in accordance with Section V.A. of this policy to determine whether it falls within the definition of research misconduct and warrants an inquiry;
- As necessary, take interim action and notify ORI of special circumstances, in accordance with Section IV.F. of this policy;
- Sequester research data and evidence pertinent to the allegation of research misconduct in accordance with Section V.C. of this policy and maintain it securely in accordance with this policy and applicable law and regulation;
- Provide confidentiality to those involved in the research misconduct proceeding as required by 42 CFR § 93.108, other applicable law, and institutional policy;
• Notify the respondent and provide opportunities for him/her to review/comment/respond to allegations, evidence, and committee reports in accordance with Section III.C. of this policy;
• Inform respondents, complainants, and witnesses of the procedural steps in the research misconduct proceeding;
• Appoint the chair and members of the inquiry and investigation committees, ensure that those committees are properly staffed and that there is expertise appropriate to carry out a thorough and authoritative evaluation of the evidence;
• Determine whether each person involved in handling an allegation of research misconduct has an unresolved personal, professional, or financial conflict of interest and take appropriate action, including recusal, to ensure that no person with such conflict is involved in the research misconduct proceeding;
• In cooperation with other institutional officials, take all reasonable and practical steps to protect or restore the positions and reputations of all parties to a dispute and counter potential or actual retaliation against them by other parties to the dispute or other institutional members;
• Keep the Deciding Official and others who need to know apprised of the progress of the review of the allegation of research misconduct;
• Notify and make reports to ORI as required by 42 CFR Part 93;
• Ensure that administrative actions taken by the institution and ORI are enforced and take appropriate action to notify other involved parties, such as sponsors, law enforcement agencies, professional societies, and licensing boards of those actions; and
• Maintain records of the research misconduct proceeding and make them available to ORI in accordance with Section VIII.F. of this policy.

Complainant
All parties participating in an inquiry and / or investigation of research misconduct have a shared responsibility to maintain confidentiality in order to protect the reputations of all parties involved in the proceedings. This responsibility is shared among the complainant, respondent, ombudperson(s), inquiry / investigation committee members, witnesses, advisor(s), institutional officials and support staff involved in the proceedings.

The complainant is responsible for making allegations in good faith and cooperating with the inquiry and investigation. As a matter of good practice, the complainant should be interviewed at the inquiry stage and given the transcript or recording of the interview for correction. The complainant must be interviewed during an investigation, and be given the transcript or recording of the interview for correction.20

Respondent
All parties participating in an inquiry and / or investigation of research misconduct have a shared responsibility to maintain confidentiality in order to protect the reputations of all parties involved in the proceedings. This responsibility is shared among the complainant, respondent, ombudsperson(s), inquiry / investigation committee members, witnesses, advisor(s), institutional officials and support staff involved in the proceedings.

The respondent is responsible for cooperating with the conduct of an inquiry and investigation. The respondent is entitled to:

- A good faith effort from the Research Integrity Ombudsperson to notify the respondent in writing at the time of or before beginning an inquiry;\textsuperscript{21}
- An opportunity to comment on the inquiry report and have his/her comments attached to the report;\textsuperscript{22}
- Be notified of the outcome of the inquiry, and receive a copy of the inquiry report that includes a copy of, or refers to 42 CFR Part 93 and the institution's policies and procedures on research misconduct;\textsuperscript{23}
- Be notified in writing of the allegations to be investigated within a reasonable time after the determination that an investigation is warranted, but before the investigation begins (within 30 business days after the institution decides to begin an investigation), and be notified in writing of any new allegations, not addressed in the inquiry or in the initial notice of investigation, within a reasonable time after the determination to pursue those allegations;\textsuperscript{24}
- Be interviewed during the investigation, have the opportunity to correct the recording or transcript, and have the corrected recording or transcript included in the record of the investigation;\textsuperscript{25}
- Have interviewed during the investigation any witness who has been reasonably identified by the respondent as having information on relevant aspects of the investigation, have the recording or transcript provided to the witness for correction, and have the corrected recording or transcript included in the record of investigation;\textsuperscript{26} and
- Receive a copy of the draft investigation report and, concurrently, a copy of, or supervised access to the evidence on which the report is based, and be notified that any comments must be submitted within 30 business days of the date on which the copy was received and that the comments will be considered by the investigation committee and deciding official and addressed in the final report.\textsuperscript{27}

The respondent should be given the opportunity to admit that research misconduct occurred and that he/she committed the research misconduct. With the advice of the Research Integrity Ombudsperson and institutional legal counsel, the Deciding Official may terminate the institution's review of an allegation that has
been admitted if the institution’s acceptance of the admission and any proposed settlement is approved by ORI.\textsuperscript{28}

Deciding Official
The DO will receive the inquiry report and after consulting with the Research Integrity Ombudsperson, decide whether an investigation is warranted under the criteria in 42 CFR § 93.307(d). Any finding that an investigation is warranted must be made in writing by the DO and must be provided to ORI, together with a copy of the inquiry report meeting the requirements of 42 CFR § 93.309, within 30 business days of the finding. If it is found that an investigation is not warranted, the DO and the Research Integrity Ombudsperson will ensure that detailed documentation of the inquiry is retained for at least 7 years after termination of the inquiry, so that ORI may assess the reasons why the institution decided not to conduct an investigation.\textsuperscript{29}

The DO will receive the investigation report and, after consulting with the Research Integrity Ombudsperson and other appropriate officials, decide the extent to which this institution accepts the findings of the investigation and, if research misconduct is found, decide what, if any, institutional administrative actions are appropriate. The DO shall ensure that the final investigation report, the findings of the DO and a description of the pending or completed administrative action are provided to ORI, as required by 42 CFR § 93.315.

IV. General Policies and Principles

A. Responsibility to Report Misconduct

All institutional members will report observed, suspected, or apparent research misconduct to the Research Integrity Ombudsperson. Any official who receives an allegation of research misconduct must report it immediately to the Research Integrity Ombudsperson. If an individual is unsure whether a suspected incident falls within the definition of research misconduct, the individual may meet with or contact the Research Integrity Ombudsperson at:

Belknap Research Integrity Ombudsperson
Michael Perlin, Ph.D.
Biology, 502-852-5944

Health Sciences:
Health Sciences Research Integrity Ombudsperson - Eleanor Lederer, MD
Medicine – Kidney Disease, 502-852-5757
to discuss the suspected research misconduct informally, which may include discussing it anonymously and/or hypothetically. If the circumstances described by the individual do not meet the definition of research misconduct, the Research Integrity Ombudsperson will refer the individual or allegation to other offices or officials with responsibility for resolving the problem.

At any time, an institutional member may have confidential discussions and consultations about concerns of possible misconduct with the Research Integrity Ombudsperson and will be counseled about appropriate procedures for reporting allegations.

B. Cooperation with Research Misconduct Proceedings

Institutional members will cooperate with the Research Integrity Ombudsperson and other institutional officials in the review of allegations and the conduct of inquiries and investigations. Institutional members, including respondents, have an obligation to provide evidence relevant to research misconduct allegations to the Research Integrity Ombudsperson or other institutional officials.

C. Confidentiality

The Research Integrity Ombudsperson shall, as required by 42 CFR § 93.108: (1) limit disclosure of the identity of respondents and complainants to those who need to know in order to carry out a thorough, competent, objective and fair research misconduct proceeding; and (2) except as otherwise prescribed by law, limit the disclosure of any records or evidence from which research subjects might be identified to those who need to know in order to carry out a research misconduct proceeding. The Research Integrity Ombudsperson should use written confidentiality agreements or other mechanisms to ensure that the recipient does not make any further disclosure of identifying information. The Research Integrity Ombudsperson should provide confidentiality for witnesses when the circumstances indicate that the witnesses may be harassed or otherwise need protection.

All parties participating in an inquiry and/or investigation of research misconduct have a shared responsibility to maintain confidentiality in order to protect the reputations of all parties involved in the proceedings. This responsibility is shared among the complainant, respondent, ombudsperson(s), inquiry/investigation committee members, witnesses, advisor and support staff involved in the proceedings.

D. Protecting complainants, witnesses, and committee members

Institutional members may not retaliate in any way against complainants, witnesses, or committee members. Institutional members should immediately report any alleged or apparent retaliation against complainants, witnesses or committee members to the Research Integrity Ombudsperson, who shall review the matter and, as necessary, make all
reasonable and practical efforts to counter any potential or actual retaliation and protect and restore the position and reputation of the person against whom the retaliation is directed.

E. Protecting the Respondent

As requested and as appropriate, the Research Integrity Ombudsperson and other institutional officials shall make all reasonable and practical efforts to protect or restore the reputation of persons alleged to have engaged in research misconduct, but against whom no finding of research misconduct is made.30

During the research misconduct proceeding, the Research Integrity Ombudsperson is responsible for ensuring that respondents receive all the notices and opportunities provided for in 42 CFR Part 93 and the policies and procedures of the institution. Respondents may consult with legal counsel or non-lawyer personal adviser(s) (who is not a principal or witness in the case) to seek advice and may bring the counsel or personal adviser to interviews or meetings on the case. Respondents are limited to the presence of one adviser or legal representative at convened meetings of the inquiry and/or investigation committee and the presence of the adviser or legal representative does not negate the requirement for the respondent to be present.

F. Interim Administrative Actions and Notifying ORI of Special Circumstances

Throughout the research misconduct proceeding, the Research Integrity Ombudsperson will review the situation to determine if there is any threat of harm to public health, federal funds and equipment, or the integrity of the PHS supported research process. In the event of such a threat, the Research Integrity Ombudsperson will, in consultation with other institutional officials and ORI, take appropriate interim action to protect against any such threat.31 Interim action might include additional monitoring of the research process and the handling of federal funds and equipment, reassignment of personnel or of the responsibility for the handling of federal funds and equipment, additional review of research data and results or delaying publication. The Research Integrity Ombudsperson shall, at any time during a research misconduct proceeding, notify ORI immediately if he/she has reason to believe that any of the following conditions exist:

- Health or safety of the public is at risk, including an immediate need to protect human or animal subjects;
- HHS resources or interests are threatened;
- Research activities should be suspended;
- There is a reasonable indication of possible violations of civil or criminal law;
• Federal action is required to protect the interests of those involved in the research misconduct proceeding;

• The research misconduct proceeding may be made public prematurely and HHS action may be necessary to safeguard evidence and protect the rights of those involved; or

• The research community or public should be informed.32

V. Conducting the Assessment and Inquiry

A. Assessment of Allegations

Upon receiving an allegation of research misconduct, the Research Integrity Ombudsperson will immediately assess the allegation to determine whether it is sufficiently credible and specific so that potential evidence of research misconduct may be identified, whether it is within the jurisdictional criteria of 42 CFR § 93.102(b), and whether the allegation falls within the definition of research misconduct in this policy and 42 CFR § 93.103.33 An inquiry must be conducted if these criteria are met.

The assessment period should be brief, preferably concluded within a week. In conducting the assessment, the Research Integrity Ombudsperson need not interview the complainant, respondent, or other witnesses, or gather data beyond any that may have been submitted with the allegation, except as necessary to determine whether the allegation is sufficiently credible and specific so that potential evidence of research misconduct may be identified. The Research Integrity Ombudsperson shall, on or before the date on which the respondent is notified of the allegation, obtain custody of, inventory, and sequester all research records and evidence needed to conduct the research misconduct proceeding, as provided in paragraph C. of this section.

B. Initiation and Purpose of the Inquiry

If the Research Integrity Ombudsperson determines that the criteria for an inquiry are met, he or she will immediately initiate the inquiry process. The purpose of the inquiry is to conduct an initial review of the available evidence to determine whether to conduct an investigation. An inquiry does not require a full review of all the evidence related to the allegation.34

C. Notice to Respondent; Sequestration of Research Records

At the time of or before beginning an inquiry, the Research Integrity Ombudsperson must make a good faith effort to notify the respondent in writing, if the respondent is known. If the inquiry subsequently identifies additional respondents, they must be notified in writing. On or before the date on which the respondent is notified, or the inquiry begins, whichever is earlier, the Research Integrity Ombudsperson must take all reasonable and practical steps
to obtain custody of all the research records and evidence needed to conduct the research misconduct proceeding, inventory the records and evidence and sequester them in a secure manner, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments. The Research Integrity Ombudsperson may consult with ORI for advice and assistance in this regard.

D. Appointment of the Inquiry Committee

The Research Integrity Ombudsperson, in consultation with other institutional officials as appropriate, will appoint an inquiry committee and committee chair within 10 business days of the initiation of the inquiry or as soon thereafter as practical. The inquiry committee must consist of individuals who do not have unresolved personal, professional, or financial conflicts of interest with those involved with the inquiry. The committee will be a core committee of three members who are authorized to add or recuse members and use experts when necessary to evaluate specific allegations. Additional committee members should include individuals with the appropriate scientific expertise to evaluate the evidence and issues related to the allegation, interview the principals and key witnesses, and conduct the inquiry.

The Research Integrity Ombudsperson or designee will notify the respondent of the proposed committee membership to give the respondent an opportunity to object to a proposed member based upon a personal, professional, or financial conflict of interest. The period for submitting objections is limited to no more than 10 business days. The Research Integrity Ombudsperson would make the final determination of whether a conflict exists.

E. Charge to the Committee and First Meeting

The Research Integrity Ombudsperson will prepare a charge for the inquiry committee that:

- Sets forth the time for completion of the inquiry;
- Describes the allegations and any related issues identified during the allegation assessment;
- States that the purpose of the inquiry is to conduct an initial review of the evidence, including the testimony of the respondent, complainant and key witnesses, to determine whether an investigation is warranted, not to determine whether research misconduct definitely occurred or who was responsible;
- States that an investigation is warranted if the committee determines: (1) there is a reasonable basis for concluding that the allegation falls within the definition of research misconduct and is within the jurisdictional criteria of 42 CFR § 93.102(b); and, (2) the allegation may have substance, based on the committee’s review during the inquiry.
• Informs the inquiry committee that they are responsible for preparing or directing the
preparation of a written report of the inquiry that meets the requirements of this policy
and 42 CFR § 93.309(a).

At the committee’s first meeting, the Research Integrity Ombudsperson will review the charge with the committee, discuss the allegations, any related issues, and the appropriate procedures for conducting the inquiry, assist the committee with organizing plans for the inquiry, and answer any questions raised by the committee. The Research Integrity Ombudsperson will be present or available throughout the inquiry to advise the committee as needed.

F. Inquiry Process

The inquiry committee will normally interview the complainant, the respondent, and key witnesses as well as examining relevant research records and materials. Then the inquiry committee will evaluate the evidence, including the testimony obtained during the inquiry. After consultation with the Research Integrity Ombudsperson, the committee members will decide whether an investigation is warranted based on the criteria in this policy and 42 CFR § 93.307(d). The scope of the inquiry is not required to and does not normally include deciding whether misconduct definitely occurred, determining definitely who committed the research misconduct or conducting exhaustive interviews and analyses. However, if a legally sufficient admission of research misconduct is made by the respondent, misconduct may be determined at the inquiry stage if all relevant issues are resolved. In that case, the institution shall promptly consult with ORI to determine the next steps that should be taken. See Section III.C.

G. Time for Completion

The inquiry, including preparation of the final inquiry report and the decision of the DO on whether an investigation is warranted, must be completed within 60 business days of initiation of the inquiry, unless the Research Integrity Ombudsperson determines that circumstances clearly warrant a longer period. If the Research Integrity Ombudsperson approves an extension, the inquiry record must include documentation of the reasons for exceeding the 60-business day period. The respondent will be notified of the extension.

VI. The Inquiry Report

A. Elements of the Inquiry Report

A written inquiry report must be prepared that includes the following information: (1) the name and position of the respondent; (2) a description of the allegations of research misconduct; (3) the PHS support, including, for example, grant numbers, grant applications, contracts and publications listing PHS support; (4) the basis for recommending or not
recommending that the allegations warrant an investigation; (5) any comments on the draft report by the respondent or complainant.\textsuperscript{38}

Institutional counsel should review the report for legal sufficiency. Modifications should be made as appropriate in consultation with the Research Integrity Ombudsperson and the inquiry committee. The inquiry report should include: the names and titles of the committee members and experts who conducted the inquiry; a summary of the inquiry process used; a list of the research records reviewed; summaries of any interviews; and whether any other actions should be taken if an investigation is not recommended.

**B. Notification to the Respondent and Opportunity to Commit**

The Research Integrity Ombudsperson shall notify the respondent whether the inquiry found an investigation to be warranted, include a copy of the draft inquiry report for comment within 10 business days, and include a copy of or refer to 42 CFR Part 93 and the institution's policies and procedures on research misconduct.\textsuperscript{39}

Any comments that are submitted will be attached to the final inquiry report. Based on the comments, the inquiry committee may revise the draft report as appropriate and prepare it in final form. The committee will deliver the final report to the Research Integrity Ombudsperson.

**C. Institutional Decision and Notification**

1. Decision by Deciding Official

   The Research Integrity Ombudsperson will transmit the final inquiry report and any comments to the DO, who will determine in writing whether an investigation is warranted. The inquiry is completed when the DO makes this determination.

2. Notification to ORI

   Within 30 business days of the DO's decision that an investigation is warranted, the Research Integrity Ombudsperson will provide ORI with the DO’s written decision and a copy of the inquiry report. The Research Integrity Ombudsperson will also notify those institutional officials who need to know of the DO’s decision. The Research Integrity Ombudsperson must provide the following information to ORI upon request: (1) the institutional policies and procedures under which the inquiry was conducted; (2) the research records and evidence reviewed, transcripts or recordings of any interviews, and copies of all relevant documents; and (3) the charges to be considered in the investigation.\textsuperscript{40}

3. Documentation of Decision Not to Investigate
If the DO decides that an investigation is not warranted, the Research Integrity Ombudsperson shall secure and maintain for 7 years after the termination of the inquiry sufficiently detailed documentation of the inquiry to permit a later assessment by ORI of the reasons why an investigation was not conducted. These documents must be provided to ORI or other authorized HHS personnel upon request.

VII. Conducting the Investigation

A. Initiation and Purpose

The investigation must begin within 30 business days after the determination by the DO that an investigation is warranted. The purpose of the investigation is to develop a factual record by exploring the allegations in detail and examining the evidence in depth, leading to recommended findings on whether research misconduct has been committed, by whom, and to what extent. The investigation will also determine whether there are additional instances of possible research misconduct that would justify broadening the scope beyond the initial allegations. This is particularly important where the alleged research misconduct involves clinical trials or potential harm to human subjects or the general public or if it affects research that forms the basis for public policy, clinical practice, or public health practice. The findings of the investigation will be set forth in an investigation report.

B. Notifying ORI and Respondent; Sequestration of Research Records

On or before the date on which the investigation begins, the Research Integrity Ombudsperson must: (1) notify the ORI Director of the decision to begin the investigation and provide ORI a copy of the inquiry report; and (2) notify the respondent in writing of the allegations to be investigated. The Research Integrity Ombudsperson must also give the respondent written notice of any new allegations of research misconduct within a reasonable amount of time of deciding to pursue allegations not addressed during the inquiry or in the initial notice of the investigation.

The Research Integrity Ombudsperson will, prior to notifying respondent of the allegations, take all reasonable and practical steps to obtain custody of and sequester in a secure manner all research records and evidence needed to conduct the research misconduct proceeding that were not previously sequestered during the inquiry. Where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments. The need for additional sequestration of records for the investigation may occur for any number of reasons, including the institution’s decision to investigate additional allegations not considered during the inquiry stage or the identification of records during the inquiry process that had not been previously secured. The procedures to be followed for
sequestration during the investigation are the same procedures that apply during the inquiry.\textsuperscript{43}

C. Appointment of the Investigation Committee

The Research Integrity Ombudsperson, in consultation with other institutional officials as appropriate, will appoint an investigation committee and the committee chair within 10 business days of the beginning of the investigation or as soon thereafter as practical. The investigation committee must consist of individuals who do not have unresolved personal, professional, or financial conflicts of interest with those involved with the investigation and should include individuals with the appropriate scientific expertise to evaluate the evidence and issues related to the allegation, interview the respondent and complainant and conduct the investigation. Individuals appointed to the investigation committee may also have served on the inquiry committee. When necessary to secure the necessary expertise or to avoid conflicts of interest, the Research Integrity Ombudsperson may select a committee member from outside the institution. When utilizing expertise from outside the institution, the Research Integrity Ombudsperson will secure confidentiality agreements from all external experts. In addition, all external experts consulted will serve in an ex-officio capacity only.

The Research Integrity Ombudsperson or designee will notify the respondent of the proposed committee membership to give the respondent an opportunity to object to a proposed member based upon a personal, professional, or financial conflict of interest. The period for submitting objections is limited to no more than 10 business days. The Research Integrity Ombudsperson would make the final determination of whether a conflict exists.

D. Charge to the Committee and the First Meeting

1. Charge to the Committee

The Research Integrity Ombudsperson will define the subject matter of the investigation in a written charge to the committee that:

- Describes the allegations and related issues identified during the inquiry;
- Identifies the respondent;
- Informs the committee that it must conduct the investigation as prescribed in paragraph E. of this section;
- Defines research misconduct;
- Informs the committee that it must evaluate the evidence and testimony to determine whether, based on a preponderance of the evidence, research
misconduct occurred and, if so, the type and extent of it and who was responsible;

- Informs the committee that in order to determine that the respondent committed research misconduct it must find that a preponderance of the evidence establishes that: (1) research misconduct, as defined in this policy, occurred (respondent has the burden of proving by a preponderance of the evidence any affirmative defenses raised, including honest error or a difference of opinion); (2) the research misconduct is a significant departure from accepted practices of the relevant research community; and (3) the respondent committed the research misconduct intentionally, knowingly, or recklessly; and

- Informs the committee that it must prepare or direct the preparation of a written investigation report that meets the requirements of this policy and 42 CFR § 93.313.

2. First Meeting

The Research Integrity Ombudsperson will convene the first meeting of the investigation committee to review the charge, the inquiry report, and the prescribed procedures and standards for the conduct of the investigation, including the necessity for confidentiality and for developing a specific investigation plan. The investigation committee will be provided with a copy of this policy and 42 CFR Part 93. The Research Integrity Ombudsperson will be present or available throughout the investigation to advise the committee as needed.

