

LEGAL ADVISORY REGARDING SHARED GOVERNANCE

(Legal Opinion M 97-20)

October 23, 1997

As required by AB 1725 (Stats. 1988, ch. 973) the Board of Governors has adopted regulations defining "minimum standards governing procedures established by governing boards of community college districts to ensure faculty, staff, and students the right to participate effectively in district and college governance, and the opportunity to express their opinions at the campus level and to ensure that these opinions are given every reasonable consideration, and the right of academic senates to assume primary responsibility for making recommendations in areas of curriculum and academic standards." (Education Code Section 70901(b)(1)(E)). These regulations are set forth at Title 5, California Code of Regulations, Sections 51023, 51023.5 and 51023.7. More detailed regulations concerning the role of local academic senates are found at Title 5, Sections 53200 et seq. Copies of these regulations are attached for your convenient reference. There are other statutes and regulations which define specific roles for academic senates and student organizations. Some of those provisions are discussed in the context of shared governance, but this advisory is not intended to be a comprehensive review of all statutes that may relate to the roles of these organizations.

This legal advisory is a compilation of answers to questions which have been raised about the implementation of the shared governance regulations. The questions have been grouped into those related to the role of faculty in district governance, those related to participation by students, and those related to the participation of staff. Additional questions on these issues should be directed to Ralph Black, General Counsel, at (916) 445-4826.

FACULTY:

1. Question. What needs to be done to implement the regulations concerning the role of local academic senates in district governance?

Answer. The senate and the local board or its designee(s) (usually the chancellor, or president and senior administration) need to "consult collegially" on the development of policies and procedures for board delegation of authority and responsibility to the academic senate related to "academic and professional matters." This policy can be very general (i.e. a statement that the district will operate according to the provisions of Title 5, Sections 53200-53204), or more specific in terms of how the district carries out the regulations. Different boards and districts may include different amounts of procedural detail in district policies.

2. Question. In adopting new policies on academic and professional matters, does the governing board have to meet directly with the senate?

Answer. No. The governing board and the senate may each designate appropriate representatives to participate in the mutual development of policy on academic and professional matters. This can be handled on a blanket basis or different representatives may be appointed to deal with individual policy issues. It is the responsibility of the designees to communicate with their respective constituencies on an ongoing basis so as to best represent them in the development of policies.

3. Question. What is meant by the term "academic and professional matters"?

Answer. Title 5, Section 53200(c) defines the term "academic and professional matters" to include policy development and implementation with respect to the following ten specific matters:

- (1) curriculum, including establishing prerequisites and placing courses within disciplines;
- (2) degree and certificate requirements;
- (3) grading policies;
- (4) educational program development;
- (5) standards or policies regarding student preparation and success;
- (6) district and college governance structures, as related to faculty roles;
- (7) faculty roles and involvement in accreditation processes, including self-study and annual reports;
- (8) policies for faculty professional development activities;
- (9) processes for program review;
- (10) processes for institutional planning and budget development.

The regulation also provides that academic and professional matters may include any other matter which is "mutually agreed upon between the governing board and the academic senate."

4. Question. How does a board go about "consulting collegially" with the academic senate?

Answer. Section 53201(d) explains that, in order to fulfill its obligation to consult collegially, the governing board is required to adopt policies and procedures on academic and professional matters by one of two methods. First, the board may choose to "rely primarily upon the advice and judgment of the academic senate." Second, it may adopt a procedure for reaching "mutual agreement" with the senate.

5. Question. Must a local board select only one procedure for addressing all ten of the identified academic and professional matters or can there be a different approach for the different matters?

Answer. Either one of the procedures can be used to address each of the ten areas defined as academic and professional matters; the procedure need not be the same for all ten. However, the Academic Senate for California Community Colleges (the statewide Academic Senate) and the Community College League of California (CCLC) recommend that the specific procedure selected be identified in policy for each of the ten "academic and professional matters."

6. Question. Who decides which of the two processes in the regulations ("rely primarily" or "mutual agreement") should be used on a given issue?

Answer. The local governing board has the legal authority to make the decision as to which method will be used. However, the statewide Academic Senate and CCLC recommend that the ten categories of academic and professional matters be the subject of local discussions during the initial implementation of the regulations so that all concerned will know in advance which issues will be dealt with according to which process. These may then be included in adopted policy.

7. Question. If the governing board chooses the option to "rely primarily" on the advice of the academic senate in any of the ten defined areas of "academic and professional matters," is the board required to accept the recommendation of the senate?

Answer. No. Title 5, Section 53203(d)(1) clearly states that when a board elects to "rely primarily" on the advice and judgment of the academic senate, the senate's recommendation will "normally be accepted." However, the regulation goes on to explain that a board can make a decision different from the senate's recommendation where there are "exceptional circumstances" and "compelling reasons." The regulations do not define these terms and they are not intended to have a legal definition. However, the basic concept is that, in instances where a recommendation is not accepted, the board's decision must be based on a clear and substantive rationale which puts the explanation for the decision in an accurate, appropriate and relevant context. The regulation requires that, upon request, the board or its designees must put such explanations in writing. The statewide Academic Senate and CCLC suggest that a governing board tempted to reject a recommendation might, instead, ask the local senate to reconsider the recommendation in light of the issues that have not been resolved to the board's satisfaction.

8. Question. Does the term "rely primarily upon the advice and judgment of the academic senate" mean that the governing board should not receive and consider the advice and judgment of others on issues of "academic and professional matters"?

Answer. No. Indeed, there are other regulations and laws which either require or enable the participation of the public, students, staff and unions in district governance. (See the answers to Questions 28 and 34.)

9. Question. Should the advice and judgment of the academic senate be accorded greater weight than the advice and judgment of other groups and constituencies in connection with "academic and professional matters"?

Answer. Yes. The intent of the regulations is to ensure that, while all relevant constituencies should have the opportunity to participate, boards should accord the greater weight to academic senates in "academic and professional matters" by "consulting collegially" with the senates.

10. Question. A district governing board which chooses the "mutual agreement" procedure is supposed to reach written agreement with the senate in any of the defined areas of "academic and professional" matters. When may the board act if it is not able to reach mutual agreement with the academic senate?

Answer. Title 5, Section 53203(d)(2) explains that, if mutual agreement has not been reached, existing policy remains in effect unless continuing that policy "exposes the district to legal liability or causes substantial fiscal hardship." If this is the case, or if there is no existing policy, the board may act without reaching mutual agreement if it has made a "good faith effort to reach agreement" and there are "compelling legal, fiscal, or organizational reasons" why it must do so. The regulations do not define these terms and they are not intended to have a legal definition. However, the basic concept is that, in instances where a recommendation is not accepted, the board's decision must be based on a clear and substantive rationale which puts the explanation for the decision in an accurate, appropriate and relevant context.

11. Question. The "mutual agreement" procedure appears to contain de facto ability to block changes in policy when an existing policy is in place by failing to agree to needed action. What would happen if this occurs?

Answer. It would be bad faith for either the governing board or its designee(s) or the academic senate to attempt to block changes in policy when an existing policy is in place, by failing to agree to needed action. (For a discussion of enforcement procedures, see Questions 20 through 22 below.)

12. Question. Does the academic senate have the exclusive right to propose or initiate any new or modified policy or procedure relating to academic and professional matters?

Answer. No. Title 5, Section 53203 requires that the governing board "consult collegially" with the academic senate, but this obligation is only triggered when the governing board is "adopting policies and procedures on academic and professional matters." The regulations do not prevent the governing board, chancellor or any other person from proposing new policies or procedures or changes in existing policies relating to