E. Investigation Process

The investigation committee and the Research Integrity Ombudsperson must:

- Use diligent efforts to ensure that the investigation is thorough and sufficiently documented and includes examination of all research records and evidence relevant to reaching a decision on the merits of each allegation;\(^ {44} \)

- Take reasonable steps to ensure an impartial and unbiased investigation to the maximum extent practical;\(^ {45} \)

- Interview each respondent, complainant, and any other available person who has been reasonably identified as having information regarding any relevant aspects of the investigation, including witnesses identified by the respondent, and record or transcribe each interview, provide the recording or transcript to the interviewee for correction, and include the recording or transcript in the record of the investigation;\(^ {46} \) and
• Pursue diligently all significant issues and leads discovered that are determined relevant to the investigation, including any evidence of any additional instances of possible research misconduct, and continue the investigation to completion.\textsuperscript{47}

F. Time for Completion

The investigation is to be completed within 120 business days of beginning it, including conducting the investigation, preparing the report of findings, providing the draft report for comment and sending the final report to ORI. However, if the Research Integrity Ombudsperson determines that the investigation will not be completed within this 120-business day period, he/she will submit to ORI a written request for an extension, setting forth the reasons for the delay. The Research Integrity Ombudsperson will ensure that periodic progress reports are filed with ORI, if ORI grants the request for an extension and directs the filing of such reports.\textsuperscript{48}

VIII. The Investigation Report

A. Elements of the Investigation Report

The investigation committee and the Research Integrity Ombudsperson are responsible for preparing a written draft report of the investigation that:

• Describes the nature of the allegation of research misconduct, including identification of the respondent;

• Describes and documents the PHS support, including, for example, the numbers of any grants that are involved, grant applications, contracts, and publications listing PHS support;

• Describes the specific allegations of research misconduct considered in the investigation;

• Includes the institutional policies and procedures under which the investigation was conducted, unless those policies and procedures were provided to ORI previously;

• Identifies and summarizes the research records and evidence reviewed and identifies any evidence taken into custody but not reviewed; and

• Includes a statement of findings for each allegation of research misconduct identified during the investigation.\textsuperscript{49} Each statement of findings must: (1) identify whether the research misconduct was falsification, fabrication, or plagiarism, and whether it was committed intentionally, knowingly, or recklessly; (2) summarize the facts and the analysis that support the conclusion and consider the merits of any reasonable explanation by the respondent, including any effort by respondent to establish by a preponderance of the evidence that he or she did not engage in
research misconduct because of honest error or a difference of opinion; (3) identify the specific PHS support; (4) identify whether any publications need correction or retraction; (5) identify the person(s) responsible for the misconduct; and (6) list any current support or known applications or proposals for support that the respondent has pending with non-PHS federal agencies.\textsuperscript{50}

\textbf{B. Comments on the Draft Report and Access to Evidence}

1. Respondent

The Research Integrity Ombudsperson must give the respondent a copy of the draft investigation report for comment and, concurrently, a copy of, or supervised access to the evidence on which the report is based. The respondent will be allowed 30 business days from the date he/she received the draft report to submit comments to the Research Integrity Ombudsperson. The respondent’s comments must be included and considered in the final report.\textsuperscript{51}

2. Confidentiality

In distributing the draft report, or portions thereof, to the respondent, the Research Integrity Ombudsperson will inform the recipient of the confidentiality under which the draft report is made available and may establish reasonable conditions to ensure such confidentiality. For example, the Research Integrity Ombudsperson may require that the recipient sign a confidentiality agreement.

\textbf{C. Decision by Deciding Official}

The Research Integrity Ombudsperson will assist the investigation committee in finalizing the draft investigation report, including ensuring that the respondent’s comments are included and considered, and transmit the final investigation report to the DO, who will determine in writing: (1) whether the institution accepts the investigation report, its findings, and the recommended institutional actions; and (2) the appropriate institutional actions in response to the accepted findings of research misconduct. If this determination varies from the findings of the investigation committee, the DO will, as part of his/her written determination, explain in detail the basis for rendering a decision different from the findings of the investigation committee. Alternatively, the DO may return the report to the investigation committee with a request for further fact-finding or analysis.

When a final decision on the case has been reached, the Research Integrity Ombudsperson will normally notify both the respondent and the complainant in writing. After informing ORI, the DO will determine whether law enforcement agencies, professional societies, professional licensing boards, editors of journals in which reports containing research
misconduct may have been published, collaborators of the respondent in the work, or other relevant parties should be notified of the outcome of the case. The Research Integrity Ombudsperson is responsible for ensuring compliance with all notification requirements of funding or sponsoring agencies.

D. Notice to ORI of Institutional Findings and Actions

Unless an extension has been granted, the Research Integrity Ombudsperson must, within the 120-business day period for completing the investigation, submit the following to ORI: (1) a copy of the final investigation report with all attachments; (2) a statement of whether the institution accepts the findings of the investigation report; (3) a statement of whether the institution found misconduct and, if so, who committed the misconduct; and (4) a description of any pending or completed administrative actions against the respondent. 52

E. Maintaining Records for Review by ORI

The Research Integrity Ombudsperson must maintain and provide to ORI upon request “records of research misconduct proceedings” as that term is defined by 42 CFR § 93.317. Unless custody has been transferred to HHS or ORI has advised in writing that the records no longer need to be retained, records of research misconduct proceedings must be maintained in a secure manner for 7 years after completion of the proceeding or the completion of any PHS proceeding involving the research misconduct allegation. 53 The Research Integrity Ombudsperson is also responsible for providing any information, documentation, research records, evidence or clarification requested by ORI to carry out its review of an allegation of research misconduct or of the institution’s handling of such an allegation. 54

IX. Completion of Cases; Reporting Premature Closures to ORI

Generally, all inquiries and investigations will be carried through to completion and all significant issues will be pursued diligently. The Research Integrity Ombudsperson must notify ORI in advance if there are plans to close a case at the inquiry, investigation, or appeal stage on the basis that respondent has admitted guilt, a settlement with the respondent has been reached, or for any other reason, except: (1) closing of a case at the inquiry stage on the basis that an investigation is not warranted; or (2) a finding of no misconduct at the investigation stage, which must be reported to ORI, as prescribed in this policy and 42 CFR § 93.315. 55

X. Institutional Administrative Actions
If the DO determines that research misconduct is substantiated by the findings, he or she will decide on the appropriate actions to be taken, after consultation with the Research Integrity Ombudsperson. The sanctions and corrective action will be imposed as required by law and in accordance with the Redbook as appropriate. The administrative actions will follow the following guidelines:

- Mitigating factors, such as past disciplinary record, as well as the nature of the offense and injury or harm resulting from it, shall be considered;
- Repeated violations may result in more severe sanctions;
- Attempts to commit acts prohibited by these policies and procedures shall be treated in the same manner as completed violations.

XI. Other Considerations

A. Termination or Resignation Prior to Completing Inquiry or Investigation

The termination of the respondent’s institutional employment, by resignation or otherwise, before or after an allegation of possible research misconduct has been reported, will not preclude or terminate the research misconduct proceeding or otherwise limit any of the institution’s responsibilities under 42 CFR Part 93.

If the respondent, without admitting to the misconduct, elects to resign his or her position after the institution receives an allegation of research misconduct, the assessment of the allegation will proceed, as well as the inquiry and investigation, as appropriate based on the outcome of the preceding steps. If the respondent refuses to participate in the process after resignation, the Research Integrity Ombudsperson and any inquiry or investigation committee will use their best efforts to reach a conclusion concerning the allegations, noting in the report the respondent’s failure to cooperate and its effect on the evidence.

B. Restoration of the Respondent’s Reputation

Following a final finding of no research misconduct, including ORI concurrence where required by 42 CFR Part 93, the Research Integrity Ombudsperson will, at the request of the respondent, undertake all reasonable and practical efforts to restore the respondent’s reputation. Depending on the particular circumstances and the views of the respondent, the Research Integrity Ombudsperson should consider notifying those individuals aware of or involved in the investigation of the final outcome, publicizing the final outcome in any forum in which the allegation of research misconduct was previously publicized, and expunging all reference to the research misconduct allegation from the respondent’s personnel file. Any institutional actions to restore the respondent’s reputation should first be approved by the DO.
C. Protection of the Complainant, Witnesses and Committee Members

During the research misconduct proceeding and upon its completion, regardless of whether the institution or ORI determines that research misconduct occurred, the Research Integrity Ombudsperson will undertake all reasonable and practical efforts to protect the position and reputation of, or to counter potential or actual retaliation against, any complainant who made allegations of research misconduct in good faith and of any witnesses and committee members who cooperate in good faith with the research misconduct proceeding. The DO will determine, after consulting with the Research Integrity Ombudsperson, and with the complainant, witnesses, or committee members, respectively, what steps, if any, are needed to restore their respective positions or reputations or to counter potential or actual retaliation against them. The Research Integrity Ombudsperson is responsible for implementing any steps the DO approves.

D. Allegations Not Made in Good Faith

If relevant, the DO will determine whether the complainant’s allegations of research misconduct were made in good faith, or whether a witness or committee member acted in good faith. If the DO determines that there was an absence of good faith he/she will determine whether any administrative action should be taken against the person who failed to act in good faith in accordance with University policy.

1 42 CFR § 93.214
2 42 CFR § 93.102
3 42 CFR § 93.201
4 42 CFR § 93.203
5 42 CFR § 93.208
6 42 CFR § 93.210
7 42 CFR § 93.212
8 42 CFR § 93.214
9 42 CFR § 93.215
10 42 CFR § 93.217
11 42 CFR § 93.219
42 CFR § 93.220
42 CFR § 93.221
42 CFR § 93.224
42 CFR § 93.103
42 CFR § 93.223
42 CFR § 93.224
42 CFR § 93.225
42 CFR § 93.226
42 CFR § 93.310(g)
42 CFR §§ 93.304(c), 93.307(b)
42 CFR §§ 93.304(e), 93.307(f)
42 CFR § 308(a)
42 CFR § 310(c)
42 CFR § 310(g)
42 CFR § 310(g)
42 CFR §§ 93.304(f), 93.312(a)
42 CFR § 93.316
42 CFR § 93.309(c)
42 CFR § 93.304(k)
42 CFR § 93.304(h)
42 CFR § 93.318
42 CFR § 93.307(a)
42 CFR § 93.307(c)
42 CFR §§ 93.305, 93.307(b)
36 42 CFR § 93.304(b)
37 42 CFR § 93.307(g)
38 42 CFR § 93.309(a)
39 42 CFR § 93.308(a)
40 42 CFR § 93.309(a) and (b)
41 42 CFR § 93.310(a)
42 42 CFR § 93.310(b) and (c)
43 42 CFR § 93.310(d)
44 42 CFR § 93.310(e)
45 42 CFR § 93.310(f)
46 42 CFR § 93.310(g)
47 42 CFR § 93.310(h)
48 42 CFR § 93.311
49 42 CFR § 93.313
50 42 CFR § 93.313(f)
51 42 CFR §§ 93.312(a), 313(g)
52 42 CFR § 93.315
53 42 CFR § 93.317(b)
54 42 CFR §§ 93.300(g), 93.403(b) and (d)
55 42 CFR § 93.316(a)
56 42 CFR § 93.304(k)
57 42 CFR § 93.304(l)

Appendix A: 42 CFR 93

PART 93--PUBLIC HEALTH SERVICE POLICIES ON RESEARCH MISCONDUCT
Appendix B: Research Integrity Ombudsperson Responsibilities

I. General

The Research Integrity Ombudsperson has lead responsibility for ensuring that the institution:

- Takes all reasonable and practical steps to foster a research environment that promotes the responsible conduct of research, research training, and activities related to that research or research training, discourages research misconduct, and deals promptly with allegations or evidence of possible research misconduct.
- Has written policies and procedures for responding to allegations of research misconduct and reporting information about that response to ORI, as required by 42 CFR Part 93.
- Complies with its written policies and procedures and the requirements of 42 CFR Part 93.
- Informs its institutional members who are subject to 42 CFR Part 93 about its research misconduct policies and procedures and its commitment to compliance with those policies and procedures.
- Takes appropriate interim action during a research misconduct proceeding to protect public health, federal funds and equipment, and the integrity of the PHS supported research process.

II. Notice and Reporting to ORI and Cooperation with ORI

The Research Integrity Ombudsperson has lead responsibility for ensuring that the institution:

- Files an annual report with ORI containing the information prescribed by ORI.
- Sends to ORI with the annual report such other aggregated information as ORI may prescribe on the institution's research misconduct proceedings and the institution's compliance with 42 CFR Part 93.
- Notifies ORI immediately if, at any time during the research misconduct proceeding, it has reason to believe that health or safety of the public is at risk, HHS resources or interests are threatened, research activities should be suspended, there is reasonable indication of possible violations of civil or criminal law, federal action is required to protect the interests of those involved in the research misconduct proceeding, the institution believes that the research
misconduct proceeding may be made public prematurely, or the research community or the public should be informed.

- Provides ORI with the written finding by the responsible institutional official that an investigation is warranted and a copy of the inquiry report, within 30 business days of the date on which the finding is made.
- Notifies ORI of the decision to begin an investigation on or before the date the investigation begins.
- Within 120 business days of beginning an investigation, or such additional days as may be granted by ORI, (or upon completion of any appeal made available by the institution) provides ORI with the investigation report, a statement of whether the institution accepts the investigation’s findings, a statement of whether the institution found research misconduct and, if so, who committed it, and a description of any pending or completed administrative actions against the respondent.
- Seeks advance ORI approval if the institution plans to close a case at the inquiry, investigation, or appeal stage on the basis that the respondent has admitted guilt, a settlement with the respondent has been reached, or for any other reason, except the closing of a case at the inquiry stage on the basis that an investigation is not warranted or a finding of no misconduct at the investigation stage.
- Cooperates fully with ORI during its oversight review and any subsequent administrative hearings or appeals, including providing all research records and evidence under the institution’s control, custody, or possession and access to all persons within its authority necessary to develop a complete record of relevant evidence.

III. Research Misconduct Proceeding

A. General

The Research Integrity Ombudsperson is responsible for:

- Promptly taking all reasonable and practical steps to obtain custody of all research records and evidence needed to conduct the research misconduct proceeding, inventory the records and evidence, and sequester them in a secure manner.
- Taking all reasonable and practical steps to ensure the cooperation of respondents and other institutional members with research misconduct proceedings, including, but not limited to their providing information, research records and evidence.
- Providing confidentiality to those involved in the research misconduct proceeding as required by 42 CFR 93.108, other applicable law, and institutional policy.
• Determining whether each person involved in handling an allegation of research misconduct has an unresolved personal, professional or financial conflict of interest and taking appropriate action, including recusal, to ensure that no person with such a conflict is involved in the research misconduct proceeding.

• Keeping the Deciding Official (DO) and others who need to know apprised of the progress of the review of the allegation of research misconduct.

• In cooperation with other institutional officials, taking all reasonable and practical steps to protect or restore the positions and reputations of good faith complainants, witnesses, and committee members and to counter potential or actual retaliation against them by respondents or other institutional members.

• Making all reasonable and practical efforts, if requested and as appropriate, to protect or restore the reputation of persons alleged to have engaged in research misconduct, but against whom no finding of research misconduct is made.

• Assisting the DO in implementing his/her decision to take administrative action against any complainant, witness, or committee member determined by the DO not to have acted in good faith.

• Maintaining records of the research misconduct proceeding, as defined in 42 CFR 93.317, in a secure manner for 7 years after completion of the proceeding, or the completion of any ORI proceeding involving the allegation of research misconduct, whichever is later, unless custody of the records has been transferred to ORI or ORI has advised that the records no longer need to be retained.

• Ensuring that administrative actions taken by the institution and ORI are enforced and taking appropriate action to notify other involved parties, such as sponsors, law enforcement agencies, professional societies, and licensing boards, of those actions.

B. Allegation Receipt and Assessment

The Research Integrity Ombudsperson is responsible for:

• Consulting confidentially with persons uncertain about whether to submit an allegation of research misconduct.

• Receiving allegations of research misconduct.

• Assessing each allegation of research misconduct to determine if an inquiry is warranted because the allegation falls within the definition of research misconduct, is within the jurisdictional criteria of 42 CFR 93.102 (b), and is sufficiently credible and specific so that potential evidence of research misconduct may be identified.

C. Inquiry
The Research Integrity Ombudsperson is responsible for:

- Initiating the inquiry process if it is determined that an inquiry is warranted.
- At the time of, or before beginning the inquiry, making a good faith effort to notify the respondent in writing, if the respondent is known.
- On or before the date on which the respondent is notified, or the inquiry begins, whichever is earlier, taking all reasonable and practical steps to obtain custody of all research records and evidence needed to conduct the research misconduct proceeding, inventorying the records and evidence and sequestering them in a secure manner, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on the instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments.
- Appointing an inquiry committee and committee chair as soon after the initiation of the inquiry as is practical.
- Preparing a charge for the inquiry committee in accordance with the institution’s policies and procedures.
- Convening the first meeting of the inquiry committee and at that meeting briefing the committee on the allegations, the charge to the committee, and the appropriate procedures for conducting the inquiry, including the need for confidentiality and for developing a plan for the inquiry, and assisting the committee with organizational and other issues that may arise.
- Providing the inquiry committee with needed logistical support, e.g., expert advice, including forensic analysis of evidence, and clerical support, including arranging witness interviews and recording or transcribing those interviews.
- Being available or present throughout the inquiry to advise the committee as needed and consulting with the committee prior to its decision on whether to recommend that an investigation is warranted on the basis of the criteria in the institution’s policies and procedures and 42 CFR 93.307 (d).
- Determining whether circumstances clearly warrant a period longer than 60 business days to complete the inquiry (including preparation of the final inquiry report and the decision of the DO on whether an investigation is warranted), approving an extension if warranted, and documenting the reasons for exceeding the 60-business day period in the record of the research misconduct proceeding.
- Assisting the inquiry committee in preparing a draft inquiry report, sending the respondent a copy of the draft report for comment (and the complainant if the institution’s policies provide that option) within a time period that permits the inquiry to be completed within the allotted time, taking appropriate action to protect the confidentiality of the draft report, receiving any comments from the respondent (and the complainant if the institution’s policies provide that option), and ensuring that the comments are attached to the final inquiry report.
• Receiving the final inquiry report from the inquiry committee and forwarding it, together with any comments the Research Integrity Ombudsperson may wish to make, to the DO who will determine in writing whether an investigation is warranted.

• Within 30 business days of a DO decision that an investigation is warranted, providing ORI with the written finding and a copy of the inquiry report and notifying those institutional officials who need to know of the decision.

• Notifying the respondent (and the complainant if the institution’s policies provide that option) whether the inquiry found an investigation to be warranted and including in the notice copies of or a reference to 42 CFR Part 93 and the institution’s research misconduct policies and procedures.

• Providing to ORI, upon request, the institutional policies and procedures under which the inquiry was conducted, the research records and evidence reviewed, transcripts or recordings of any interviews, copies of all relevant documents, and the charges to be considered in the investigation.

• If the DO decides that an investigation is not warranted, securing and maintaining for 7 years after the termination of the inquiry sufficiently detailed documentation of the inquiry to permit a later assessment by ORI of the reasons why an investigation was not conducted.

D. Investigation

The Research Integrity Ombudsperson is responsible for:

• Initiating the investigation within 30 business days after the determination by the DO that an investigation is warranted.

• On or before the date on which the investigation begins: (1) notifying ORI of the decision to begin the investigation and providing ORI a copy of the inquiry report; and (2) notifying the respondent in writing of the allegations to be investigated.

• Prior to notifying respondent of the allegations, taking all reasonable and practical steps to obtain custody of and sequester in a secure manner all research records and evidence needed to conduct the research misconduct proceeding that were not previously sequestered during the inquiry.

• In consultation with other institutional officials as appropriate, appointing an investigation committee and committee chair as soon after the initiation of the investigation as is practical.

• Preparing a charge for the investigation committee in accordance with the institution’s policies and procedures.

• Convening the first meeting of the investigation committee and at that meeting: (1) briefing the committee on the charge, the inquiry report and the procedures and standards for the conduct of the investigation, including the need for
confidentiality and developing a specific plan for the investigation; and (2) providing committee members a copy of the institution's policies and procedures and 42 CFR Part 93.

- Providing the investigation committee with needed logistical support, e.g., expert advice, including forensic analysis of evidence, and clerical support, including arranging interviews with witnesses and recording or transcribing those interviews.
- Being available or present throughout the investigation to advise the committee as needed.
- On behalf of the institution, the Research Integrity Ombudsperson is responsible for each of the following steps and for ensuring that the investigation committee: (1) uses diligent efforts to conduct an investigation that includes an examination of all research records and evidence relevant to reaching a decision on the merits of the allegations and that is otherwise thorough and sufficiently documented; (2) takes reasonable steps to ensure an impartial and unbiased investigation to the maximum extent practical; (3) interviews each respondent, complainant, and any other available person who has been reasonably identified as having information regarding any relevant aspects of the investigation, including witnesses identified by the respondent, and records or transcribes each interview, provides the recording or transcript to the interviewee for correction, and includes the recording or transcript in the record of the research misconduct proceeding; and (4) pursues diligently all significant issues and leads discovered that are determined relevant to the investigation, including any evidence of any additional instances of possible research misconduct, and continues the investigation to completion.
- Upon determining that the investigation cannot be completed within 120 business days of its initiation (including providing the draft report for comment and sending the final report with any comments to ORI), submitting a request to ORI for an extension of the 120-business day period that includes a statement of the reasons for the extension. If the extension is granted, the Research Integrity Ombudsperson will file periodic progress reports with ORI.
- Assisting the investigation committee in preparing a draft investigation report that meets the requirements of 42 CFR Part 93 and the institution's policies and procedures, sending the respondent (and complainant at the institution's option) a copy of the draft report for his/her comment within 30 business days of receipt, taking appropriate action to protect the confidentiality of the draft report, receiving any comments from the respondent (and complainant at the institution's option) and ensuring that the comments are included and considered in the final investigation report.
• Transmitting the draft investigation report to institutional counsel for a review of its legal sufficiency.

• Assisting the investigation committee in finalizing the draft investigation report and receiving the final report from the committee.

• Transmitting the final investigation report to the DO and: (1) if the DO determines that further fact-finding or analysis is needed, receiving the report back from the DO for that purpose; (2) if the DO determines whether or not to accept the report, its findings and the recommended institutional actions, transmitting to ORI within the time period for completing the investigation, a copy of the final investigation report with all attachments, a statement of whether the institution accepts the findings of the report, a statement of whether the institution found research misconduct, and if so, who committed it, and a description of any pending or completed administrative actions against the respondent; or (3) if the institution provides for an appeal by the respondent that could result in a modification or reversal of the DO’s finding of research misconduct, ensuring that the appeal is completed within 120 business days of its filing, or seeking an extension from ORI in writing (with an explanation of the need for the extension) and, upon completion of the appeal, transmitting to ORI a copy of the investigation report with all attachments, a copy of the appeal proceedings, a statement of whether the institution accepts the findings of the appeal proceeding, a statement of whether the institution found research misconduct, and if so, who committed it, and a description of any pending or completed administrative actions against the respondent.

• When a final decision on the case is reached, the Research Integrity Ombudsman will normally notify both the respondent and the complainant in writing and will determine whether law enforcement agencies, professional societies, professional licensing boards, editors of involved journals, collaborators of the respondent, or other relevant parties should be notified of the outcome of the case.

• Maintaining and providing to ORI upon request all relevant research records and records of the institution’s research misconduct proceeding, including the results of all interviews and the transcripts or recordings of those interview

[1] Sections based on 42 CFR Part 93 have endnotes indicating the applicable section.

[2] This is the case whether an individual is on leave and / or between appointment intervals (e.g. summer term or ten month appointment). An individual’s status does not impact whether a day is a treated as a business day.

ADMINISTRATIVE AUTHORITY
Executive Vice President for Research and Innovation

**RESPONSIBLE UNIVERSITY DEPARTMENT/DIVISION**
Research Integrity Program
Jouett Hall, Louisville, KY 40292
Phone: 502-852-2454
Email: ori@louisville.edu

**HISTORY**
Original Effective Date: October 21, 2002
Last Revision Date: September 17, 2015

The University Policy and Procedure Library is updated regularly. In order to ensure a printed copy of this document is current, please access it online at http://louisville.edu/policies.
Part III

Department of Health and Human Services

42 CFR Parts 50 and 93
Public Health Service Policies on Research Misconduct; Final Rule
DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Parts 50 and 93

RIN 0940–AA04

Public Health Service Policies on Research Misconduct

AGENCY: U.S. Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule removes 42 CFR part 50, subpart A, “Responsibilities of Awardee and Applicant Institutions for Dealing With and Reporting Possible Misconduct in Science,” and replaces it with a new, more comprehensive part 93, “Public Health Service Policies on Research Misconduct.” The proposed part 93 was published for public comment on April 16, 2004. The final rule reflects both substantive and non-substantive amendments in response to public comments and to correct errors and improve clarity, but the general approach of the NPRM is retained. The purpose of the final rule is to implement legislative and policy changes applicable to research misconduct that occurred over the last several years, including the common Federal policies and procedures on research misconduct issued by the Office of Science and Technology Policy on December 6, 2000.

DATES: This final rule will become effective June 16, 2005.

ADDRESSES: Address any comments or questions regarding this final rule to: Chris B. Pascal, J.D., Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852. Some commonly asked questions and answers to them will be posted on the Office of Research Integrity Web site prior to the effective date of the regulation. The URL for the ORI Web site is: http://ori.hhs.gov.

You may submit comments and questions on this final rule by sending electronic mail (e-mail) to research@nihpaphs.dhhs.gov. Submit electronic comments as either a WordPerfect file, version 9.1 or higher, or a Microsoft Word 97 or 2000 file format. You may also submit comments or questions as an ASCII file avoiding the use of special characters and any form of encryption.

FOR FURTHER INFORMATION CONTACT: Brenda Harrington, (301) 443–3400. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Public Comments—General

The Notice of Proposed Rulemaking (NPRM) proposing to remove 42 CFR part 50, subpart A and replace it with a new part 93 was published in the Federal Register on April 16, 2004 (69 FR 20778). Comments were requested on or before June 15, 2004. In addition to this invitation for public comment on any aspect of the proposed rulemaking, the NPRM requested comment on specific aspects of the proposed rule including: (A) Whether there should be any limitation on the ability of institutions to conduct a research misconduct proceeding through a consortium or other entity qualified by practice and experience to conduct research misconduct proceedings (§ 93.306); (B) the use of Administrative Law Judges (ALJs) to conduct HHS research misconduct hearings rather than a panel of three decisionmakers (§ 93.502); (C) treating the decision of the ALJ as a recommended decision to the Assistant Secretary for Health (ASH) as opposed to the current practice in which the decision of the panel on the merits of the HHS findings of misconduct and administrative actions, other than debarment, constitutes final agency action (§§ 93.500(d) and 93.523(c)); (D) authorizing the ALJ to appoint a scientific expert (that appointment is required if requested by either party) to advise the ALJ on scientific issues, but not provide testimony for the record (§ 93.502(b)); (E) consistent with current practice, permitting HHS to amend its findings of research misconduct up to 30 days before the scheduled hearing (§ 93.514); (F) extending the period for retaining records of the research misconduct proceeding, including inquiries, from 3 to 7 years (§ 93.317); (G) imposing a 120-day deadline for the completion of any institutional appeal from a finding of research misconduct (§ 93.314); and (H) whether the HHS estimates on the potential burden of information collection requirements are accurate and whether those requirements are necessary for the proper performance of HHS functions.

Twenty-eight documents commenting on the NPRM were submitted to HHS by mail or e-mail. Most of the documents addressed multiple sections of the proposed rule. A number of the commentators made general positive comments such as that: the proposed rule is well drafted, provides valuable guidance for researchers and institutions and is much improved over the current regulation; the detail and transparency of the procedures will result in a better focus on the merits of a case rather than procedural complications; the proposal recognizes the importance of primary reliance on the institutions to respond to allegations of research misconduct; and the clarification and harmonization of definitions, standards, and procedures are appreciated.

Most of the commentators endorsed the changes in the definition of research misconduct and the incorporation of the three elements necessary for a finding of research misconduct in conformity with the Federal Policy on Research Misconduct issued by the Office of Science and Technology Policy (OSTP). Some expressed support for the PHS practice of excluding coverage of authorship disputes in the absence of a clear allegation of plagiarism. There were expressions of support for the coverage of PHS intramural programs and PHS contractors, the coverage of the plagiarism of a PHS supported research record, even if the respondent does not receive such support, the clarification of the role of the complainant, the adoption of a six-year limitation on the pursuit of misconduct allegations, separation of adjudication and appeal from the inquiry and investigation stages, setting a time limit on the investigation by the institution, and the inclusion of ALJs in the hearing process. These and other supportive comments may be discussed in the consideration of specific changes to the proposed rule that follows.

There were also general, negative comments on the proposed rule, some of which were in direct opposition to positive comments. Some commentators feel that the proposal is overly detailed and thus contrary to the OSTP goal of a more uniform Federal-wide approach. Another criticizes the continuation in the proposed rule of a trend toward legalization of scientific disputes by immediately casting parties into adversarial roles. Other commentators object to the change from a hearing conducted by a three-member panel to one conducted by an ALJ, stating that there has not been any showing of a need to change the current practice. One commentator felt that HHS should be responsible for investigating allegations of misconduct at institutions that have repeatedly failed to properly investigate research misconduct. These and other critical comments may be discussed in the consideration of specific changes that follow.

Some letters of comment repeated comments that had been made in response to the OSTP proposal for a government-wide Federal policy on research misconduct. Because OSTP considered those comments prior to
issuing its final policy and this final rule is consistent with the aspects of the OSTP policy addressed in the comments, those comments will not be further discussed here.

Comments on specific sections of the regulation are addressed below under headings based on the general issue raised by the comments. If that issue encompasses more than one section of the regulation, all those sections will be discussed under that heading.

II. Changes Made in Response to Comments

A. Applicability, Secs. 93.110(b) and 93.102(b)

A number of commentators concluded that the applicability section, 93.102, and the descriptions of applicability in other sections unreasonably extend HHS jurisdiction beyond PHS supported biomedical or behavioral research and research training. One commentator recommended that descriptions of applicability be uniform throughout the regulation. There were specific objections to: (1) The statement in Sec. 93.100(b) that covered institutions must comply with the regulation with respect to allegations of misconduct “occurring at or involving research or research training projects or staff of the institution”; (2) the coverage, in Sec. 93.102(a) and other sections describing applicability, of “activities related to that research or research training;” and (3) the extension of coverage in Sec. 93.102(a) to allegations of misconduct involving any research record generated from covered research, research training, or activities related to that research or training, regardless of whether the user or reviewer receives PHS support or whether an application resulted in any PHS support.

Several clarifying changes have been made in response to these comments, but these changes do not change the intended substance of the provisions in the NPRM. The current regulation, 42 CFR 50.101, covers each entity that applies for a “research, research-training or research-related grant or cooperative agreement” under the PHS Act. Such an entity must establish policies and procedures for investigating and reporting instances of alleged misconduct involving “research or research training or related research activities that are supported with funds available under the PHS Act.” Thus, applicability to research-related activities is not new. The NPRM was not intended to change the applicability to those activities as it is expressed in the current regulation and has been applied in practice under that regulation.

This rulemaking establishes the necessary HHS jurisdiction to implement the new term “reviewing research” in the OSTP definition of research misconduct. In ORI’s experience, plagiarism can occur during the review process when a manuscript is submitted for publication. In the great majority of cases where an allegation arises that a PHS supported research record was plagiarized, we expect that the reviewers will be current recipients of PHS research funds because the reviewers are selected based on their subject matter expertise and the research in question is PHS funded biomedical and behavioral research. In cases where the respondent is PHS supported or affiliated with a PHS supported institution, we would expect the misconduct allegation to be pursued by the PHS supported institution. In those cases where the reviewer who is alleged to have committed plagiarism is solely funded by another Federal agency, ORI would refer the allegation to that agency. In addition, jurisdiction does not attach to allegations of plagiarism where there is no PHS support for the research record in question. Thus, we have removed the phrase “regardless of whether the user or reviewer currently receives PHS support” from Sec. 93.102.

To eliminate redundancy and clarify the general policy and applicability provisions, Secs. 93.100 and 93.102, we have: (1) Moved the statement of applicability to institutions from Sec. 93.100(b) to Sec. 93.102(b) and rewritten it to be more explicit and (2) moved paragraph (c) of Sec. 93.100 to paragraph (a) of that section and combined the proposed paragraphs (a) and (d) into a new paragraph (b).

The provision setting forth the types of allegations to which the regulation applies has been moved from Sec. 93.102(a) to paragraph (b) of that section and has been amended to clarify that the regulation applies to allegations of research misconduct involving: (i) Applications or proposals for PHS support for biomedical or behavioral extramural or intramural research, research training, or activities related to that research or research training, such as the operation of tissue or data banks or the dissemination of research information; (ii) PHS supported biomedical or behavioral extramural or intramural research; (iii) PHS supported biomedical or behavioral extramural or intramural research training programs; (iv) PHS supported extramural or intramural activities that are related to biomedical research or research training, such as the operation of tissue and data banks or the dissemination of research information; and (v) plagiarism of research records produced in the course of PHS supported research, research training, or PHS supported activities related to that research or research training. The examples of activities that are related to research or research training are intended to be illustrative, not exhaustive. They are intended to convey the concept that under its research and research training authorities, PHS funds many activities that are closely related to research and research training, but might not be considered to be within the common understanding of what constitutes research or research training.

In each section that refers to the applicability of the regulation we have referenced the applicability section or repeated the applicability of the regulation to PHS supported research, research training, and activities related to that research or research training.

B. Subsequent Use Exception to Six Year Limitation on Misconduct Allegations, Secs. 93.105(b)(1)

In response to a comment requesting clarification, we have amended paragraph (b)(1) of Sec. 93.105. The amendment clarifies that even though HHS or an institution does not receive an allegation of research misconduct within six years of when the misconduct is alleged to have occurred, the regulation would apply if, within six years of when the allegation is received, the respondent has cited, republished, or otherwise used for his or her potential benefit the research record that is the subject of the allegation of misconduct.

C. Rebuttable Presumption of Misconduct in the Absence of Records, Secs. 93.106(a)(1) and 93.516(b)

Commentators raised several concerns about proposed Sec. 93.106(a)(1) and Sec. 93.516(b) under which the absence of, or respondent’s failure to provide research records adequately documenting the questioned research establishes a presumption of research misconduct that can be rebutted by credible evidence corroborating the research or providing a reasonable explanation for the absence of, or respondent’s failure to provide the research records. The concerns were addressed: (1) Retract the application of the provision where there was no previous requirement for the retention
of the records; (2) holding the respondent responsible for the retention of records over which he/she may have no control; and (3) there is no guidance on what would be a “reasonable explanation” for the absence of records.

In response to these comments, we have eliminated the rebuttable presumption of research misconduct. Sections 93.106 and 93.516 have been changed to state that the destruction, absence of, or respondent’s failure to provide records adequately documenting the questioned research is evidence of research misconduct where the institution or HHS establishes by a preponderance of the evidence that the respondent intentionally, knowingly, or recklessly had research records and destroyed them, had the opportunity to maintain the records but failed to do so, or maintained the records, but failed to produce them in a timely manner, and that respondent’s conduct constitutes a significant departure from accepted practices of the relevant research community. This is in keeping with the definition of falsification to include omitting data or results such that the research is not accurately represented in the research record (Sec. 93.103(b)) and with the requirements for a finding of research misconduct in Sec. 93.104.

This answers the concerns about retroactive application and that the respondent may not have had control over the records by holding the respondent to the accepted practices of his/her research community. The weight to be accorded the evidence of research misconduct under these circumstances must be determined by the trier of fact in each case.

D. Respondent’s Burden To Prove Honest Error or Difference of Opinion, Secs. 93.106(a)(2) and 93.516(b)

As proposed, Sec. 93.106(a)(2) provided that once the institution or HHS makes a prima facie showing of research misconduct the respondent has the burden of proving any affirmative defenses raised, including honest error or difference of opinion. There were a number of objections to that section on the grounds that shifting the burden of proving honest error or difference of opinion to the respondent effectively shifts the burden of the institution and HHS to prove each element of research misconduct or, at the least, creates confusion. Some of the commentators opined that the institution and the HHS have the burden of proving the absence of honest error or difference of opinion.

As stated in the preamble of the Federal Register notice promulgating the final OSTP Research Misconduct Policy (65 FR 76260, Dec. 6, 2000), the exclusion of honest error or difference of opinion from the definition of research misconduct does not create a separate element of proof; institutions and agencies are not required to disprove possible honest error or difference of opinion. Given that guidance, this final rule retains honest error or difference of opinion as an affirmative defense that the respondent has the burden of proving by a preponderance of the evidence.

However, we recognize that there is an overlap between the responsibility of respondents to prove this affirmative defense and the burden of institutions and HHS to prove that research misconduct was committed intentionally, knowingly, or recklessly. Accordingly, consistent with the opinion of the United States Supreme Court in Martin v. Ohio, 480 U.S. 228, 107 S. Ct. 1098 (1987), we have amended Sec. 93.106 to require consideration of admissible, credible evidence respondent submits to prove honest error or difference of opinion in determining whether the institution and HHS have carried their burden of proving by a preponderance of the evidence that the alleged research misconduct was committed intentionally, knowingly, or recklessly. This consideration would be required, regardless of whether respondent carries his/her burden of proving honest error or difference of opinion by a preponderance of the evidence.

In light of this change, we have removed the reference to the institution or HHS making a prima facie showing of research misconduct as unnecessary and confusing. Because this is the only use of prima facie in the regulation, we have removed the definition of that term.

E. Coordination With Other Agencies, Sec. 93.109

Some commentators pointed out that Sec. 93.109(a), as proposed, is not consistent with the statement in the OSTP Policy that a lead agency should be designated when more than one agency has jurisdiction. We have amended paragraph (a) to state that if more than one agency of the Federal government has jurisdiction, HHS will cooperate with the other agencies in designating a lead agency. We have added a sentence clarifying that where HHS is not the lead agency, it may, in consultation with the lead agency, take action to protect the health and safety of the public, promote the integrity of the PHS supported research and research process, or to conserve public funds.

F. Definition of Research Record, Sec. 93.224

One commentator recommended that the research record include the comments of the complainant and respondent on the inquiry and investigation reports. We agree that documents and materials provided by the respondent as part of his/her comments on the inquiry and investigation reports, or at any other stage of the research misconduct proceeding do not differ significantly from those provided in response to questions regarding the research. Only the latter were included in the proposed definition of research record.

Accordingly, we have amended Sec. 93.224 (formerly Sec. 93.226) so that the definition of research record includes documents and materials that embody the facts resulting from the research that are provided by the respondent at any point in the course of the research misconduct proceeding. The purpose of including documents provided by respondent in the research record is to hold the respondent responsible for the integrity of those research documents regardless of when they were prepared or furnished to the institution or HHS.

Because the complainant is not being held responsible for the record of data or results that embodies the facts resulting from the research at issue, we are not including comments provided by the complainant during the research misconduct proceeding in the definition of the term “research record.” Those comments may be considered by the institution and/or HHS and they may be admitted as evidence in any hearing, but they are not part of the research record. If the complainant possesses documents that embody the facts resulting from the research that is the subject of the research misconduct proceeding, those documents are research records and the institution is responsible for maintaining and securing those documents in the same manner as other research records. Those documents are distinct from analyses of research records or results that a complainant may prepare prior to or in the course of a research misconduct proceeding to support his or her allegation of misconduct. Any such documents may be considered evidence pertinent to the allegation, but they are not part of the research record.

G. Reporting Inquiries to ORI, Sec. 93.300(a)

Several commentators interpreted the general language in proposed Sec. 93.300(a), requiring institutions to have policies and procedures for “reporting
inquiries and investigations of alleged research misconduct in compliance with this part,” to require the reporting of all inquiries to ORI, contrary to the requirement in Sec. 93.309 for reporting only those inquiries resulting in a finding that an investigation is warranted. We have amended Sec. 93.300(a) to clarify that the institution’s policies and procedures must comply with the requirements of the regulation for addressing allegations of research misconduct. This includes the requirements of Sec. 93.309.

It was also recommended that this section be amended to require that the institution’s written policies and procedures be provided to the complainant and other interested parties on request. We have added a requirement that the policies and procedures be provided to members of the public upon request to Sec. 93.302(a)(1) because it addresses the availability of the institution’s policies and procedures to HHS and ORI upon request.

H. Precautions To Protect Against Conflicts of Interest, Secs. 93.300(b) and 93.304(b)

In response to a general comment that the regulation should ensure that those conducting inquiries and investigations do not have conflicts of interest, we have amended Secs. 93.300(b) and 93.304(b) to require institutions to include precautions against conflicts of interest on the part of those involved in the inquiry or investigation. This expands upon the requirement in Sec. 93.310(f) that institutions take reasonable steps to ensure an impartial investigation, “including participation of persons with appropriate scientific expertise who do not have unresolved personal, professional, or financial conflicts of interest with those involved with the inquiry or investigation.”

I. Reporting of Aggregated Information by Institutions, Sec. 93.302(c)

Several commentators recommended deletion of proposed Sec. 93.302(c) because its broad language would encompass research misconduct proceedings that are outside the jurisdiction of HHS. We agree with the intent of these comments and have amended this provision to refer to aggregated information on the institution’s research misconduct proceedings covered by this part.

J. Responsibility for Securing Research Records and Evidence, Secs. 93.305, 93.307(b) and 93.310(d)

Several commentators recommended that Sec. 93.305 be amended to ensure that any securing of scientific instruments not interfere with ongoing research. Scientific instruments are included in the definition of “research record” in Sec. 93.224 to the extent they are, or contain physical or electronic records of data or results that embody the facts resulting from scientific inquiry. In response to these comments we have added language to paragraphs (a) and (c) of Sec. 93.305, paragraph (b) of Sec. 93.307, and paragraph (d) of Sec. 93.310 permitting institutions to secure copies of data or other research records on shared scientific instruments, so long as those copies are substantially equivalent in evidentiary value to the instruments themselves. It is expected that institutions will exercise discretion in determining whether copies of the data are substantially equivalent in evidentiary value to the instruments themselves, consulting with ORI as the institution determines necessary. The evidentiary value of scientific instruments will vary from case to case. In some cases their value may be dependent upon the manner in which they record data, rather than the data they contain. In those cases, it may be reasonable for the institution to permit continued use of the instrument, so long as it remains available for inspection by those conducting the inquiry and investigation.

K. Using a Consortium or Other Entity To Conduct Research Misconduct Proceedings, Sec. 93.306

One commentator recommended that there should be greater detail regarding the kinds of practice and experience that would qualify an outside entity to conduct research misconduct proceedings, how possible conflicts of interest would be handled, and whose responsibility it would be to determine whether the outside entity is qualified. The proposed Sec. 93.306 contains a catchall phrase providing that an institution may use a consortium or other entity to conduct research misconduct proceedings, if the institution prefers not to conduct its own proceeding. In light of the incorporation of this broad discretion in the proposed section, we have simplified Sec. 93.306 to provide that an institution may use the services of a consortium or person that the institution reasonably determines to be qualified by practice and experience to conduct research misconduct proceedings. Thus, the institution may decide to use an outside consortium or person for any reason and it determines whether the outside consortium or person is qualified. We have substituted the defined term “person” for the term “entity.” Any outside person conducting a research misconduct proceeding would be subject to the requirements for precautions against conflicts of interest in Secs. 93.300(b) and 93.304(b).

L. Standards for Investigation, Sec. 93.310(g) and (h)

A number of commentators felt that the provisions of proposed Sec. 93.310(g) and (h) establish a performance standard that cannot be met through the use of the terms “any” and “all.” We have amended paragraphs (g) and (h) to require, respectively, interviews of each person who has been reasonably identified as having information regarding relevant aspects of the investigation, and the pursuit of all significant issues and leads discovered that are determined relevant to the investigation. The institutions are responsible for making the relevancy determinations that are included in these paragraphs.

M. Opportunity To Comment on the Investigation Report and Review the Supporting Evidence, Secs. 93.312(a) and (b)

One commentator proposed language clarifying the period for the respondent to comment on the investigation report. Another commentator felt that the institution should be required to give the respondent an opportunity to review all research records and evidence upon which the investigation report is based. We believe that clarification of the 30-day period for comment by the respondent and for comment by the complainant, at the discretion of the institution, is needed. We have amended paragraphs (a) and (b) of Sec. 93.312 accordingly. In addition, we have amended paragraph (b) to make it clear that institutions have the discretion to provide the complete investigation report to the complainant for comment or relevant portions of it.

The OSTP Guidelines for Fair and Timely Procedures, Section IV of the Uniform Federal Policy, provide that one of the safeguards for subjects of allegations is reasonable access to the data and other evidence supporting the allegations and the opportunity to respond to the allegations, the supporting evidence and the proposed findings of research misconduct, if any. Consistent with that guidance, we have amended Sec. 93.312(a) to require institutions to give the respondent, concurrently with the draft investigation report, a copy of, or supervised access to, the evidence on which the report is based.
N. Institutional Appeals, Sec. 93.314(a)

One commentator requested language clarifying that the 120-day period for completing institutional appeals applies only to appeals from the finding of misconduct, not appeals from personnel actions. We have implemented this comment through the addition of appropriate language to Sec. 93.314(a).

O. Completing the Research Misconduct Process, Sec. 93.316

Several commentators objected to this provision because they interpreted it as requiring that ORI be notified when an inquiry ends in a finding of no misconduct. These commentators recommended that the regulation address the question of whether settlements based on an admission of misconduct are reportable. In response to these comments we have amended Sec. 93.316(a) to require that institutions notify ORI if they plan to close a case at the inquiry stage or appeal stage on the basis that the respondent has admitted research misconduct, a settlement with the respondent has been reached, or for any other reason. We have also changed Sec. 93.316(b) to allow for consultation with the institution on its basis for closing a case, and expanded the actions ORI may take to include approving or conditionally approving closure of the case and taking compliance action.

P. Retention and Custody of Records of the Research Misconduct Proceeding, Sec. 93.317

There were several objections that the seven-year retention period: (1) Creates storage problems; (2) should not apply to scientific instruments; and (3) is contrary to the 3-year retention period for records relating to grants in OMB Circular A-110. One commentator recommended that the term “records of research misconduct proceedings” be defined to include a relevancy standard. In order to clarify what must be retained, we have added a new paragraph (a) to Sec. 93.317 defining records of research misconduct proceedings by referring to the sections of the regulation that describe what records institutions must prepare in the course of research misconduct proceedings. The definition includes a relevancy standard and requires that an institution document any determination that records are irrelevant. We have added two exceptions to the requirement for retention of the records for a period of 7 years that is now in paragraph (b) of Sec. 93.317. The institution is not responsible for maintaining the records if they have been transferred to HHS in accordance with paragraph (c), formerly (b), or ORI has advised the institution in writing that it no longer needs to retain the records.

As stated in the preamble of the NPRM (69 FR at 20784) the 7-year retention period is based on concerns that the 3-year period for retaining inquiry records in the current regulation, 42 CFR 50.103(d)(6) is too short to permit HHS or the Department of Justice to investigate potential civil or criminal fraud cases. While the 7-year retention period is potentially burdensome, that burden will fall on a limited number of institutions, 53 according to the Paperwork Reduction Act burden estimate in the preamble to the NPR, and the burden is mitigated by exceptions to transfer of custody to HHS and for a written notification from ORI that the records do not have to be retained by the institution. Upon the effective date of this final rule, the 7-year retention period for records of research misconduct proceedings will supercede the more general requirements for the retention of records relating to grants. We note that the 7-year retention period is consistent with the provision in the HHS general grants administration regulation, 45 CFR 74.53(b)(1) that if any review, claim, financial management review, or audit is started during the 3-year retention period, the pertinent records must be retained until all such matters have been resolved and final action taken.

Q. ORI Allegation Assessments, Sec. 93.402

Several commentators recommended requiring that ORI notify the institution of any allegation received by ORI regardless of how ORI disposes of the allegation. Consistent with this recommendation, we have amended paragraph (d) of Sec. 93.402 to provide that if ORI decides that an inquiry is not warranted, it will close the case and may forward the allegation in accordance with paragraph (e) which provides that allegations not covered by the regulation may be forwarded to the appropriate HHS component, Federal or State agency, institution or other appropriate entity. In deciding whether to forward a specific allegation to the institution, ORI will consider potential confidentiality issues for the complainant and others. We are open to further dialogue with the research community on this issue.

R. Standard for the Assistant Secretary for Health’s Review of the ALJ’s Decision, Secs. 93.500(d) and 93.523

One commentator recommended that there be criteria for the Assistant Secretary for Health (ASH) to review the ALJ’s decision, similar to the “arbitrary and capricious, or clearly erroneous standard for the HHS debarring official to review the ALJ’s decision” (paragraph (e) of Sec. 93.500).

In response to this comment, we have added to Sec. 93.523(b) a standard of review for the ASH’s review of the decision of the ALJ. The standard of review for the ASH is the same “arbitrary and capricious or clearly erroneous” standard that applies to the debarring official’s review where debarment or suspension is a recommended HHS administrative action. In addition, we have amended Secs. 93.500 and 93.523 to establish a procedure for the ASH review, clarify the relationship between the ASH review and the debarring official’s decision on recommended debarment or suspension actions, and identify what constitutes the final HHS action. The Assistant Secretary for Health notifies the parties of an intention to review the ALJ’s recommended decision within 30 days after service of the recommended decision. Upon review, the ASH may modify or reject the decision in whole or in part after determining it, or the part modified or rejected, to be arbitrary and capricious or clearly erroneous. If the ASH does not notify the parties of an intent to review the ALJ’s recommended decision within 30 days after service of the recommended decision, the decision becomes final and constitutes the final HHS action, unless debarment or suspension is an administrative action recommended in the decision. If debarment or suspension is a recommended HHS action either in a decision of the ALJ that the ASH does not review, or in the decision of the ASH after review, the decision constitutes proposed findings of fact to the HHS debarring official.

As noted in the discussion of changes not based on comments, we have amended several sections to ensure that the Assistant Secretary for Health cannot be responsible both for making findings of research misconduct and for reviewing the ALJ’s recommended decision on those findings, if respondent contests the findings by requesting a hearing. ORI will not be responsible for making findings, consistent with its responsibilities as the reviewer of institutional findings of
research misconduct and as a party to any hearing on those findings. This maintains the separation between investigation and adjudication, because any inquiry or investigation would be conducted by the institution, or if conducted by HHS, it would not be conducted by ORI (Sec. 93.400(a)(4)).

S. Extension for Good Cause To Supplement the Hearing Request, Sec. 93.501(d)

One commentator recommended that the 30-day limit for supplementing the hearing request be measured from notification of the appointment of the ALJ, rather than from receipt of the charge letter. The commentator notes that the ALJ may not be appointed within 30 days after receipt of the charge letter and recommends an amendment providing that the ALJ may grant an additional period of no more than 60 days from the respondent’s receipt of notification of the appointment of the ALJ. This comment makes a good point, but 60 days from notice of the appointment of the ALJ is too long a period, given that there may be an additional 30 days for appointment of the ALJ after the request for a hearing is filed. Thus, we have amended paragraph (d) to provide that after receiving notification of the appointment of the ALJ, the respondent has 10 days to file with the ALJ a proposal for supplementation of the hearing request that includes a showing of good cause for supplementation. Note that this 10-day period is consistent with the period for responding to a motion in Sec. 93.510(c) and that in accordance with Sec. 93.509(d), the ALJ may modify the 10-day period for good cause shown.

T. Role of Scientific Expert Appointed by ALJ, Sec. 93.502

It was recommended that advice of the scientific expert appointed to advise the ALJ be part of the record and available to both parties. It was further recommended that the scientific expert be available for questioning by the parties. Another commentator recommended specific guidance in the regulation to assist ALJs in retaining appropriate scientific expertise. Another commentator felt that the appointment of an expert to assist the ALJ should be mandatory in every case, while others felt such an appointment should be mandatory in those cases involving complex scientific, medical or technical issues. For the reasons explained below under the heading, “Significant Changes Not Based on Comments,” we are not requiring the appointment of an expert to assist the ALJ in every case.

The proposed Sec. 93.502 provides some guidance on the selection of scientific and technical experts by requiring that they have appropriate expertise to assist the ALJ in evaluating scientific or technical issues related to the HHS findings of research misconduct. Furthermore, experts may not have real or apparent conflicts of interest, or as added in this final rule, bias or prejudice that might reasonably impair their objectivity in the proceeding.

In paragraph (b)(1) of Sec. 93.502 of this final rule we are providing further guidance on the selection of an expert to advise the ALJ. Upon a motion by the ALJ or one of the parties to appoint an expert to advise the ALJ, the ALJ must permit the parties to submit nominations. If such a motion is made by a party, the ALJ must appoint an expert, either: (1) The expert, if any, who is agreeable to both parties and found to be qualified by the ALJ; or, (2) if the parties cannot agree upon an expert, the expert chosen by the ALJ.

These provisions will ensure the selection of well-qualified experts, minimize disputes, speed the appointment process by providing precise procedural rules, and enhance fairness by providing for greater involvement of the parties in the process.

Consistent with the greater involvement of the parties in the selection of the expert and with the comment recommending a more formalized process for the expert to provide advice, we are adding Sec. 93.502(b)(2) to clarify the role of the expert appointed by the ALJ. The ALJ may seek advice from the appointed expert at any time during the discovery or hearing phase of the proceeding. Advice must be provided in the form of a written report, containing the expert’s background and qualifications, which is served upon the parties. The report and the expert’s qualifications and advice may be challenged by the parties in the form of a motion or through testimony of the parties’ own experts, unless the ALJ determines such testimony to be inadmissible in accordance with Sec. 93.519, or that such testimony would unduly delay the proceeding. In this manner, the report and any comment on it would be part of the record. These procedures will greatly enhance the detail and quality of the expert advice available for consideration by the ALJ and provide greater transparency and confidence to the scientific community on the expertise provided to the ALJ.

II. Changes Not Based on Comments

A. Grandfather Exception to Six Year Limitation on Receipt of Misconduct Allegations, Sec. 93.105(b)(3)

We have changed the condition for the grandfather exception from “had the allegation of research misconduct under review or investigation on the effective date of this regulation” to “had received the allegation of research misconduct before the effective date of this part.” This makes the condition for the grandfather exception consistent with the event that tolls the running of the six-year limitation: the receipt of the misconduct allegation by the institution or HHS.

B. Confidentiality, 93.108

Consistent with longstanding practice and with Sec. 93.403, we have added a provision to clarify that ORI is within the category of those who need to know the identity of the respondent and complainant and that an institution may not invoke confidentiality to withhold that information from ORI as it conducts its review under Sec. 93.403.

C. Definition of Deciding Official, Sec. 93.207, and Authority of ORI, Sec. 93.400

To ensure that the Assistant Secretary for Health is not responsible for both making findings of research misconduct and for reviewing the recommended decision of the ALJ on those findings if respondent contests the findings by requesting a hearing, Sec. 93.400 has been amended to give ORI the authority to make findings of research misconduct. That section and Sec. 93.404 have also been amended to clarify that ORI proposes administrative actions to HHS (defined as the Secretary or his delegate) and upon HHS approval, proceeds to implement those proposed actions in accordance with the procedures in the regulation. Accordingly, the definition of, and references to the term “deciding official” have been deleted. Giving ORI the responsibility for making findings of research misconduct is consistent with its responsibilities for reviewing institutional findings of research misconduct and for defending those findings if the respondent challenges them. This change will maintain the separation between investigation and adjudication, because ORI will not conduct any inquiry or investigation on behalf of HHS.

These changes have necessitated changing references to HHS and ORI and other wording changes in Secs. 93.403–406, 93.411, 93.500–501, 93.503, and 93.516–517. As provided in Sec.
93.406, the ORI finding of research misconduct is the final HHS action only if the respondent does not contest the charge letter within the prescribed period. The administrative actions, proposed by ORI and approved by HHS, become final in the same manner, except that the debarring official’s decision is the final HHS action on any debarment or suspension action.

C. Definition of Good Faith, Sec. 93.210

Under Secs. 93.227 and 93.300(d), committee members are protected against retaliation for good faith cooperation with a research misconduct proceeding. As proposed, Sec. 93.211 (now Sec. 93.210) defined “good faith” for complainants and witnesses, but not for committee members. We have added such a definition, stating that a committee member acts in good faith if he/she cooperates with the research misconduct proceeding by carrying out the duties assigned impartially for the purpose of helping an institution meet its responsibilities under this regulation. A committee member does not act in good faith if his/her acts or omissions on the committee are dishonest or influenced by personal, professional, or financial conflicts of interest with those involved in the research misconduct proceeding.

D. Definition of Institutional Member, Sec. 93.214

We have added more examples of institutional members.

E. Institutional Policies and Procedures—Reporting the Opening of an Investigation, Sec. 93.304(d)

We have simplified the date for institutions to report the opening of investigations to ORI. This report must be made on or before the date on which the investigation begins. Institutions are encouraged to report the opening of an investigation to ORI as promptly as possible after the decision to open an investigation is made.

F. Taking Custody of and Securing Records at the Beginning of an Inquiry, Sec. 93.307(b)

We have added a requirement that on or before the date on which the respondent is notified of the inquiry, or the inquiry begins, whichever is earlier, the institution must, to the extent it has not already done so, promptly take all reasonable and practical steps to obtain custody of all the research records and evidence needed to conduct the research misconduct proceeding, inventory the records and evidence and sequester them in a secure manner, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments. This is consistent with the identical requirements that become applicable when the institution notifies the respondent of the allegation and when the respondent is notified of an investigation. (Secs. 93.305(a) and 93.310(d)). These requirements are necessary because of the potential for the destruction or alteration of the research records. To minimize that potential, an institution should take custody of the records whenever it has reason to believe that the records may be subject to alteration or destruction because of an allegation or potential allegation of research misconduct. This may protect the respondent, as well as the institution.

G. Interaction With Other Offices, Sec. 93.401

To accurately reflect ORI’s authority and practices, we have expanded this section to authorize ORI to provide expertise and assistance to the Department of Justice, the HHS Inspector General, PHS and other Federal offices, and State or local offices involved in investigating or otherwise pursuing research misconduct allegations or related matters.

H. Procedures for Debarment or Suspension Actions Based on Misconduct Findings, Secs. 93.405, 93.500–501, 93.503 and 93.523.

We have amended these sections to clarify the relationship between the regulations governing debarment and suspension and the procedures in subpart E for contesting ORI findings of research misconduct and proposed HHS administrative actions. Section 93.500(d) (comparable to Sec. 93.500(c) of the NPRM) explains that the procedures under subpart E provide the notification, opportunity to contest and fact finding required under the HHS regulation governing debarment and suspension. Consistent with that regulation, the debarring official provides notification of the proposed debarment or suspension as part of the charge letter (Sec. 93.405(a)) and makes the final decision on debarment and suspension actions whether that decision is based upon respondent’s failure to contest the charge letter (Secs. 93.406, 93.501(a) and 93.503(c)), the decision of the ALJ, or the decision of the ALJ as modified by the Assistant Secretary for Health (Secs. 93.500(c) and 93.523(b) and (c)).

I. HHS Administrative Action—Recovery of Funds, Sec. 93.407(b)

We have clarified what funds HHS may seek to recover in connection with a finding of research misconduct by amending Sec. 93.407(b) to refer to the potential recovery of PHS funds spent in support of activities that involved research misconduct.

J. Appointment of the ALJ—Description of Functions, Sec. 93.502(a)

We have amended Sec. 93.502(a) to describe the functions of the ALJ more completely.

K. Limits on the Authority of the ALJ, Sec. 93.506(a) and (c)

We have added references in Secs. 93.506(a) and (c) stating that the ALJ does not have the authority to find invalid or refuse to follow Federal statutes or regulations, Secretarial delegations of authority, or HHS policies. This is consistent with a similar provision in the regulation upon which the research misconduct hearing process is based, 42 CFR part 1005, which governs the hearing process for OIG exclusion of health care providers.

L. Actions for Violating an Order or Disruptive Conduct, Sec. 93.515(b)(6)

We have changed “taking a negative inference from the absence of research records, documents, or other information” to “drawing the inference that spoliated evidence was unfavorable to the party responsible for its spoliation.” This change is intended to clarify the nature of the negative inference that may be reached by the ALJ and distinguish the spoliation of evidence during or in anticipation of the hearing, from the absence or destruction of records that may be evidence of research misconduct. In this context, spoliation has essentially the same meaning as is accepted by Federal courts, i.e., the destruction or significant alteration of evidence during or in anticipation of the hearing.

M. Corrections and Minor Changes

In addition to the significant changes not based on comments described above, we have made changes to: (1) Correct errors, such as references to PHS rather than HHS, or to a hearing officer, rather than the ALJ; (2) use uniform language in describing the same condition or event in different sections of the regulation; (3) adding citations to other sections, where appropriate, to make cross-references more concise and
III. Significant Comments Not Resulting in Changes

A. Definition of Research Misconduct, Sec. 93.103

Although most commentators supported the new definition of research misconduct, there were a number of comments recommending changes, including that: (1) The definition should be based on deception; (2) the definition of falsification is inadequate because it does not cover the nonexperimental manipulation of human or animal subjects with the goal of influencing research results, or bias in the coding of qualitative data; (3) the definition of plagiarism should expressly exclude authorship and credit disputes; and (4) the definition of misconduct should be expanded to include neglect and intentional mistreatment of animals.

As explained in the preamble of the NPRM, the proposed definition of research misconduct, which is included in this final rule without change, includes OSTP’s description of “fabrication, falsification, and plagiarism.” That description is clear and sufficiently concrete to provide the basis for reasonable determinations of whether research misconduct has occurred and whether the misconduct was intentional, knowing, or reckless. Given the careful consideration that has been given to this definition and the value of a uniform government-wide definition, we are adopting the definition as it was proposed. We note that the nonexperimental manipulation of human or animal subjects to influence the research results would appear to be a manipulation of research materials or processes within the intendment of the definition of falsification.

B. Confidentiality, Secs. 93.108, 93.300(e) and 93.304(a)

Several commentators recommended including witnesses and committee members and strengthening the confidentiality protections to provide the same protections as the OSTP Policy. Other commentators recommended that: (1) The rule give examples of what disclosures are limited and state when an institution is free to announce the results of an investigation to scientific journals; (2) the identity of the complainant and his/her statement be disclosed to the respondent; and (3) that the sanctions for a violation of confidentiality be specified.

We have not changed Sec. 93.108 or the other provisions requiring institutions to provide confidentiality to respondents, complainants, and research subjects who are identifiable from research records or evidence. We believe these provisions provide the same protections as the OSTP policy. Institutions have considerable discretion in implementing the confidentiality protections and are free to extend them to witnesses and committee members. However, consistent with the limitation of the OSTP confidentiality provision to complainants and respondents, we are not requiring that they do so.

C. Definition of Allegation—Inclusion of Oral Allegations, Sec. 93.201

Several commentators objected to the inclusion of oral allegations in the definition of the term “allegation.” Although, the current PHS regulation at 42 CFR part 50, subpart A, does not define the term allegation, it has been longstanding ORI practice to accept oral allegations, including oral, anonymous allegations. Experience has shown that oral allegations may contain relatively complete information, but if they do not, they are often followed by more complete allegations, or lead to more complete information.

The definition of allegation must be considered in the context of the criteria warranting an inquiry. Under Sec. 93.307(a), an inquiry is warranted if the allegation: (1) Falls within the definition of research misconduct; (2) involves PHS supported biomedical or behavioral research, research training, or activities related to that research or research training; and (3) is sufficiently credible and specific so that potential evidence of research misconduct may be identified. Information sufficient to make these determinations can be transmitted orally. If such information is not transmitted orally or by other means, the institution cannot initiate an inquiry based upon the oral allegation. Under Sec. 93.300(b), an institution is obligated to respond to each allegation of research misconduct involving PHS supported biomedical or behavioral research, research training or activities related to that research or research training. The response must consist of assessing the allegation to determine if the criteria for initiating an inquiry are met and should consist of reasonable efforts to obtain further information about the allegation. We do not believe these are unreasonable burdens in response to oral allegations, particularly since oral allegations, and have conveyed information leading to findings of research misconduct that have protected the integrity of PHS supported research. We also note that the Offices of the Inspector General at various Federal agencies routinely accept oral and anonymous allegations in their pursuit of fraud, waste, and abuse.

D. Definition of Research Record, Sec. 93.226

We did not make any changes in this section in response to comments that the inclusion of oral allegations will inhibit open scientific discourse and objections to the interpretation of “data and results” to include computers and scientific equipment. The definition of “research record” is consistent with the definition of that term in the OSTP Policy. Oral presentations are a widely accepted method of conveying scientific information and research results. There is no logical reason why scientists should be permitted to falsify, fabricate, and plagiarize PHS supported biomedical and behavioral research, research training and activities related to that research and research training in oral presentations. The interpretation of the OSTP definition to include computers and scientific instruments is reasonable and consistent with the wording of the definition. Laboratory records, “both physical and electronic,” are covered in the OSTP definition. Computers and scientific instruments contain electronic records. As explained above, we have made changes to clarify that if those electronic records can be extracted from the computer or instrument without changing and recorded for later use, the computer or instrument need not be retained as the repository of the record.

E. Definition of Retaliation, Sec. 93.226; Protection From Retaliation Secs. 93.300(d) and 93.304(l)

One commentator recommended that the definition be amended to include retaliation against the respondent for his/her efforts to defend against the charges of research misconduct. The proposed definition would not include action resulting from research misconduct proceedings or personnel actions. It was also recommended that Secs. 93.300(d) and 93.304(l) be amended to require institutions to protect respondents from retaliation by referring to “all participants.”

The purpose of the retaliation provision is to encourage researchers to come forward with good faith allegations of research misconduct and to encourage good faith cooperation with a research misconduct proceeding. In ORI’s experience, there has been no showing of a need to protect
respondents from retaliation in order to ensure they will take steps to defend against an allegation of misconduct. In contrast, experience has shown a need to restore the reputations of respondents where there is a finding of no misconduct and Sec. 93.304(k) requires institutions to do that. If a need to protect respondents from retaliation is shown, institutions have broad discretion under the rule to address that situation on a case-by-case basis or adopt a policy to remedy the problem.

F. Responsibility of Institutions To Foster Responsible Conduct of Research, Sec. 93.300(c)

Several commentators objected to the requirement that institutions foster a research environment that promotes the responsible conduct of research, arguing that it is beyond the scope of a regulation on research misconduct. One letter, signed by four separate organizations, stated: “Though responsible conduct of research is clearly an imperative that our institutions embrace, the nature of the general research environment and the promotion of the responsible conduct of research are not tied only to research misconduct as ORI staff have asserted in many venues, and, as a consequence, should not be linked in this particular policy.”

These commentators are reading too much into this provision. This is not a requirement for institutions to establish a new program for the responsible conduct of research. Rather, this provision appropriately updates the language of the current regulation requiring institutions to foster a research environment that discourages misconduct in all research and deals forthrightly with possible misconduct associated with research for which PHS funds have been provided or requested (42 CFR 50.105). The new provision recognizes the continuing importance of the responsible conduct of research to competent research that is free of any misconduct. As stated by the Institute of Medicine (IOM) in its 2002 report, Integrity in Scientific Research: Creating an Environment That Promotes Responsible Conduct, “instruction in the responsible conduct of research need not be driven by federal mandates, for it derives from a premise fundamental to doing science: the responsible conduct of research is not distinct from research; on the contrary, competency in research encompasses the responsible conduct of that research and the capacity for ethical decision making.” (Report at p. 9). In the context of this regulation, the directive in Sec. 93.300(c) to foster a research environment that promotes the responsible conduct of research means an environment that promotes competent, ethical research that is free of misconduct. This is directly related to the purposes of the regulation to establish the responsibilities of institutions in responding to research misconduct issues and to promote the integrity of PHS supported research and the research process (Sec. 93.101).

G. Responsibility for Maintenance of Research Records and Evidence, Sec. 93.305

One commentator recommended that this section be amended to require the prompt return to the respondent of records that, upon inventory, are found not to be relevant to the misconduct proceeding. Paragraph (a) of Sec. 93.305 requires the institution to obtain custody of all records and evidence needed to conduct the research misconduct proceeding. That requirement would not extend to records that are reasonably determined by the institution not to be needed to conduct the proceeding. We believe the imposition of an affirmative duty to return records that are determined to be irrelevant could adversely affect inquiries and investigations, because experience has shown that research misconduct proceedings are better served by broadly securing all records thought to be relevant. The respondent is protected by paragraph (b) of Sec. 93.305 under which he/she may obtain copies of the records or reasonable, supervised access.

H. Institutional Inquiry—Consideration of Honest Error or Difference of Opinion, Sec. 93.307

Several commentators recommended amending this section to impose an affirmative burden on institutions to assess whether honest error or difference of opinion exempts the allegation from consideration as research misconduct. As noted earlier in this supplementary information, we have concluded that honest error or difference of opinion is an affirmative defense based on the statement in the preamble of the OSTP final rule that institutions and agencies are not required to disprove possible honest error or difference of opinion in order to make a finding of research misconduct. However, because of the overlap between this affirmative defense and the responsibility of institutions and HHS to prove that the alleged research misconduct was committed intentionally, knowingly, or recklessly, evidence of honest error or difference of opinion is to be considered in determining whether the institutions and HHS have met their burden of proving that element, a prerequisite to a finding of research misconduct.

Under Sec. 93.307(c), the purpose of an inquiry is to conduct an initial review of the evidence to determine if an investigation is warranted. An investigation is warranted under Sec. 93.307(d) if: (1) There is a reasonable basis for concluding that the allegation involves PHS supported research, research training, or activities related to that research or research training and falls within the definition of research misconduct, and (2) preliminary information-gathering and fact-finding from the inquiry indicates that the allegation may have substance. It is important to note that possible honest error or difference of opinion goes to the issue of whether the alleged research misconduct was committed intentionally, knowingly, or recklessly, not whether the allegation involves fabrication, falsification, or plagiarism. A finding that the research misconduct is conducted intentionally, knowingly, or recklessly is necessary for a finding of research misconduct; a finding that is not made until the investigation is completed, absent an admission at an earlier stage.

Given this fact, and the preliminary nature of the fact finding at the inquiry stage, it would be appropriate for the inquiry report to note if there is possible evidence of honest error or difference of opinion for consideration in the investigation, but it would be inappropriate for the inquiry report to conclude, on the basis of an initial review of the evidence of honest error or difference of opinion, that the allegation should be dismissed. The determination of whether the alleged misconduct is intentional, knowing, or reckless, including consideration of evidence of honest error or difference of opinion, should be made at the investigation stage, following a complete review of the evidence. As noted in the preamble of the OSTP final policy, institutions and HHS do not have the burden of disproving possible honest error or differences of opinion.

I. Institutional Investigation, Sec. 93.310 and Investigation Time Limits, Sec. 93.311

Some commentators recommended that complainants be given a right to participate in the process. As explained in the preamble of the NPRM, complainants are witnesses in that they do not control or direct the process, do not have special access to evidence, except as determined by the institution.
or ORI, and do not act as decision makers. This ensures that the institution will carry out its responsibility under Sec. 93.310(f) to conduct investigations that are fair.

Other commentators felt that the respondent should have an explicit right to review and comment on evidence and cross-examine witnesses at the investigation stage, and the right to request an extension of time for conducting the investigation. The proposed regulation requires that: (1) Where appropriate, the respondent be given copies of, or reasonable, supervised access to the research records secured by the institution on or before the date it notifies the respondent of the allegation, inquiry or investigation (Sec. 93.305(b)); (2) the respondent be notified in writing of the allegations before the investigation begins (Sec. 93.310(c)); (3) the institution interview the respondent and any witnesses he/she identifies who may have substantive information regarding any relevant aspects of the investigation (Sec. 93.310(g)); and (4) the respondent be given 30 days to review and comment on the investigation report (Sec. 93.312). These provisions have been retained and, as noted above, we have added to this final rule a requirement that respondent be given copies of, or supervised access to the evidence supporting the investigation report, concurrent with the period for comment. We believe these requirements ensure that the respondent will have a fair opportunity to present relevant evidence during the research misconduct proceeding, particularly when viewed in the context of the respondent’s right to contest any HHS findings of research misconduct and proposed administrative sanctions before an ALJ. It is important to note that the final rule does not prohibit institutions from giving respondents greater rights during the investigation, so long as they do not contravene HHS requirements; the rule establishes a floor for their participation.

J. Appointment of the ALJ and Scientific Expert, Sec. 93.502

Two scientific societies objected to the ALJ provision, recommending that the current three member adjudication panel be retained. Another scientific society raised concerns about the extent to which scientists would be involved in the process, if they were not part of the adjudication panel (these concerns have been addressed through the changes in this section discussed above) and four associations supported the ALJ provision, provided that scientific or technical experts are required to participate in those cases involving complex scientific, medical or technical issues. As stated in the preamble of the NPRM, we believe that the change to a single decisionmaker will substantially improve and simplify the process for all parties. The change provides a process similar to Medicare and State health care program exclusion cases brought by the Office of the Inspector General (OIG), which have similar impacts on the reputations of the respondents. This process is also consistent with Recommendation 92–7 of the Administrative Conference of the United States that ALJs should hear and decide cases involving the imposition of sanctions having a substantial economic effect. Use of an ALJ with ready access to scientific and technical expertise, rather than multiple decision makers, will streamline the process without compromising the quality of decisions that are dependent upon resolution of scientific, medical, or technical issues.

In addition to the comments recommending mandatory appointment of an expert in complex cases, another commentator recommended that the ALJ be required to appoint a scientific or technical expert to assist the ALJ in every case, rather than the ALJ being authorized to appoint such an expert and being required to appoint such an expert upon the request of one of the parties, as proposed in the NPRM. We are not changing the provision to require the appointment of an expert in every case or in all cases involving complex issues. We believe that such a rigid requirement is not needed to ensure fairness. In complex cases, it will always be in the interest of at least one of the parties to ensure that the ALJ fully understands the issues by requesting the appointment of an expert. Upon such a request, the appointment of an expert is mandatory. Furthermore, the ALJ, who is in the best position to assess the complexity of the case in light of his/her own knowledge and training, may appoint an expert in the absence of any motion by a party. The self-interest of the parties and the duty of the ALJ to exercise his/her discretion to provide a fair hearing should ensure that an expert is appointed where necessary to ensure fairness. We will closely monitor the appointment of experts in future hearings and, if problems are apparent, consider amending the regulations to compel the appointment of an expert in order to ensure that the ALJ will have the benefit of expert advice in cases involving complex issues.

IV. General Issues and Requests for Clarification

Several general comments and requests for clarification are addressed in the following question and answer format.

Q. Is the detail in the final rule contrary to the goal of the OSTP Federal Policy on Research Misconduct to provide a more uniform Federal-wide approach?

A. No, the final rule is consistent with the OSTP Federal Policy. As stated elsewhere in this Supplementary Information we have made some changes in order to adhere more closely to the Federal Policy and refused to make other changes that would have been inconsistent with the Federal Policy. The Supplementary Information section of the Notice of Proposed Rulemaking (69 FR 20778, 20780 (April 16, 2004)) explained that the proposed rule contained more detail than the existing rule because institutions had over the years asked for more detailed guidance and that detailed guidance would ensure thorough and fair inquiries and investigations and greater accountability on the part of all participants in research misconduct proceedings. Similarly, it was explained that the more detailed hearing process was being proposed in response to concerns that the current informal procedures lack the consistency and clarity provided by binding rules of procedure for other types of cases. Thus, the detail in the final rule is necessary to ensure more uniformity among the various institutions that will be conducting research misconduct proceedings and to ensure fair, uniform procedures for the benefit of respondents. The detail in the proposed rule, which is retained in this final rule, is entirely consistent with the goals of the OSTP Federal Policy to provide for fair and timely procedures and to strive for uniformity in implementation.

Q. How should institutions deal with bad faith allegations?

A. The final rule, Sec. 93.300(d), requires institutions to take all reasonable and practical steps to protect the positions and reputations of good faith complainants and protect them from retaliation by respondents and other institutional members. By negative implication, such steps are not required for bad faith complainants. Bad faith complainants are those who, under the definition of “good faith” in Sec. 93.210, do not have a belief in the truth of their allegation that a reasonable person in the complainant’s position could have based on the information known to the complainant at the time.
We have determined there is no need for the final rule to further address bad faith allegations, given that institutions may have internal standards of conduct that address matters not addressed in the final rule (Sec. 93.319). However, the definition of “good faith” provides important guidance for institutions because it makes clear that an allegation can lack sufficient credibility and specificity so that potential evidence of research misconduct cannot be identified (Sec. 93.307(a)(3)), but still may not be a bad faith allegation. Thus, if institutions exercise their discretion to adopt procedures addressing bad faith allegations, we urge them to include fair procedures for determining whether there has been a bad faith allegation. ORI is prepared to work collaboratively with the research community to develop guidance in this area if research institutions and associations desire to do so.

Q. Will the final rule apply retroactively?
A. No. The final rule will become effective 30 days after the date it is published in the Federal Register and will apply prospectively. The effect of that prospective application will depend upon how the provisions of the rule interact with the activities of the institution and ORI. Upon the expiration of 30 days, the final rule will immediately apply to institutions that are receiving PHS support for research, research training or activities related to that research or research training. For institutions not receiving such PHS support, the regulation will not apply until they submit an application for that support.

If an institution to which the final rule applies immediately has completed an inquiry or investigation and reports to ORI after the effective date of the final rule, ORI will take further action, make findings, and provide an opportunity for a hearing in accordance with the final rule. If a request for a hearing is received by the DAB Chair after the effective date of the final rule, the hearing will be conducted in accordance with the final rule. This will ensure that respondents have the benefit of the detailed, fair hearing procedures in the final rule. Because it is not possible to address every possible scenario relating to the prospective application of the final rule, institutions that have received allegations of misconduct, or have ongoing inquiries or investigations upon the effective date of this final rule should contact ORI to determine how the rule will apply to those ongoing activities. In every effort to minimize burdens and ensure that all parties are treated fairly. Generally, if an institution has a research misconduct proceeding pending at the time the new regulation becomes effective with respect to that institution, ORI would expect the new procedural requirements to be applicable to the institution’s subsequent steps in that proceeding, unless the institution or respondent would be unduly burdened or treated unfairly. However, the definition of research misconduct that was in effect at the time the misconduct occurred would apply.

Q. Should HHS take action to provide immunity from personal liability for institutions, committee members, and witnesses who participate in research misconduct proceedings?
A. As the commentator who raised this issue implied, a Federal statute, rather than an HHS regulation, would be needed to provide this immunity. Earlier attempts by HHS to develop legislation providing immunity were unsuccessful. ORI does not currently have sufficient data to make the case for Federal legislation. Interested parties are encouraged to submit evidence that would help us in determining whether there is a need for Federal legislation to provide immunity for committee members and witnesses or to propose ways to provide such protection in the absence of such legislation.

Q. Should HHS have primary responsibility for responding to allegations of research misconduct at institutions that have repeatedly failed to handle such allegations properly?
A. Under the final rule, HHS has the discretion to take responsibility for responding to allegations of research misconduct at institutions that are failing to handle such allegations properly. Under Sec. 93.400, ORI may respond directly to any allegation of research misconduct at any time before, during, or after an institution’s response to the matter. The ORI response may include, but is not limited to, reviewing an institution’s findings and process and recommending that HHS perform an inquiry or investigation. In addition, ORI may make findings and impose HHS administrative actions related to an institution’s compliance with the final rule. Where an institution has failed in the past to respond promptly or properly to allegations of research misconduct, ORI will monitor closely its subsequent responses to allegations of research misconduct. However, ORI would intervene only as it determines necessary and would first provide advice and assistance to the institution. ORI would exercise its discretion to respond and take action on behalf of research misconduct only if the institution disregarded that advice or assistance or otherwise continued to fail to properly carry out its responsibilities under the final rule.

Q. Are sanctions required or available for imposition against those who violate the confidentiality requirements in the final rule?
A. The final rule does not provide for specific sanctions against those who violate the confidentiality protections in Sec. 93.108, but an institution would be subject to the general sanctions for failure to comply with the final rule and its assurance if it fails to comply with Sec. 93.108. Section 93.304(e) requires institutions to provide confidentiality to the extent required by Sec. 93.108, and Sec. 93.304 requires that an institution seeking an approved assurance have written policies and procedures that, consistent with Sec. 93.108, provide for protecting the confidentiality of respondents, complainants and research subjects. The final rule does not impose, or require institutions to impose sanctions against institutional members who violate the confidentiality provisions of Sec. 93.108, but institutions have the discretion to impose such sanctions by making compliance with those provisions a condition of employment. Institutions may also wish to develop specific policies addressing actions the institution may take when institutional members violate the confidentiality requirements.

Q. Does a respondent have a right to continue his/her research after allegations of research misconduct have been made?
A. The final rule does not directly address the issue of whether the respondent has a right to continue his/her research after an allegation of research misconduct has been made. Section 93.305 requires the institution to: (1) promptly obtain custody of and sequester all research records and evidence needed to conduct the research misconduct proceeding; and (2) where appropriate, give the respondent copies of, or reasonable, supervised access to the research records. There are at least two reasons for providing such access: to enable the respondent to prepare a defense against the allegation, and/or to continue the research.

As proposed and adopted in this final rule, Sec. 93.305(b) requires the institution to provide the respondent copies of, or supervised access to the research records secured by the institution, unless that would be inappropriate. The determination of when it would be inappropriate to provide such copies or access is left to the discretion of the institution. In exercising this discretion, institutions
should consider separately the issues of whether the respondent should continue the research and whether and under what circumstances the respondent should be given copies of or access to the research records. In considering the former issue, institutions should weigh, among other factors, the special circumstances listed in Sec. 93.318, the importance of continuing the research, and whether the expertise of the respondent is unique. Institutions must also be cognizant of the interests of the PHS funding agency and the need to confer with that agency about suspension or discontinuation of the research or to obtain approval if the Principal Investigator is being replaced. If the respondent does not continue the research, it would be appropriate, absent special circumstances, to give him/her a copy of the records, or reasonable, supervised access to them for the purpose of preparing a defense to the allegations. In order to ensure that the respondent has this opportunity at the investigation stage, Sec. 93.312(a) requires the institution to give the respondent a copy of, or supervised access to the evidence upon which the draft investigation report is based concurrently with the provision of the draft report for comment by the respondent.

Q. Does the 120-day time limit for completing an investigation include the 30-day period for respondent to review and comment on the draft report?

A. Yes. Section 93.311 provides in pertinent part that an institution must complete all aspects of an investigation within 120 days of beginning it, including providing the draft report for comment in accordance with Sec. 93.312, and sending the final report to ORI under Sec. 93.315. Under Sec. 93.313(g), the final report must include and consider any comments made by the respondent or complainant on the draft investigation report. If additional time is needed, the institution can request reasonable extensions for completion of the investigation.

Analysis of Impacts

As discussed in greater detail below, we have examined the potential impact of this final rule as directed by Executive Orders 12866 and 13132, the Unfunded Mandates Act of 1995, the Regulatory Flexibility Act, and the Paperwork Reduction Act of 1995.

We have also determined that this final rule will not: (1) Have an impact on family well-being under section 654 of the Unfunded Mandates Reform Act of 1999; nor (2) have a significant adverse effect on the supply, distribution, or use of energy sources under Executive Order 13211.

A. Executive Order 12866

These final regulations have been drafted and reviewed in accordance with Executive Order 12866 (58 FR 51735), section 1(b), Principles of Regulation. The Department has determined that this final rule is a “significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review because it will materially alter the obligations of recipients of PHS biomedical and behavioral research and research training grants. However, the final regulation is not economically significant as defined in section 3(f)(1), because it will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the information enumerated in section 6(a)(3)(C) of the Executive Order is not required. The final rule has been reviewed by the Office of Management and Budget (OMB) under the terms of the Executive Order.

Recipients of PHS biomedical and behavioral research grants will have to comply with the reporting and record keeping requirements in the proposed regulation. As shown below in the Paperwork Reduction Act analysis, those burdens encompass essentially all of the activities of the institutions that are required under the proposed regulation. The estimated total annual burden is 19,727.5 hours. The U.S. Department of Labor, Bureau of Labor Statistics, sets the mean hourly wage for Educational Administrators, Postsecondary at $ 36.12. The mean hourly wage for lawyers is $ 51.56. The average hourly cost of benefits for all civilian workers would add $ 7.40 to these amounts. In order to ensure that all possible costs are included and to account for or potentially higher rates at some institutions, we estimated the cost per burden hour at $ 100. This results in a total annual cost for all institutions of $ 1,972,750.

B. The Unfunded Mandates Reform Act of 1995

Sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1332 and 1535) require that agencies prepare several analytic statements before promulgating a rule that may result in annual expenditures of State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. This final rule will not result in expenditures of this magnitude, and thus the Secretary certifies that such statements are not necessary.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) requires agencies to prepare a regulatory flexibility analysis describing the impact of the final rule on small entities, but also permits agency heads to certify that the final rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The primary effect of this rule is to require covered institutions to implement policies and procedures for responding to research misconduct cases. The Department certifies that this rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act, based on the following facts.

Approximately 47 percent (1862) of the 4000 institutions that currently have research misconduct assurances are small entities. The primary impact of the final rule on covered institutions results from the reporting and record keeping provisions which are analyzed in detail under the heading, “The Paperwork Reduction Act.” Significant annual burdens apply only if an institution learns of possible research misconduct and begins an inquiry, investigation, or both. In 2001, 86 inquiries and 46 investigations were conducted among all the institutions. No investigations were conducted by a small entity and only one conducted an inquiry. Small entities would be able to avoid entirely the potential burden of conducting an inquiry or investigation by filing a Small Organization Statement under section 93.303. The burden of filing this Statement is .5 hour. Thus, the significant burden of conducting inquiries and investigations will not fall on a substantial number of small entities.

A small organization that files the Small Organization Statement must report allegations of research misconduct to ORI and comply with all provisions of the proposed regulation other than those requiring the conduct of inquiries and investigations. The total annual average burden per response for creating written policies and procedures for addressing research misconduct is approximately 16 hours. However, approximately 99 percent of currently funded institutions already have these policies and procedures in place and spend approximately .5 hour updating
them. The most significant of the burdens that might fall on an entity filing a Small Organization Statement is taking custody of research records and evidence when there is an allegation of research misconduct. The average burden per response is 35 hours, but based on reports of research misconduct over the last three years, less than 5 small entities would have to incur that burden in any year.

Based on the foregoing analysis that was not commented upon when it appeared in the Notice of Proposed Rulemaking, the Department concludes that this final rule will not impose a significant burden on a substantial number of small entities.

D. Executive Order 13132: Federalism

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, we have determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

E. The Paperwork Reduction Act

Sections 300–305, 307–311, 313–318, and 413 of the rule contain information collection requirements that are subject to review by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.). The title, description, and respondent description of the information collection requirements are shown below with an estimate of the annual reporting burdens. Included in the estimates is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. Public comments on these estimates and other aspects of compliance with the Paperwork Reduction Act were invited in the NPRM.

As indicated in the foregoing discussion of the comments, a number of them addressed reporting and recordkeeping burdens. In response to comments that the proposed reporting requirements in Secs. 93.300(a), 93.302(c), and 393.316 were subject to an overly broad interpretation, we have made clarifying changes to limit their scope. This did not result in any change in the burden estimates, because those estimates were based upon a restrictive interpretation of the requirements. While changes were made to make it easier for institutions to meet the requirements in Secs. 93.305, 93.307, and 93.310 for securing records contained in scientific instruments we do not believe that those changes significantly affect the burden of the collection requirements.

As explained above, the addition of a relevancy standard to Sec. 93.317 and provisions for transferring the custody of records to HHS will lessen the overall burden of retaining records of research misconduct proceedings, although we have added a requirement that the institutions document any determination that records are irrelevant. In addition, we are adding an explanatory note to the burden estimate for Sec. 93.317. This note explains that not all of the 53 respondents that are expected to conduct research misconduct proceedings each year, on average, will have to retain the records of those proceedings for a full seven years. If ORI determines that a thorough, complete investigation has been conducted and finds that there was no research misconduct or settles a case, it will notify the institution that it does not have to retain the records of the research misconduct proceeding, unless ORI is aware of an action by federal or state government to which the records may pertain. Historically, about 60 percent of cases closed by ORI do not result in PHS misconduct findings or PHS administrative actions. Therefore, it is expected that in the majority of cases ORI will notify the institutions that they do not have to retain the records for the full seven-year period.

We have added a burden statement for the requirement in Sec. 93.302(a)(1) that institutions provide their policies and procedures on research misconduct, upon request, to ORI, HHS, and members of the public. This third item was added in response to comments. Based on recent data, we have increased the number of respondents in the items relating to the conduct of investigations by institutions. In addition, we have made minor changes to account for the renumbering of sections and paragraphs and to correct errors. With these changes, the estimates published in the NPRM are adopted as the burden estimates of the final rule. The information collection requirements in the final rule have been submitted to OMB for review.

Title: Public Health Service Policies on Research Misconduct.

Description: This final rule revises the current regulation, 42 CFR 50.101, et seq., in three significant ways and will supersede the current regulation. First, the proposed rule integrates the White House Office of Science and Technology Policy’s (OSTP) December 6, 2000, government wide Federal Policy on Research Misconduct. Second, the proposed rule incorporates the recommendations of the HHS Review Group on Research Misconduct and Research Integrity that were approved by the Secretary of HHS on August 25, 1999. Third, the proposed rule integrates a decade’s worth of experience and understanding since the agency’s first regulations were promulgated.

Description of Respondents: The “respondents” for the collection of information described in this regulation are institutions that apply for or receive PHS support through grants, contracts, or cooperative agreements for any project or program that involves the conduct of biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training (see definition of “Institution” at Sec. 93.213.).

Subpart C—Responsibilities of Institutions

Compliance and Assurances

Section 93.300(a)

See Sec. 93.304 for burden statement.

Section 93.300(c)

See Sec. 93.302(a)(2)(i) for burden statement.

Section 93.300(i)

See Sec. 93.301(a) for burden statement.

Section 93.301(a)

Covered institutions must provide ORI with an assurance either by submitting the initial certification (500 institutions) or by submitting an annual report (3500 institutions).

Number of Respondents—4000.

Number of Responses per Respondent—1.

Annual Average Burden per Response—5 hour.

Total Annual Burden—2000 hours.

Section 93.302(a)(1)

Covered institutions must, upon request, provide their policies and procedures on research misconduct to ORI, authorized HHS personnel, and members of the public.

Number of Respondents—2000.

Number of Responses per Respondent—1.

Annual Average Burden per Response—5 hour.

Total Annual Burden—1000 hours.

Section 93.302(a)(2)(i)

Each applicant institution must inform its research members
participating in or otherwise involved with PHS supported biomedical or behavioral research, research training or activities related to that research or research training, including those applying for PHS support, of the institution’s policies and procedures and emphasize the importance of compliance with these policies and procedures.

Section 93.302(b)
See Sec. 93.301(a) for burden statement.

Section 93.302(c)
In addition to the annual report, covered institutions must submit aggregated information to ORI on request regarding research misconduct proceedings.

Section 93.303
Covered institutions that, due to their small size, lack the resources to develop their own research misconduct policies and procedures may elect to file a “Small Organization Statement” with ORI.

Section 93.304
Covered institutions with active assurances must have written policies and procedures for addressing research misconduct. Approximately 3500 institutions already have these policies and procedures in place in any given year and spend minimal time (.5 hour) updating them. Approximately 500 institutions each year spend an average of two days creating these policies and procedures for the first time.

Section 93.305(a), (c), and (d)
When a covered institution learns of possible research misconduct, it must promptly take custody of all research records and evidence and then inventory and sequester them. Covered institutions must also take custody of additional research records or evidence discovered during the course of a research misconduct proceeding. Once the records are in custody, the institutions must maintain them until ORI requests them, HHS takes final action, or as required under Sec. 93.317.

Section 93.307(f)
Covered institutions must provide the respondent an opportunity to review and comment on the inquiry report and attach any comments to the report.

Section 93.308(a)
Covered institutions must notify the respondent whether the inquiry found that an investigation is warranted.

Section 93.309(a)
When a covered institution issues an inquiry report in which it finds that an investigation is warranted, the institution must provide ORI with a specified list of information within 30 days of the inquiry report's issuance.
Section 93.313

See Sec. 93.315 for burden statement.

Section 93.314(b)

If unable to complete any institutional appeals process relating to the institutional finding of misconduct within 120 days from the appeal’s filing, covered institutions must request an extension in writing and provide an explanation.

Number of Respondents—5.

Annual Average Burden per Respondent—1.

Total Annual Burden—1600 hours.

Section 93.315

At the conclusion of the institutional investigation process, covered institutions must submit four items to ORI: the investigation report (with attachments and appeals), final institutional actions, the institutional finding, and any institutional administrative actions.

Number of Respondents—20.

Annual Average Burden per Respondent—1.

Total Annual Burden—80 hours.

Section 93.316(a)

Covered institutions that plan to end an inquiry or investigation before completion for any reason must contact ORI before closing the case and submitting its final report.

Number of Respondents—10.

Annual Average Burden per Respondent—1.

Total Annual Burden—20 hours.

Other Institutional Responsibilities

Section 93.317(a) and (b)

See Sec. 93.305(a), (c), and (d), for burden statement. It is expected that not all of the 53 respondents that learn of misconduct will have to retain the records of their research misconduct proceedings for seven years. If ORI determines that a thorough, complete investigation has been conducted and finds that there was no research misconduct, or settles the case, it will notify the institution that it does not have to retain the records of the research misconduct proceeding, unless ORI is aware of an action by federal or state government to which the records pertain.

Section 93.318

Covered institutions must notify ORI immediately in the event of any of an enumerated list of exigent circumstances.

Number of Respondents—5.

Annual Average Burden per Respondent—1.

Total Annual Burden—16 hours.

Subpart D—Responsibilities of the U.S. Department of Health and Human Services Institutional Compliance Issues

Section 93.413(c)(6)

ORI may require noncompliant institutions to adopt institutional integrity agreements.

Number of Respondents—1.

Number of Responses per Respondent—1.

Annual Average Burden per Response—20 hours.

Total Annual Burden—20 hours.

The Department has submitted a copy of this final rule to OMB for its review of these information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Prior to the effective date of this final rule, HHS will publish a notice in the Federal Register announcing OMB’s decision to approve, modify, or disapprove the information collection provisions in this final rule. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

List of Subjects

42 CFR Part 50

Administrative practice and procedure, Science and technology, Reporting and recordkeeping requirements, Research, Government contracts, Grant programs.

42 CFR Part 93

Administrative practice and procedure, Science and technology, Reporting and recordkeeping requirements, Research, Government contracts, Grant programs.
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§ 93.25 Organization of this part.

This part is subdivided into five subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities as shown in the following table.

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§ 93.50 Special terms.

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart B of this part.

Subpart A—General

§ 93.100 General policy.

(a) Research misconduct involving PHS support is contrary to the interests of the PHS and the Federal government, and to the health and safety of the public, to the integrity of research, and to the conservation of public funds.

(b) The U.S. Department of Health and Human Services (HHS) and institutions that apply for or receive Public Health Service (PHS) support for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or research training share responsibility for the integrity of the research process.

HHS has ultimate oversight authority for PHS supported research, and for taking other actions as appropriate or necessary, including the right to assess allegations and perform inquiries or investigations at any time. Institutions and institutional members have an affirmative duty to protect PHS funds from misuse by ensuring the integrity of all PHS supported work, and primary responsibility for responding to and reporting allegations of research misconduct, as provided in this part.

§ 93.101 Purpose.

The purpose of this part is to—

(a) Establish the responsibilities of HHS, PHS, the Office of Research Integrity (ORI), and institutions in responding to research misconduct issues;

(b) Define what constitutes misconduct in PHS supported research;

(c) Define the general types of administrative actions HHS and the PHS may take in response to research misconduct; and

(d) Require institutions to develop and implement policies and procedures for—

(1) Reporting and responding to allegations of research misconduct covered by this part;

(2) Providing HHS with the assurances necessary to permit the institutions to participate in PHS supported research;

(e) Protect the health and safety of the public, promote the integrity of PHS supported research and the research process, and conserve public funds.

§ 93.102 Applicability.

(a) Each institution that applies for or receives PHS support for biomedical or
behavioral research, research training or activities related to that research or research training must comply with this part.

(b)(1) This part applies to allegations of research misconduct and research misconduct involving:

(i) Applications or proposals for PHS support for behavioral extramural or intramural research, research training or activities related to that research or research training, such as the operation of tissue and data banks and the dissemination of research information;

(ii) PHS supported biomedical or behavioral extramural or intramural research;

(iii) PHS supported biomedical or behavioral extramural or intramural research training programs;

(iv) PHS supported extramural or intramural activities that are related to biomedical or behavioral research or research training, such as the operation of tissue and data banks or the dissemination of research information; and

(v) Plagiarism of research records produced in the course of PHS supported research, research training or activities related to that research or research training.

(2) This includes any research proposal, performed, reviewed, or reported, or any research record generated from that research, regardless of whether an application or proposal for PHS funds resulted in a grant, contract, cooperative agreement, or other form of PHS support.

(c) This part does not supersede or establish an alternative to any existing regulations or procedures for handling fiscal improprieties, the ethical treatment of human or animal subjects, criminal matters, personnel actions against Federal employees, or actions taken under the HHS debarment and suspension regulations at 45 CFR parts 76 and 48 CFR subparts 9.4 and 309.4.

(d) This part does not prohibit or otherwise limit how institutions handle allegations of misconduct that do not fall within this part’s definition of research misconduct or that do not involve PHS support.

§ 93.103 Research misconduct.

Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.

(a) Fabrication is making up data or results and recording or reporting them.

(b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

(c) Plagiarism is the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.

(d) Research misconduct does not include honest error or differences of opinion.

§ 93.104 Requirements for findings of research misconduct.

A finding of research misconduct made under this part requires that—

(a) There be a significant departure from accepted practices of the relevant research community; and

(b) The misconduct be committed intentionally, knowingly, or recklessly; and

(c) The allegation be proven by a preponderance of the evidence.

§ 93.105 Time limitations.

(a) Six-year limitation. This part applies only to research misconduct occurring within six years of the date HHS or an institution receives an allegation of research misconduct.

(b) Exceptions to the six-year limitation. Paragraph (a) of this section does not apply in the following instances:

(1) Subsequent use exception. The respondent continues or renews any incident of alleged research misconduct that occurred before the six-year limitation through the citation, republication or other use for the potential benefit of the respondent of the research record that is alleged to have been fabricated, falsified, or plagiarized.

(2) Health or safety of the public exception. If ORI or the institution, following consultation with ORI, determines that the alleged misconduct, if it occurred, would possibly have a substantial adverse effect on the health or safety of the public.

(3) “Grandfather” exception. If HHS or an institution received the allegation of research misconduct before the effective date of this part.

§ 93.106 Evidentiary standards.

The following evidentiary standards apply to findings made under this part.

(a) Standard of proof. An institutional or HHS finding of research misconduct must be proved by a preponderance of the evidence.

(b) Burden of proof. (1) The institution or HHS has the burden of proof for making a finding of research misconduct. The destruction, absence of, or respondent’s failure to provide research records adequately documenting the questioned research is evidence of research misconduct where the institution or HHS establishes by a preponderance of the evidence that the respondent intentionally, knowingly, or recklessly had research records and destroyed them, had the opportunity to maintain the records but did not do so, or maintained the records and failed to produce them in a timely manner and that the respondent’s conduct constitutes a significant departure from accepted practices of the relevant research community.

(2) The respondent has the burden of going forward with and the burden of proving, by a preponderance of the evidence, any and all affirmative defenses raised. In determining whether HHS or the institution has carried the burden of proof imposed by this part, the finder of fact shall give due consideration to admissible, credible evidence of honest error or difference of opinion presented by the respondent.

(3) The respondent has the burden of going forward with and proving by a preponderance of the evidence any mitigating factors that are relevant to a decision to impose administrative actions following a research misconduct proceeding.

§ 93.107 Rule of interpretation.

Any interpretation of this part must further the policy and purpose of the HHS and the Federal government to protect the health and safety of the public, to promote the integrity of research, and to conserve public funds.

§ 93.108 Confidentiality.

(a) Disclosure of the identity of respondents and complainants in research misconduct proceedings is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective and fair research misconduct proceeding, and as allowed by law. Provided, however, that:

(1) The institution must disclose the identity of respondents and complainants to ORI pursuant to an ORI review of research misconduct proceedings under § 93.403.

(2) Under § 93.517(g), HHS administrative hearings must be open to the public.

(b) Except as may otherwise be prescribed by applicable law, confidentiality must be maintained for any records or evidence from which research subjects might be identified. Disclosure is limited to those who have a need to know to carry out a research misconduct proceeding.
§ 93.109 Coordination with other agencies.
(a) When more than one agency of the Federal government has jurisdiction of the subject misconduct allegation, HHS will cooperate in designating a lead agency to coordinate the response of the agencies to the allegation. Where HHS is not the lead agency, it may, in consultation with the lead agency, take appropriate action to protect the health and safety of the public, promote the integrity of the PHS supported research and research process and conserve public funds.
(b) In cases involving more than one agency, HHS may refer to evidence or reports developed by that agency if HHS determines that the evidence or reports will assist in resolving HHS issues. In appropriate cases, HHS will seek to resolve allegations jointly with the other agency or agencies.

Subpart B—Definitions

§ 93.200 Administrative action.
Administrative action means—
(a) An HHS action in response to a research misconduct proceeding taken to protect the health and safety of the public, to promote the integrity of PHS supported biomedical or behavioral research, research training, or activities related to that research or research training and to conserve public funds; or
(b) An HHS action in response either to a breach of a material provision of a settlement agreement in a research misconduct proceeding or to a breach of any HHS debarment or suspension.

§ 93.201 Allegation.
Allegation means a disclosure of possible research misconduct through any means of communication. The disclosure may be by written or oral statement or other communication to an institutional or HHS official.

§ 93.202 Charge letter.
Charge letter means the written notice, as well as any amendments to the notice, that are sent to the respondent stating the findings of research misconduct and any HHS administrative actions. If the charge letter includes a debarment or suspension action, it may be issued jointly by the ORI and the debarring official.

§ 93.203 Complainant.
Complainant means a person who in good faith makes an allegation of research misconduct.

§ 93.204 Contract.
Contract means an acquisition instrument awarded under the HHS Federal Acquisition Regulation (FAR), 48 CFR Chapter 1, excluding any small purchases awarded pursuant to FAR Part 13.

§ 93.205 Debarment or suspension.
Debarment or suspension means the Government wide exclusion, whether temporary or for a set term, of a person from eligibility for Federal grants, contracts, and cooperative agreements under the HHS regulations at 45 CFR part 76 (nonprocurement) and 48 CFR subparts 9.4 and 309.4 (procurement).

§ 93.206 Debarring official.
Debarring official means an official authorized to impose debarment or suspension. The HHS debarring official is either—
(a) The Secretary; or
(b) An official designated by the Secretary.

§ 93.207 Departmental Appeals Board or DAB.
Departmental Appeals Board or DAB means, depending on the context—
(a) The organization, within the Office of the Secretary, established to conduct hearings and provide impartial review of disputed decisions made by HHS operating components; or
(b) An Administrative Law Judge (ALJ) at the DAB.

§ 93.208 Evidence.
Evidence means any document, tangible item, or testimony offered or obtained during a research misconduct proceeding that tends to prove or disprove the existence of an alleged fact.

§ 93.209 Funding component.
Funding component means any organizational unit of the PHS authorized to award grants, contracts, or cooperative agreements for any activity that involves the conduct of biomedical or behavioral research, research training or activities related to that research or research training, e.g., agencies, bureaus, centers, institutes, divisions, or offices and other awarding units within the PHS.

§ 93.210 Good faith.
Good faith as applied to a complainant or witness, means having a belief in the truth of one’s allegation or testimony that a reasonable person in the complainant’s or witness’s position could have based on the information known to the complainant or witness at the time. An allegation or cooperation with a research misconduct proceeding is not in good faith if made with knowing or reckless disregard for information that would negate the allegation or testimony. Good faith as applied to a committee member means cooperating with the research misconduct proceeding by carrying out the duties assigned impartially for the purpose of helping an institution meet its responsibilities under this part. A committee member does not act in good faith if his/her acts or omissions on the committee are dishonest or influenced by personal, professional, or financial conflicts of interest with those involved in the research misconduct proceeding.

§ 93.211 Hearing.
Hearing means that part of the research misconduct proceeding from the time a respondent files a request for an administrative hearing to contest ORI findings of research misconduct and HHS administrative actions until the time the ALJ issues a recommended decision.

§ 93.212 Inquiry.
Inquiry means preliminary information-gathering and preliminary fact-finding that meets the criteria and follows the procedures of §§ 93.307–93.309.

§ 93.213 Institution.
Institution means any individual or person that applies for or receives PHS support for any activity or program that involves the conduct of biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training. This includes, but is not limited to colleges and universities, PHS intramural biomedical or behavioral research laboratories, research and development centers, national user facilities, industrial laboratories or other research institutes, small research institutions, and independent researchers.

§ 93.214 Institutional member.
Institutional member or members means a person who is employed by, is an agent of, or is affiliated by contract or agreement with an institution. Institutional members may include, but are not limited to, officials, tenured and untenured faculty, teaching and support staff, researchers, research coordinators, clinical technicians, postdoctoral and other fellows, students, volunteers, agents, and contractors, subcontractors, and subawardees, and their employees.

§ 93.215 Investigation.
Investigation means the formal development of a factual record and the examination of that record leading to a decision not to make a finding of research misconduct or to a recommendation for a finding of research misconduct which may include
§ 93.216 Notice.

Notice means a written communication served in person, sent by mail or its equivalent to the last known street address, facsimile number or e-mail address of the addressee. Several sections of Subpart E of this part have special notice requirements.

§ 93.217 Office of Research Integrity or ORI.

Office of Research Integrity or ORI means the office to which the HHS Secretary has delegated responsibility for addressing research integrity and misconduct issues related to PHS supported activities.

§ 93.218 Person.

Person means any individual, corporation, partnership, institution, association, unit of government, or legal entity, however organized.

§ 93.219 Preponderance of the evidence.

Preponderance of the evidence means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

§ 93.220 Public Health Service or PHS.

Public Health Service or PHS means the unit within the Department of Health and Human Services that includes the Office of Public Health and Science and the following Operating Divisions: Agency for Healthcare Research and Quality, Agency for Toxic Substances and Disease Registry, Centers for Disease Control and Prevention, Food and Drug Administration, Health Resources and Services Administration, Indian Health Service, National Institutes of Health, and the Substance Abuse and Mental Health Services Administration, and the offices of the Regional Health Administrators.

§ 93.221 PHS support.

PHS support means PHS funding, or applications or proposals therefor, for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training, that may be provided through: Funding for PHS intramural research; PHS grants, cooperative agreements, or contracts or subgrants or subcontracts under those PHS funding instruments; or salary or other payments under PHS grants, cooperative agreements or contracts.

§ 93.222 Research.

Research means a systematic experiment, study, evaluation, demonstration or survey designed to develop or contribute to general knowledge (basic research) or specific knowledge (applied research) relating broadly to public health by establishing, discovering, developing, elucidating or confirming information about, or the underlying mechanism relating to, biological causes, functions or effects, diseases, treatments, or related matters to be studied.

§ 93.223 Research misconduct proceeding.

Research misconduct proceeding means any actions related to alleged research misconduct taken under this part, including but not limited to, allegation assessments, inquiries, investigations, ORI oversight reviews, hearings, and administrative appeals.

§ 93.224 Research record.

Research record means the record of data or results that embody the facts resulting from scientific inquiry, including but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, journal articles, and any documents and materials provided to HHS or an institutional official by a respondent in the course of the research misconduct proceeding.

§ 93.225 Respondent.

Respondent means the person against whom an allegation of research misconduct is directed or who is the subject of a research misconduct proceeding.

§ 93.226 Retaliation.

Retaliation for the purpose of this part means an adverse action taken against a complainant, witness, or committee member by an institution or one of its members in response to—

(a) A good faith allegation of research misconduct; or

(b) Good faith cooperation with a research misconduct proceeding.

§ 93.227 Secretary or HHS.

Secretary or HHS means the Secretary of HHS or any other officer or employee of the HHS to whom the Secretary delegates authority.

Subpart C—Responsibilities of Institutions

§ 93.300 General responsibilities for compliance.

Institutions under this part must—

(a) Have written policies and procedures for addressing allegations of research misconduct that meet the requirements of this part;

(b) Respond to each allegation of research misconduct for which the institution is responsible under this part in a thorough, competent, objective and fair manner, including precautions to ensure that individuals responsible for carrying out any part of the research misconduct proceeding do not have unresolved personal, professional or financial conflicts of interest with the complainant, respondent or witnesses;

(c) Foster a research environment that promotes the responsible conduct of research, research training, and activities related to that research or research training, discourages research misconduct, and deals promptly with allegations or evidence of possible research misconduct;

(d) Take all reasonable and practical steps to protect the positions and reputations of good faith complainants, witnesses and committee members and protect them from retaliation by respondents and other institutional members;

(e) Provide confidentiality to the extent required by § 93.108 to all respondents, complainants, and research subjects identifiable from research records or evidence;

(f) Take all reasonable and practical steps to ensure the cooperation of respondents and other institutional members with research misconduct proceedings, including, but not limited to, their providing information, research records, and evidence;

(g) Cooperate with HHS during any research misconduct proceeding or compliance review;

(h) Assist in administering and enforcing any HHS administrative actions imposed on its institutional members; and

(i) Have an active assurance of compliance.

§ 93.301 Institutional assurances.

(a) General policy. An institution with PHS supported biomedical or behavioral research, research training or activities related to that research or research training must provide PHS with an assurance of compliance with this part, satisfactory to the Secretary. PHS funding components may authorize
§93.302 Institutional compliance with assurance.
(a) Compliance with assurance. ORI considers an institution in compliance with its assurance if the institution—
(1) Establishes policies and procedures according to this part, keeps them in compliance with this part, and upon request, provides them to ORI, other HHS personnel, and members of the public;
(2) Takes all reasonable and practical steps to foster research integrity consistent with §93.300, including—
(i) Informs the institution’s research members participating in or otherwise involved with PHS supported biomedical or behavioral research, research training or activities related to that research or research training, including those applying for support from any PHS funding component, about its policies and procedures for responding to allegations of research misconduct, and the institution’s commitment to compliance with the policies and procedures; and
(ii) Complies with its policies and procedures and each specific provision of this part.
(b) Annual report. An institution must file an annual report with ORI which contains information specified by ORI on the institution’s compliance with this part.
(c) Additional information. Along with its assurance or annual report, an institution must send ORI such other information as ORI may request on the institution’s research misconduct proceedings covered by this part and the institution’s compliance with the requirements of this part.

§93.303 Assurances for small institutions.
(a) If an institution is too small to handle research misconduct proceedings, it may file a “Small Organization Statement” with ORI in place of the formal institutional policies and procedures required by §§93.301 and 93.304.
(b) By submitting a Small Organization Statement, the institution agrees to report all allegations of research misconduct to ORI. ORI or another appropriate HHS office will work with the institution to develop and implement a process for handling allegations of research misconduct consistent with this part.
(c) The Small Organization Statement does not relieve the institution from complying with any other provision of this part.

§93.304 Institutional policies and procedures.
Institutions seeking an approved assurance must have written policies and procedures for addressing research misconduct that include the following—
(a) Consistent with §93.108, protection of the confidentiality of respondents, complainants, and research subjects identifiable from research records or evidence;
(b) A thorough, competent, objective, and fair response to allegations of research misconduct consistent with and within the time limits of this part, including precautions to ensure that individuals responsible for carrying out any part of the research misconduct proceeding do not have unresolved personal, professional, or financial conflicts of interest with the complainant, respondent, or witnesses;
(c) Notice to the respondent, consistent with and within the time limits of this part;
(d) Written notice to ORI of any decision to open an investigation on or before the date on which the investigation begins;
(e) Opportunity for the respondent to provide written comments on the institution’s inquiry report;
(f) Opportunity for the respondent to provide written comments on the draft report of the investigation, and provisions for the institutional investigation committee to consider and address the comments before issuing the final report;
(g) Protocols for handling the research record and evidence, including the requirements of §93.305;
(h) Appropriate interim institutional actions to protect public health, Federal funds and equipment, and the integrity of the PHS supported research process;
(i) Notice to ORI under §93.318 and notice of any facts that may be relevant to protect public health, Federal funds and equipment, and the integrity of the PHS supported research process;
(j) Institutional actions in response to final findings of research misconduct;
(k) All reasonable and practical efforts, if requested and as appropriate, to protect or restore the reputation of persons alleged to have engaged in research misconduct but against whom no finding of research misconduct is made;
(l) All reasonable and practical efforts to protect or restore the position and reputation of any complainant, witness, or committee member and to counter potential or actual retaliation against these complainants, witnesses, and committee members; and
(m) Full and continuing cooperation with ORI during its oversight review under Subpart D of this part or any subsequent administrative hearings or appeals under Subpart E of this part. This includes providing all research records and evidence under the institution’s control, custody, or possession and access to all persons within its authority necessary to develop a complete record of relevant evidence.

§93.305 Responsibility for maintenance and custody of research records and evidence.
An institution, as the responsible legal entity for the PHS supported research, has a continuing obligation under this part to ensure that it maintains adequate records for a research misconduct proceeding. The institution must—
(a) Either before or when the institution notifies the respondent of the allegation, inquiry or investigation, promptly take all reasonable and practical steps to obtain custody of all the research records and evidence needed to conduct the research misconduct proceeding, inventory the records and evidence, and sequester them in a secure manner, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments;
(b) Where appropriate, give the respondent copies of, or reasonable, supervised access to the research records;
(c) Undertake all reasonable and practical efforts to take custody of additional research records or evidence that is discovered during the course of a research misconduct proceeding, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the
§ 93.306 Using a consortium or other person for research misconduct proceedings.

(a) An institution may use the services of a consortium or person that the institution reasonably determines to be qualified by practice and experience to conduct research misconduct proceedings.

(b) A consortium may be a group of institutions, professional organizations, or mixed groups which will conduct research misconduct proceedings for other institutions.

(c) A consortium or person acting on behalf of an institution must follow the requirements of this part in conducting research misconduct proceedings.

The Institutional Inquiry

§ 93.307 Institutional inquiry.

(a) Criteria warranting an inquiry. An inquiry is warranted if the allegation—

(1) Falls within the definition of research misconduct under this part;

(2) Is within § 93.102; and

(3) Is sufficiently credible and specific so that potential evidence of research misconduct may be identified.

(b) Notice to respondent and custody of research records. At the time of or before beginning an inquiry, an institution must make a good faith effort to notify in writing the presumed respondent, if any. If the inquiry subsequently identifies additional respondents, the institution must notify them. To the extent it has not already done so at the allegation stage, the institution must, on or before the date on which the respondent is notified of the inquiry begins, whichever is earlier, promptly take all reasonable and practical steps to obtain custody of all the research records and evidence needed to conduct the research misconduct proceeding, inventory the records and evidence, and sequester them in a secure manner, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments.

(c) Review of evidence. The purpose of an inquiry is to conduct an initial review of the evidence to determine whether to conduct an investigation. Therefore, an inquiry does not require a full review of all the evidence related to the allegation.

(d) Criteria warranting an investigation. An inquiry’s purpose is to decide if an allegation warrants an investigation. An investigation is warranted if there is—

(1) A reasonable basis for concluding that the allegation falls within the definition of research misconduct under this part and involves PHS supported biomedical or behavioral research, research training or activities related to that research or research training, as provided in § 93.102; and

(2) Preliminary information-gathering and preliminary fact-finding from the inquiry indicates that the allegation may have substance.

(e) Inquiry report. The institution must prepare a written report that meets the requirements of this section and § 93.309.

(f) Opportunity to comment. The institution must provide the respondent an opportunity to review and comment on the inquiry report and attach any comments received to the report.

(g) Time for completion. The institution must complete the inquiry within 60 calendar days of its initiation unless circumstances clearly warrant a longer period. If the inquiry takes longer than 60 days to complete, the inquiry record must include documentation of the reasons for exceeding the 60-day period.

§ 93.308 Notice of the results of the inquiry.

(a) Notice to respondent. The institution must notify the respondent whether the inquiry found that an investigation is warranted. The notice must include a copy of the inquiry report and include a copy of or refer to this part and the institution’s policies and procedures adopted under its assurance.

(b) Notice to complainants. The institution may notify the complainant who made the allegation whether the inquiry found that an investigation is warranted. The institution may provide relevant portions of the report to the complainant for comment.

§ 93.309 Reporting to ORI on the decision to initiate an investigation.

(a) Within 30 days of finding that an investigation is warranted, the institution must provide ORI with the written finding by the responsible institutional official and a copy of the inquiry report which includes the following information—

(1) The name and position of the respondent;

(2) A description of the allegations of research misconduct;

(3) The PHS support, including, for example, grant numbers, grant applications, contracts, and publications listing PHS support;

(4) The basis for recommending that the alleged actions warrant an investigation; and

(5) Any comments on the report by the respondent or the complainant.

(b) The institution must provide the following information to ORI on request—

(1) The institutional policies and procedures under which the inquiry was conducted;

(2) The research records and evidence reviewed, transcripts or recordings of any interviews, and copies of all relevant documents; and

(3) The charges for the investigation to consider.

(c) Documentation of decision not to investigate. Institutions must keep sufficiently detailed documentation of inquiries to permit a later assessment by ORI of the reasons why the institution decided not to conduct an investigation. Consistent with § 93.317, institutions must keep these records in a secure manner for at least 7 years after the termination of the inquiry, and upon request, provide them to ORI or other authorized HHS personnel.

(d) Notification of special circumstances. In accordance with § 93.318, institutions must notify ORI and other PHS agencies, as relevant, of any special circumstances that may exist.

The Institutional Investigation

§ 93.310 Institutional investigation.

Institutions conducting research misconduct investigations must:

(a) Time. Begin the investigation within 30 days after determining that an investigation is warranted.

(b) Notice to ORI. Notify the ORI Director of the decision to begin an investigation on or before the date the investigation begins and provide an inquiry report that meets the requirements of § 93.307 and § 93.309.

(c) Notice to the respondent. Notify the respondent in writing of the allegations within a reasonable amount of time after determining that an investigation is warranted, but before the investigation begins. The institution must give the respondent written notice of any new allegations of research misconduct within a reasonable amount of time of deciding to pursue allegations not addressed during the inquiry or in the initial notice of investigation.

(d) Custody of the records. To the extent they have not already done so at the allegation or inquiry stages, take all reasonable and practical steps to obtain custody of all the research records and
evidence needed to conduct the research misconduct proceeding, inventory the records and evidence, and sequester them in a secure manner, except that where the research records or evidence encompass scientific instruments shared by a number of users, custody may be limited to copies of the data or evidence on such instruments, so long as those copies are substantially equivalent to the evidentiary value of the instruments. Whenever possible, the institution must take custody of the records—

(1) Before or at the time the institution notifies the respondent; and
(2) Whenever additional items become known or relevant to the investigation.

(e) Documentation. Use diligent efforts to ensure that the investigation is thorough and sufficiently documented and includes examination of all research records and evidence relevant to reaching a decision on the merits of the allegations.

(f) Ensuring a fair investigation. Take reasonable steps to ensure an impartial and unbiased investigation to the maximum extent practicable, including participation of persons with appropriate scientific expertise who do not have unresolved personal, professional, or financial conflicts of interest with those involved with the inquiry or investigation.

(g) Interviews. Interview each respondent, complainant, and any other available person who has been reasonably identified as having information regarding any relevant aspects of the investigation, including witnesses identified by the respondent, and record or transcribe each interview, provide the recording or transcript to the interviewee for correction, and include the recording or transcript in the record of the investigation.

(h) Pursue leads. Pursue diligently all significant issues and leads discovered that are determined relevant to the investigation, including any evidence of additional instances of possible research misconduct, and continue the investigation to completion.

§93.311 Investigation time limits.

(a) Time limit for completing an investigation. An institution must complete all aspects of an investigation within 120 days of beginning it, including conducting the investigation, preparing the report of findings, providing the draft report for comment in accordance with §93.312, and sending the final report to ORI under §93.315.

(b) Extension of time limit. If unable to complete the investigation in 120 days, the institution must ask ORI for an extension in writing.

(c) Progress reports. If ORI grants an extension, it may direct the institution to file periodic progress reports.

§93.312 Opportunity to comment on the investigation report.

(a) The institution must give the respondent a copy of the draft investigation report and, concurrently, a copy of, or supervised access to, the evidence on which the report is based. The comments of the respondent on the draft report, if any, must be submitted within 30 days of the date on which the respondent received the draft investigation report.

(b) The institution may provide the complainant a copy of the draft investigation report or relevant portions of that report. The comments of the complainant, if any, must be submitted within 30 days of the date on which the complainant received the draft investigation report or relevant portions of it.

§93.313 Institutional investigation report.

The final institutional investigation report must be in writing and include:

(a) Allegations. Describe the nature of the allegations of research misconduct.

(b) PHS support. Describe and document the PHS support, including, for example, any grant numbers, grant applications, contracts, and publications listing PHS support.

(c) Institutional charge. Describe the specific allegations of research misconduct for consideration in the investigation.

(d) Policies and procedures. If not already provided to ORI with the inquiry report, include the institutional policies and procedures under which the investigation was conducted.

(e) Research records and evidence. Identify and summarize the research records and evidence reviewed, and identify any evidence taken into custody but not reviewed.

(f) Statement of findings. For each separate allegation of research misconduct identified during the investigation, provide a finding as to whether research misconduct did or did not occur, and if so—

(1) Identify whether the research misconduct was falsification, fabrication, or plagiarism, and if it was intentional, knowing, or in reckless disregard;

(2) Summarize the facts and the analysis which support the conclusion and consider the merits of any reasonable explanation by the respondent;

(3) Identify the specific PHS support; and

(4) Identify whether any publications need correction or retraction;

(5) Identify the person(s) responsible for the misconduct; and

(6) List any current support or known applications or proposals for support that the respondent has pending with non-PHS Federal agencies.

(g) Comments. Include and consider any comments made by the respondent and complainant on the draft investigation report.

(h) Maintain and provide records. Maintain and provide to ORI upon request all relevant research records and records of the institution’s research misconduct proceeding, including results of all interviews and the transcripts or recordings of such interviews.

§93.314 Institutional appeals.

(a) While not required by this part, if the institution’s procedures provide for an appeal by the respondent that could result in a reversal or modification of the findings of research misconduct in the investigation report, the institution must complete any such appeal within 120 days of its filing. Appeals from personnel or similar actions that would not result in a reversal or modification of the findings of research misconduct are excluded from the 120-day limit.

(b) If unable to complete any appeals within 120 days, the institution must ask ORI for an extension in writing and provide an explanation for the request.

(c) ORI may grant requests for extension for good cause. If ORI grants an extension, it may direct the institution to file periodic progress reports.

§93.315 Notice to ORI of institutional findings and actions.

The institution must give ORI the following:

(a) Investigation Report. Include a copy of the report, all attachments, and any appeals.

(b) Final institutional action. State whether the institution found research misconduct, and if so, who committed the misconduct.

(c) Findings. State whether the institution accepts the investigation’s findings.

(d) Institutional administrative actions. Describe any pending or completed administrative actions against the respondent.

§93.316 Completing the research misconduct process.

(a) ORI expects institutions to carry inquiries and investigations through to completion and to pursue diligently all significant issues. An institution must
notify ORI in advance if the institution plans to close a case at the inquiry, investigation, or appeal stage on the basis that the respondent has admitted guilt, a settlement with the respondent has been reached, or for any other reason, except the closing of a case at the inquiry stage on the basis that an investigation is not warranted or a finding of no misconduct at the investigation stage, which must be reported to ORI under §93.315.

(b) After consulting with the institution on its basis for closing a case under paragraph (a) of this section, ORI may conduct an oversight review of the institution’s handling of the case and take appropriate action including:

(1) Approving or conditionally approving closure of the case;

(2) Directing the institution to complete its process;

(3) Referring the matter for further investigation by HHS; or,

(4) Taking a compliance action.

Other Institutional Responsibilities

§93.317 Retention and custody of the research misconduct proceeding record.

(a) Definition of records of research misconduct proceedings. As used in this section, the term “records of research misconduct proceedings” includes:

(1) The records that the institution secures for the proceeding pursuant to §§93.305, 93.307(b) and 93.310(d), except to the extent the institution subsequently determines and documents that those records are not relevant to the proceeding or that the records duplicate other records that are being retained;

(2) The documentation of the determination of irrelevant or duplicate records; (3) The inquiry report and final documents (not drafts) produced in the course of preparing that report, including the documentation of any decision not to investigate as required by §93.309(d);

(4) The investigation report and all records (other than drafts of the report) in support of that report, including the recordings or transcriptions of each interview conducted pursuant to §93.310(g); and

(5) The complete record of any institutional appeal covered by §93.314.

(b) Maintenance of record. Unless custody has been transferred to HHS under paragraph (c) of this section, ORI has advised the institution in writing that it no longer needs to retain the records, an institution must maintain records of research misconduct proceedings in a secure manner for 7 years after completion of the proceeding or the completion of any PHS proceeding involving the research misconduct allegation under subparts D and E of this part, whichever is later.

(c) Provision for HHS custody. On request, institutions must transfer custody of or provide copies to HHS, of any institutional record relevant to a research misconduct allegation covered by this part, including the research records and evidence, to perform forensic or other analyses or as otherwise needed to conduct an HHS inquiry or investigation or for ORI to conduct its review or to present evidence in any proceeding under subparts D and E of this part.

§93.318 Notifying ORI of special circumstances.

At any time during a research misconduct proceeding, as defined in §93.223, an institution must notify ORI immediately if it has reason to believe that any of the following conditions exist:

(a) Health or safety of the public is at risk, including an immediate need to protect human or animal subjects.

(b) HHS resources or interests are threatened.

(c) Research activities should be suspended.

(d) There is reasonable indication of possible violations of civil or criminal law.

(e) Federal action is required to protect the interests of those involved in the research misconduct proceeding.

(f) The research institution believes the research misconduct proceeding may be made public prematurely so that HHS may take appropriate steps to safeguard evidence and protect the rights of those involved.

(g) The research community or public should be informed.

§93.319 Institutional standards.

(a) Institutions may have internal standards of conduct different from the HHS standards for research misconduct under this part. Therefore, an institution may find conduct to be actionable under its standards even if the action does not meet this part’s definition of research misconduct.

(b) An HHS finding or settlement does not affect institutional findings or administrative actions based on an institution’s internal standards of conduct.

Subpart D—Responsibilities of the U.S. Department of Health and Human Services

General Information

§93.400 General statement of ORI authority.

(a) ORI review. ORI may respond directly to any allegation of research misconduct at any time before, during, or after an institution’s response to the matter. The ORI response may include, but is not limited to—

(1) Conducting allegation assessments;

(2) Determining independently if jurisdiction exists under this part in any matter;

(3) Forwarding allegations of research misconduct to the appropriate institution or HHS component for inquiry or investigation;

(4) Recommending that HHS should perform an inquiry or investigation or issue findings and taking all appropriate actions in response to the inquiry, investigation, or findings;

(5) Notifying or requesting assistance and information from PHS funding components or other affected Federal and state offices and agencies or institutions;

(6) Reviewing an institution’s findings and process;

(7) Making a finding of research misconduct; and

(8) Proposing administrative actions to HHS.

(b) Requests for information. ORI may request clarification or additional information, documentation, research records, or evidence from an institution or its members or other persons or sources to carry out ORI’s review.

(c) HHS administrative actions. (1) In response to a research misconduct proceeding, ORI may propose administrative actions against any person to the HHS and, upon HHS approval and final action in accordance with this part, implement the actions.

(2) ORI may propose to the HHS debarring official that a person be suspended or debarred from receiving Federal funds and may propose to other appropriate PHS components the implementation of HHS administrative actions within the components’ authorities.

(d) ORI assistance to institutions. At any time, ORI may provide information, technical assistance, and procedural advice to institutional officials as needed regarding an institution’s participation in research misconduct proceedings.

(e) Review of institutional assurances. ORI may review institutional assurances...
and policies and procedures for
compliance with this part.

(f) Institutional compliance. ORI may
make findings and impose HHS
administrative actions related to an
institution's compliance with this part
and with its policies and procedures,
including an institution's participation in
research misconduct proceedings.

§93.401 Interaction with other offices and interim actions.

(a) ORI may notify and consult with
other offices at any time if it has reason
to believe that a research misconduct
proceeding may involve that office. If
ORI believes that a criminal or civil
fraud violation may have occurred, it
shall promptly refer the matter to the
Department of Justice (DOJ), the HHS
Inspector General (OIG), or other
appropriate investigative body. ORI may
provide expertise and assistance to the
DOJ, OIG, PHS offices, other Federal
offices, and state or local offices
involved in investigating or otherwise
pursuing research misconduct
allegations or related matters.

(b) ORI may notify affected PHS
offices and funding components at any
time to permit them to make appropriate
interim responses to protect the health
and safety of the public, to promote the
integrity of the PHS supported research
and research process, and to conserve
public funds.

(c) The information provided will not
be disclosed as part of the peer review
and advisory committee review
processes, but may be used by the
Secretary in making decisions about the
award or continuation of funding.

Research Misconduct Issues

§93.402 ORI allegation assessments.

(a) When ORI receives an allegation of
research misconduct directly or
becomes aware of an allegation or
apparent instance of research
misconduct, it may conduct an initial
assessment or refer the matter to the
relevant institution for an assessment,
inquiry, or other appropriate actions.

(b) If ORI conducts an assessment, it
considers whether the allegation of
research misconduct appears to fall
within the definition of research
misconduct, appears to involve PHS
supported biomedical or behavioral
research, research training or activities
related to that research or research
training, as provided in §93.102, and
whether it is sufficiently specific so that
potential evidence may be identified
and sufficiently substantive to warrant
an inquiry. ORI may review all readily
accessible, relevant information related
to the allegation.

(c) If ORI decides that an inquiry is
warranted, it forwards the matter to the
appropriate institution or HHS
component.

(d) If ORI decides that an inquiry is
not warranted it will close the case and
forward the allegation in accordance
with paragraph(e) of this section.

(e) ORI may forward allegations that
do not fall within the jurisdiction of this
part to the appropriate HHS component,
Federal or State agency, institution, or
other appropriate entity.

§93.403 ORI review of research
misconduct proceedings.

ORI may conduct reviews of research
misconduct proceedings. In conducting
its review, ORI may—

(a) Determine whether there is HHS
jurisdiction under this part;

(b) Consider any reports, institutional
findings, research records, and
evidence;

(c) Determine if the institution
conducted the proceedings in a timely
and fair manner in accordance with this
part with sufficient thoroughness,
objectivity, and competence to support
the conclusions;

(d) Obtain additional information or
materials from the institution, the
respondent, complainants, or other
persons or sources;

(e) Conduct additional analyses and
develop evidence;

(f) Decide whether research
misconduct occurred, and if so who
committed it;

(g) Make appropriate research
misconduct findings and propose HHS
administrative actions; and

(h) Take any other actions necessary
to complete HHS’ review.

§93.404 Findings of research misconduct
and proposed administrative actions.

After completing its review, ORI
either closes the case without a finding of
research misconduct or—

(a) Makes findings of research
misconduct and proposes and obtains
HHS approval of administrative actions
based on the record of the research
misconduct proceedings and any other
information obtained by ORI during its
review; or

(b) Recommends that HHS seek to
settle the case.

§93.405 Notifying the respondent of
findings of research misconduct and HHS
administrative actions.

(a) When the ORI makes a finding of
research misconduct or seeks to impose
or enforce HHS administrative actions,
other than debarment or suspension, it
notifies the respondent in a charge
letter. In cases involving a debarment or
suspension action, the HHS debarring
official issues a notice of proposed
debarment or suspension to the
respondent as part of the charge letter.
The charge letter includes the ORI
findings of research misconduct and the
basis for them and any HHS
administrative actions. The letter also
advises the respondent of the
opportunity to contest the findings and
administrative actions under Subpart E
of this part.

(b) The ORI sends the charge letter by
certified mail or a private delivery
service to the last known address of the
respondent or the last known principal
place of business of the respondent’s
attorney.

§93.406 Final HHS actions.

Unless the respondent contests the
charge letter within the 30-day period
prescribed in §93.501, the ORI finding of
research misconduct is the final HHS
action on the research misconduct
issues and the HHS administrative
actions become final and will be
implemented, except that the debarring
official’s decision is the final HHS
action on any debarment or suspension
actions.

§93.407 HHS administrative actions.

(a) In response to a research
misconduct proceeding, HHS may
impose HHS administrative actions that
include but are not limited to:

(1) Clarification, correction, or
retraction of the research record.

(2) Letters of reprimand.

(3) Imposition of special certification
or assurance requirements to ensure
compliance with applicable regulations
or terms of PHS grants, contracts, or
cooperative agreements.

(4) Suspension or termination of a
PHS grant, contract, or cooperative
greement.

(5) Restriction on specific activities or
expenditures under an active PHS grant,
contract, or cooperative agreement.

(6) Special review of all requests for
PHS funding.

(7) Imposition of supervision
requirements on a PHS grant, contract,
or cooperative agreement.

(8) Certification of attribution or
authenticity in all requests for support
and reports to the PHS.

(9) No participation in any advisory
capacity to the PHS.

(10) Adverse personnel action if the
respondent is a Federal employee, in
compliance with relevant Federal
personnel policies and laws.

(11) Suspension or debarment under
45 CFR Part 76, 48 CFR Subparts 9.4
and 309.4, or both.

(b) In connection with findings of
research misconduct, HHS also may
seek to recover PHS funds spent in support of the activities that involved research misconduct.

(c) Any authorized HHS component may impose, administer, or enforce HHS administrative actions separately or in coordination with other HHS components, including, but not limited to ORI, the Office of Inspector General, the PHS funding component, and the debarring official.

§ 93.408 Mitigating and aggravating factors in HHS administrative actions.

The purpose of HHS administrative actions is remedial. The appropriate administrative action is commensurate with the seriousness of the misconduct, and the need to protect the health and safety of the public, promote the integrity of the PHS supported research and research process, and conserve public funds. HHS considers aggravating and mitigating factors in determining appropriate HHS administrative actions and their terms. HHS may consider other factors as appropriate in each case. The existence or nonexistence of any factor is not determinative:

(a) Knowing, intentional, or reckless. Were the respondent’s actions knowing or intentional or was the conduct reckless?

(b) Pattern. Was the research misconduct an isolated event or part of a continuing or prior pattern of dishonest conduct?

(c) Impact. Did the misconduct have significant impact on the proposed or reported research record, research subjects, other researchers, institutions, or the public health or welfare?

(d) Acceptance of responsibility. Has the respondent accepted responsibility for the misconduct by—

(1) Admitting the conduct;
(2) Cooperating with the research misconduct proceedings;
(3) Demonstrating remorse and awareness of the significance and seriousness of the research misconduct; and

(4) Taking steps to correct or prevent the recurrence of the research misconduct.

(e) Failure to accept responsibility. Does the respondent blame others rather than accepting responsibility for the actions?

(f) Retaliation. Did the respondent retaliate against complainants, witnesses, committee members, or other persons?

(g) Present responsibility. Is the respondent presently responsible to conduct PHS supported research?

(h) Other factors. Other factors appropriate to the circumstances of a particular case.

§ 93.409 Settlement of research misconduct proceedings.

(a) HHS may settle a research misconduct proceeding at any time it concludes that settlement is in the best interests of the Federal government and the public health or welfare.

(b) Settlement agreements are publicly available, regardless of whether the ORI made a finding of research misconduct.

§ 93.410 Final HHS action with no settlement or finding of research misconduct.

When the final HHS action does not result in a settlement or finding of research misconduct, ORI may:

(a) Provide written notice to the respondent, the relevant institution, the complainant, and HHS officials.

(b) Take any other actions authorized by law.

§ 93.411 Final HHS action with settlement or finding of research misconduct.

When a final HHS action results in a settlement or research misconduct finding, ORI may:

(a) Provide final notification of any research misconduct findings and HHS administrative actions to the respondent, the relevant institution, the complainant, and HHS officials. The debarring official may provide a separate notice of final HHS action on any debarment or suspension actions.

(b) Identify publications which require correction or retraction and prepare and send a notice to the relevant journal.

(c) Publish notice of the research misconduct findings.

(d) Notify the respondent’s current employer.

(e) Take any other actions authorized by law.

Institutional Compliance Issues

§ 93.412 Making decisions on institutional noncompliance.

(a) Institutions must foster a research environment that discourages misconduct in all research and that deals forthrightly with possible misconduct associated with PHS supported research.

(b) ORI may decide that an institution is not compliant with this part if ORI concludes that the institution shows a disregard for, or inability or unwillingness to implement and follow the requirements of this part and its assurance. In making this decision, ORI may consider, but is not limited to the following factors—

(1) Failure to establish and comply with policies and procedures under this part;

(2) Failure to respond appropriately when allegations of research misconduct arise;

(3) Failure to report to ORI all investigations and findings of research misconduct under this part;

(4) Failure to cooperate with ORI’s review of research misconduct proceedings; or

(5) Other actions or omissions that have a material, adverse effect on reporting and responding to allegations of research misconduct.

§ 93.413 HHS compliance actions.

(a) An institution’s failure to comply with its assurance and the requirements of this part may result in enforcement action against the institution.

(b) ORI may address institutional deficiencies through technical assistance if the deficiencies do not substantially affect compliance with this part.

(c) If an institution fails to comply with its assurance and the requirements of this part, HHS may take some or all of the following compliance actions:

(1) Issue a letter of reprimand.

(2) Direct that research misconduct proceedings be handled by HHS.

(3) Place the institution on special review status.

(4) Place information on the institutional noncompliance on the ORI Web site.

(5) Require the institution to take corrective actions.

(6) Require the institution to adopt and implement an institutional integrity agreement.

(7) Recommend that HHS debar or suspend the entity.

(8) Any other action appropriate to the circumstances.

(d) If the institution’s actions constitute a substantial or recurrent failure to comply with this part, ORI may also revoke the institution’s assurance under §§ 93.301 or 93.303.

(e) ORI may make public any findings of institutional noncompliance and HHS compliance actions.

Disclosure of Information

§ 93.414 Notice.

(a) ORI may disclose information to other persons for the purpose of providing or obtaining information about research misconduct as permitted under the Privacy Act, 5 U.S.C. 552a.

(b) ORI may publish a notice of final agency findings of research misconduct, settlements, and HHS administrative actions and release and withhold information as permitted by the Privacy Act and the Freedom of Information Act, 5 U.S.C. 552.
Subpart E—Opportunity To Contest ORI Findings of Research Misconduct and HHS Administrative Actions

General Information

§ 93.500 General policy.
(a) This subpart provides a respondent an opportunity to contest ORI findings of research misconduct and HHS administrative actions, including debarment or suspension, arising under 42 U.S.C. 289b in connection with PHS supported biomedical and behavioral research, research training, or activities related to that research or research training.
(b) A respondent has an opportunity to contest ORI research misconduct findings and HHS administrative actions under this part, including debarment or suspension, by requesting an administrative hearing before an Administrative Law Judge (ALJ) affiliated with the HHS DAB, when—
(1) ORI has made a finding of research misconduct against a respondent; and
(2) The respondent has been notified of those findings and any proposed HHS administrative actions, including debarment or suspension, in accordance with this part.
(c) The ALJ’s ruling on the merits of the ORI research misconduct findings and the HHS administrative actions is subject to review by the Assistant Secretary for Health in accordance with § 93.523. The decision made under that section is the final HHS action, unless that decision results in a recommendation for debarment or suspension. In that case, the decision under § 93.523 shall constitute findings of fact to the debarring official in accordance with 45 CFR 76.845(c).
(d) Where a proposed debarment or suspension action is based upon an ORI finding of research misconduct, the procedures in this part provide the notification, opportunity to contest, and fact-finding required under the HHS debarment and suspension regulations at 45 CFR part 76, subparts H and G, respectively, and 48 CFR Subparts 9.4 and 309.4.

§ 93.501 Opportunity to contest findings of research misconduct and administrative actions.
(a) Opportunity to contest. A respondent may contest ORI findings of research misconduct and HHS administrative actions, including any debarment or suspension action, by requesting a hearing within 30 days of receipt of the charge letter or other written notice provided under § 93.405.
(b) Form of a request for hearing. The respondent’s request for a hearing must be—
(1) In writing;
(2) Signed by the respondent or by the respondent’s attorney; and
(3) Sent by certified mail, or other equivalent (i.e., with a verified method of delivery), to the DAB Chair and ORI.
(c) Contents of a request for hearing. The request for a hearing must—
(1) Admit or deny each finding of research misconduct and each factual assertion made in support of the finding;
(2) Accept or challenge each proposed HHS administrative action;
(3) Provide detailed, substantive reasons for each denial or challenge;
(4) Identify any legal issues or defenses that the respondent intends to raise during the proceeding; and
(5) Identify any mitigating factors that the respondent intends to prove.
(d) Extension for good cause to supplement the hearing request. (1) After receiving notification of the appointment of the ALJ, the respondent has 10 days to submit a written request to the ALJ for supplementation of the hearing request to comply fully with the requirements of paragraph (c) of this section. The written request must show good cause in accordance with paragraph (d)(2) of this section and set forth the proposed supplementation of the hearing request. The ALJ may permit the proposed supplementation of the hearing request in whole or in part upon a finding of good cause.
(2) Good cause means circumstances beyond the control of the respondent or respondent’s representative and not attributable to neglect or administrative inadequacy.

Hearing Process

§ 93.502 Appointment of the Administrative Law Judge and scientific expert.
(a) Within 30 days of receiving a request for a hearing, the DAB Chair, in consultation with the Chief Administrative Law Judge, must designate an Administrative Law Judge (ALJ) to determine whether the hearing request should be granted and, if the hearing request is granted, to make recommended findings in the case after a hearing or review of the administrative record in accordance with this part.
(b) The ALJ may retain one or more persons with appropriate scientific or technical expertise to assist the ALJ in evaluating scientific or technical issues related to the findings of research misconduct.
(1) On the ALJ’s or a party’s motion to appoint an expert, the ALJ must give the parties an opportunity to submit nominations. If such a motion is made by a party, the ALJ must appoint an expert, either:
(i) The expert, if any, who is agreed upon by both parties and found to be qualified by the ALJ; or,
(ii) If the parties cannot agree upon an expert, the expert chosen by the ALJ.
(2) The ALJ may seek advice from the expert(s) at any time during the discovery and hearing phases of the proceeding. The expert(s) shall provide advice to the ALJ in the form of a written report or reports that will be served upon the parties within 10 days of submission to the ALJ. That report must contain a statement of the expert’s background and qualifications. Any comment on or response to a report by a party, which may include comments on the expert’s qualifications, must be submitted to the ALJ in accordance with § 93.510(c). The written reports and any comment on, or response to them are part of the record. Expert witnesses of the parties may testify on the reports and any comments or responses at the hearing, unless the ALJ determines such testimony to be inadmissible in accordance with § 93.519, or that such testimony would unduly delay the proceeding.
(c) No ALJ, or person hired or appointed to assist the ALJ, may serve in any proceeding under this subpart if he or she has any real or apparent conflict of interest, bias, or prejudice that might reasonably impair his or her objectivity in the proceeding.
(d) Any party to the proceeding may request the ALJ or scientific expert to withdraw from the proceeding because of a real or apparent conflict of interest, bias, or prejudice under paragraph (c) of this section. The motion to disqualify must be timely and state with particularity the grounds for disqualification. The ALJ may rule upon the motion or certify it to the Chief ALJ for decision. If the ALJ rules upon the motion, either party may appeal the decision to the Chief ALJ.
(e) An ALJ must withdraw from any proceeding for any reason found by the ALJ or Chief ALJ to be disqualifying.

§ 93.503 Grounds for granting a hearing request.
(a) The ALJ must grant a respondent’s hearing request if the ALJ determines there is a genuine dispute over facts material to the findings of research misconduct or proposed administrative actions, including any debarment or suspension action. The respondent’s general denial or assertion of error for each finding of research misconduct, and any basis for the finding, or for the proposed HHS administrative actions in
the charge letter, is not sufficient to establish a genuine dispute.

(b) The hearing request must specifically deny each finding of research misconduct in the charge letter, each basis for the finding and each HHS administrative action in the charge letter, or it is considered an admission by the respondent. If the hearing request does not specifically dispute the HHS administrative actions, including any debarment or suspension actions, they are considered accepted by the respondent.

c) If the respondent does not request a hearing within the 30-day time period prescribed in §93.501(a), the finding(s) and any administrative action(s), other than debarment or suspension actions, become final agency actions at the expiration of the 30-day period. Where there is a proposal for debarment or suspension, after the expiration of the 30-day time period the official record is closed and forwarded to the debarring official for a final decision.

d) If the ALJ grants the hearing request, the respondent may waive the opportunity for any in-person proceeding, and the ALJ may review and decide the case on the basis of the administrative record. The ALJ may grant a respondent’s request that waiver of the in-person proceeding be conditioned upon the opportunity for respondent to file additional pleadings and documentation. ORI may also supplement the administrative record through pleadings, documents, in-person or telephonic testimony, and oral presentations.

§93.504 Grounds for dismissal of a hearing request.

(a) The ALJ must dismiss a hearing request if the respondent—

(1) Does not file the request within 30 days after receiving the charge letter;
(2) Does not raise a genuine dispute over facts or law material to the findings of research misconduct and any administrative actions, including debarment and suspension actions, in the hearing request or in any extension to supplement granted by the ALJ under §93.501(d);
(3) Does not raise any issue which may properly be addressed in a hearing;
(4) Withdraws or abandons the hearing request or;

(b) The ALJ may dismiss a hearing request if the respondent fails to provide ORI with notice in the form and manner required by §93.501.

§93.505 Rights of the parties.

(a) The parties to the hearing are the respondent and ORI. The investigating institution is not a party to the case, unless it is a respondent.

(b) Except as otherwise limited by this subpart, the parties may—

(1) Be accompanied, represented, and advised by an attorney;
(2) Participate in any case-related conference held by the ALJ;
(3) Conduct discovery of documents and other tangible items;
(4) Agree to stipulations of fact or law that must be made part of the record;
(5) File motions in writing before the ALJ;
(6) Present evidence relevant to the issues at the hearing;
(7) Present and cross-examine witnesses;
(8) Present oral arguments;
(9) Submit written post-hearing briefs, proposed findings of fact and conclusions of law, and reply briefs within reasonable time frames agreed upon by the parties or established by the ALJ as provided in §93.522; and
(10) Submit materials to the ALJ and other parties under seal, or in redacted form, when necessary, to protect the confidentiality of any information contained in them consistent with this part, the Privacy Act, the Freedom of Information Act, or other Federal law or regulation.

§93.506 Authority of the Administrative Law Judge.

(a) The ALJ assigned to the case must conduct a fair and impartial hearing, avoid unnecessary delay, maintain order, and assure that a complete and accurate record of the proceeding is properly made. The ALJ is bound by all Federal statutes and regulations, Secretarial delegations of authority, and applicable HHS policies and may not refuse to follow them or find them invalid, as provided in paragraph (c)(4) of this section. The ALJ has the authorities set forth in this part.

(b) Subject to review as provided elsewhere in this subpart, the ALJ may—

(1) Set and change the date, time, schedule, and place of the hearing upon reasonable notice to the parties;
(2) Conduct any conference or oral proceeding in the charge letter, upon request if the respondent

§93.507 Ex parte communications.

(a) No party, attorney, or other party representative may communicate ex parte with the ALJ on any matter at issue in a case, unless both parties have notice and an opportunity to participate in the communication. However, a party, attorney, or other party representative may communicate with DAB staff about administrative or procedural matters.

(b) If an ex parte communication occurs, the ALJ will disclose it to the other party and make it part of the record after the other party has an opportunity to comment.

(c) The provisions of this section do not apply to communications between an employee or contractor of the DAB and the ALJ.

§93.508 Filing, forms, and service.

(a) Filing. (1) Unless the ALJ provides otherwise, all submissions required or authorized to be filed in the proceeding must be filed with the ALJ.
93.405. Service of documents.

(a) The ALJ must schedule an initial prehearing conference within 30 days of the filing of the request for hearing. The conference must be fair, just, and prompt.

(b) All motions must be in writing and provided to the other party.

(c) A party filing a motion for a hearing must provide the legal authority relied upon, the nature of the relief requested, and the fair, just, and prompt disposition of the motion.

(d) Except for the respondent's request for a hearing, the ALJ may modify the time for the filing of any document or paper required or authorized under the rules in this part to be filed for good cause shown. When time permits, notice of a party's request for extension of the time and an opportunity to respond must be provided to the other party.

93.510 Filing motions.

(a) Parties must file all motions and requests for an order or ruling with the ALJ, serve them on the other party, state the nature of the relief requested, provide the legal authority relied upon, and state the facts alleged.

(b) All motions must be in writing except for those made during a prehearing conference or at the hearing.

(c) Within 10 days after being served with a motion, or other time as set by the ALJ, a party may file a response to the motion. The moving party may not file a reply to the responsive pleading unless authorized by the ALJ.

(d) The ALJ may not grant a motion before the time for filing a response has expired, except with the parties' consent or after a hearing on the motion. However, the ALJ may overrule or deny any motion without awaiting a response.

(e) The ALJ must make a reasonable effort to dispose of all motions promptly, and, whenever possible, dispose of all outstanding motions before the hearing.

93.511 Prehearing conferences.

(a) The ALJ must schedule an initial prehearing conference with the parties within 30 days of the DAB Chair's assignment of the case.

(b) The ALJ may use the initial prehearing conference to discuss—

(1) Identification and simplification of the issues, specification of disputes of fact and their materiality to the ORI; findings of research misconduct and any HHS administrative actions; and amendments to the pleadings, including any need for a more definite statement;

(2) Stipulations and admissions of fact including the contents, relevancy, and authenticity of documents;

(3) Respondent's waiver of an administrative hearing, if any, and submission of the case on the basis of the administrative record as provided in § 93.503(d);

(4) Identification of legal issues and any need for briefing before the hearing;

(5) Identification of evidence, pleadings, and other materials, if any, that the parties should exchange before the hearing;

(6) Identification of the parties' witnesses, the general nature of their testimony, and the limitation on the number of witnesses and the scope of their testimony;

(7) Scheduling dates such as the filing of briefs on legal issues identified in the charge letter or the respondent's request for hearing, the exchange of witness lists, witness statements, proposed exhibits, requests for the production of documents, and objections to proposed witnesses and documents;

(8) Scheduling the time, place, and anticipated length of the hearing; and

(9) Other matters that may encourage the fair, just, and prompt disposition of the proceedings.

(c) The ALJ may schedule additional prehearing conferences as appropriate, upon reasonable notice to or request of the parties.

(d) All prehearing conferences will be audio-taped with copies provided to the parties upon request.

(e) Whenever possible, the ALJ must memorialize in writing any oral rulings within 10 days after the prehearing conference.

(f) By 15 days before the scheduled hearing date, the ALJ must hold a final prehearing conference to resolve to the maximum extent possible all outstanding issues about evidence, witnesses, stipulations, motions, and all other matters that may encourage the fair, just, and prompt disposition of the proceedings.

93.512 Discovery.

(a) Request to provide documents. A party may only request another party to produce documents or other tangible items for inspection and copying that are relevant and material to the issues identified in the charge letter and in the respondent's request for hearing.

(b) Meaning of documents. For purposes of this subpart, the term documents includes information, reports, answers, records, accounts, papers, tangible items, and other data and documentary evidence. This subpart does not require the creation of any document. However, requested data
stored in an electronic data storage system must be produced in a form reasonably accessible to the requesting party.

(c) Nondisclosable items. This section does not authorize the disclosure of—

(1) Interview reports or statements obtained by any party, or on behalf of any party, of persons whom the party will not call as witness in its case-in-chief;

(2) Analyses and summaries prepared in conjunction with the inquiry, investigation, ORI oversight review, or litigation of the case; or

(3) Any privileged documents, including but not limited to those protected by the attorney-client privilege, attorney-work product doctrine, or Federal law or regulation.

(d) Responses to a discovery request. Within 30 days of receiving a request for the production of documents, a party must either fully respond to the request, submit a written objection to the discovery request, or seek a protective order from the ALJ. If a party objects to a request for the production of documents, the party must identify each document or item subject to the scope of the request and state the basis of the objection for each document, or any part that the party does not produce.

(1) Within 30 days of receiving any objections, the party seeking production may file a motion to compel the production of the requested documents.

(2) The ALJ may order a party to produce the requested documents for in camera inspection to evaluate the merits of a motion to compel or for a protective order.

(3) The ALJ must compel the production of a requested document and deny a motion for a protective order, unless the requested document is—

(i) Not relevant or material to the issues identified in the charge letter or the respondent’s request for hearing;

(ii) Unduly costly or burdensome to produce;

(iii) Likely to unduly delay the proceeding or substantially prejudice a party;

(iv) Privileged, including but not limited to documents protected by the attorney-client privilege, attorney-work product doctrine, or Federal law or regulation; or

(v) Collateral to issues to be decided at the hearing.

(4) If any part of a document is protected from disclosure under paragraph (d)(3) of this section, the ALJ must redact the protected portion of a document before giving it to the requesting party.

(5) The party seeking discovery has the burden of showing that the ALJ should allow it.

(e) Refusal to produce items. If a party refuses to provide requested documents when ordered by the ALJ, the ALJ may take corrective action, including but not limited to, ordering the noncompliant party to submit written answers under oath to written interrogatories posed by the other party or taking any of the actions at §93.515.

§93.513 Submission of witness lists, witness statements, and exhibits.

(a) By 60 days before the scheduled hearing date, each party must give the ALJ a list of witnesses to be offered during the hearing and a statement describing the substance of their proposed testimony, copies of any prior written statements or transcribed testimony of proposed witnesses, a written report of each expert witness to be called to testify that meets the requirements of Federal Rule of Civil Procedure 26(a)(2)(B), and copies of proposed hearing exhibits, including copies of any written statements that a party intends to offer instead of live direct testimony. If there are no prior written statements or transcribed testimony of a proffered witness, the party must submit a detailed factual affidavit of the proposed testimony.

(b) A party may supplement its submission under paragraph (a) of this section until 30 days before the scheduled hearing date if the ALJ determines:

(1) There are extraordinary circumstances; and

(2) There is no substantial prejudice to the objecting party.

(c) The parties must have an opportunity to object to the admission of evidence submitted under paragraph (a) of this section under a schedule set by the ALJ. However, the parties must file all objections before the final prehearing conference.

(d) If a party tries to introduce evidence after the deadlines in paragraph (a) of this section, the ALJ must exclude the offered evidence from the party’s case-in-chief unless the conditions of paragraph (b) of this section are met. If the ALJ admits evidence under paragraph (b) of this section, the objecting party may file a motion to postpone all or part of the hearing to allow sufficient time to prepare and respond to the evidence. The ALJ may not unreasonably deny that motion.

(e) If a party fails to object within the time set by the ALJ and before the final prehearing conference, evidence exchanged under paragraph (a) of this section is considered authentic, relevant and material for the purpose of admissibility at the hearing.

§93.514 Amendment to the charge letter.

(a) The ORI may amend the findings of research misconduct up to 30 days before the scheduled hearing.

(b) The ALJ may not unreasonably deny a respondent’s motion to postpone all or part of the hearing to allow sufficient time to prepare and respond to the amended findings.

§93.515 Actions for violating an order or for disruptive conduct.

(a) The ALJ may take action against any party in the proceeding for violating an order or procedure or for other conduct that interferes with the prompt, orderly, or fair conduct of the hearing. Any action imposed upon a party must reasonably relate to the severity and nature of the violation or disruptive conduct.

(b) The actions may include—

(1) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;

(2) Staying proceedings, in whole or in part;

(3) Staying the proceedings;

(4) Entering a decision by default;

(5) Refusing to consider any motion or other action not timely filed; or

(6) Drawing the inference that spoliated evidence was unfavorable to the party responsible for its spoliation.

§93.516 Standard and burden of proof.

(a) Standard of proof. The standard of proof is the preponderance of the evidence.

(b) Burden of proof. (1) ORI bears the burden of proving the findings of research misconduct. The destruction, absence of, or respondent’s failure to provide research records adequately documenting the questioned research is evidence of research misconduct where ORI establishes by a preponderance of the evidence that the respondent intentionally, knowingly, or recklessly had research records and destroyed them, had the opportunity to maintain the records but did not do so, or maintained the records and failed to produce them in a timely manner and the respondent’s conduct constitutes a significant departure from accepted practices of the relevant research community.

(2) The respondent has the burden of going forward with and the burden of proving, by a preponderance of the evidence, any and all affirmative defenses raised. In determining whether ORI has carried the burden of proof
imposed by this part, the ALJ shall give due consideration to admissible, credible evidence of honest error or difference of opinion presented by the respondent.

(3) ORI bears the burden of proving that the proposed HHS administrative actions are reasonable under the circumstances of the case. The respondent has the burden of going forward with and by proving by a preponderance of the evidence any mitigating factors that are relevant to a decision to impose HHS administrative actions following a research misconduct proceeding.

§ 93.517 The hearing.

(a) The ALJ will conduct an in-person hearing to decide if the respondent committed research misconduct and if the HHS administrative actions, including any debarment or suspension actions, are appropriate.

(b) The ALJ provides an independent de novo review of the ORI findings of research misconduct and the proposed HHS administrative actions. The ALJ does not review the institution’s procedures or misconduct findings or ORI’s research misconduct proceedings.

(c) A hearing under this subpart is not limited to specific findings and evidence set forth in the charge letter or the respondent’s request for hearing. Additional evidence and information may be offered by either party during its case-in-chief unless the offered evidence is—

(1) Privileged, including but not limited to those protected by the attorney-client privilege, attorney-work product doctrine, or Federal law or regulation.

(2) Otherwise inadmissible under §§ 93.515 or 93.519.

(3) Not offered within the times or terms of §§ 93.512 and 93.513.

(d) ORI proceeds first in its presentation of evidence at the hearing.

(e) After both parties have presented their cases-in-chief, the parties may offer rebuttal evidence even if not exchanged earlier under §§ 93.512 and 93.513.

(f) Except as provided in § 93.518(c), the parties may appear at the hearing in person or by an attorney of record in the proceeding.

(g) The hearing must be open to the public, unless the ALJ orders otherwise for good cause shown. However, even if the hearing is closed to the public, the ALJ may not exclude a party or party representative, persons whose presence a party shows to be essential to the presentation of its case, or expert witnesses.

§ 93.518 Witnesses.

(a) Except as provided in paragraph (b) of this section, witnesses must give testimony at the hearing under oath or affirmation.

(b) The ALJ may admit written testimony if the witness is available for cross-examination, including prior sworn testimony of witnesses that has been subject to cross-examination. These written statements must be provided to all other parties under § 93.513.

(c) The parties may conduct direct witness examination and cross-examination in person, by telephone, or by audio-visual communication as permitted by the ALJ. However, a respondent must always appear in person to present testimony and for cross-examination.

(d) The ALJ may exercise reasonable control over the mode and order of questioning witnesses and presenting evidence to—

(1) Make the witness questioning and presentation relevant to deciding the truth of the matter; and

(2) Avoid undue repetition or needless consumption of time.

(e) The ALJ must permit the parties to conduct cross-examination of witnesses.

(f) Upon request of a party, the ALJ may exclude a witness from the hearing before the witness’ own testimony. However, the ALJ may not exclude—

(1) A party or party representative;

(2) Persons whose presence is shown by a party to be essential to the presentation of its case; or

(3) Expert witnesses.

§ 93.519 Admissibility of evidence.

(a) The ALJ decides the admissibility of evidence offered at the hearing.

(b) Except as provided in this part, the ALJ is not bound by the Federal Rules of Evidence (FRE). However, the ALJ may apply the FRE where appropriate (e.g., to exclude unreliable evidence).

(c) The ALJ must admit evidence unless it is clearly irrelevant, immaterial, or unduly repetitious. However, the ALJ may exclude relevant and material evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence under FRE 401–403.

(d) The ALJ must exclude relevant and material evidence if it is privileged, including but not limited to evidence protected by the attorney-client privilege, the attorney-work product doctrine, or Federal law or regulation.

(e) The ALJ may take judicial notice of matters upon the ALJ’s own initiative or upon motion by a party as permitted under FRE 201 (Judicial Notice of Adjudicative Facts).

(1) The ALJ may take judicial notice of any other matter of technical, scientific, or commercial fact of established character.

(2) The ALJ must give the parties adequate notice of matters subject to judicial notice and adequate opportunity to show that the ALJ erroneously noticed the matters.

(f) Evidence of crimes, wrongs, or acts other than those at issue in the hearing is admissible only as permitted under FRE 404(b) (Character Evidence not Admissible to Prove Conduct; Exceptions, Other Crimes).

(g) Methods of proving character are admissible only as permitted under FRE 405 (Methods of Proving Character).

(h) Evidence related to the character and conduct of witnesses is admissible only as permitted under FRE Rule 608 (Evidence of Character and Conduct of Witness).

(i) Evidence about offers of compromise or settlement made in this action is inadmissible as provided in FRE 408 (Compromise and Offers to Compromise).

(j) The ALJ must admit relevant and material hearsay evidence, unless an objecting party shows that the offered hearsay evidence is not reliable.

(k) The parties may introduce witnesses and evidence on rebuttal.

(l) All documents and other evidence offered or admitted into the record must be open to examination by both parties, unless otherwise ordered by the ALJ for good cause shown.

(m) Whenever the ALJ excludes evidence, the party offering the evidence may make an offer of proof, and the ALJ must include the offer in the transcript or recording of the hearing in full. The offer of proof should consist of a brief oral statement describing the evidence excluded. If the offered evidence consists of an exhibit, the ALJ must mark it for identification and place it in the hearing record. However, the ALJ may rely upon the offered evidence in reaching the decision on the case only if the ALJ admits it.

§ 93.520 The record.

(a) HHS will record and transcribe the hearing, and if requested, provide a transcript to the parties at HHS’ expense.

(b) The exhibits, transcripts of testimony, any other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ.
(c) For good cause shown, the ALJ may order appropriate redactions made to the record at any time.
(d) The DAB may return original research records and other similar items to the parties or awardee institution upon request after final HHS action, unless under judicial review.

§ 93.521 Correction of the transcript.
(a) At any time, but not later than the time set for the parties to file their post-hearing briefs, any party may file a motion proposing material corrections to the transcript or recording.
(b) At any time before the filing of the ALJ’s decision and after consideration of any corrections proposed by the parties, the ALJ may issue an order making any requested corrections in the transcript or recording.

§ 93.522 Filing post-hearing briefs.
(a) After the hearing and under a schedule set by the ALJ, the parties may file post-hearing briefs, and the ALJ may allow the parties to file reply briefs.
(b) The parties may include proposed findings of fact and conclusions of law in their post-hearing briefs.

§ 93.523 The Administrative Law Judge’s ruling.
(a) The ALJ shall issue a ruling in writing setting forth proposed findings of fact and any conclusions of law within 60 days after the last submission by the parties in the case. If unable to meet the 60-day deadline, the ALJ must set a new deadline and promptly notify the parties, the Assistant Secretary for Health and the debarring official, if debarment or suspension is under review. The ALJ shall serve a copy of the ruling upon the parties and the Assistant Secretary for Health.
(b) The ruling of the ALJ constitutes a recommended decision to the Assistant Secretary for Health. The Assistant Secretary for Health may review the ALJ’s recommended decision and modify or reject it in whole or in part after determining it, or the part modified or rejected, to be arbitrary and capricious or clearly erroneous. The Assistant Secretary for Health shall notify the parties of an intention to review the ALJ’s recommended decision within 30 days after service of the recommended decision. If that notification is not provided within the 30-day period, the ALJ’s recommended decision shall become final. An ALJ decision that becomes final in that manner or a decision by the Assistant Secretary for Health modifying or rejecting the ALJ’s recommended decision in whole or in part is the final HHS action, unless debarment or suspension is an administrative action recommended in the decision.
(c) If a decision under § 93.523(b) results in a recommendation for debarment or suspension, the Assistant Secretary for Health shall serve a copy of the decision upon the debarring official and the decision shall constitute findings of fact to the debarring official in accordance with 45 CFR 76.845(c). The decision of the debarring official on debarment or suspension is the final HHS decision on those administrative actions.

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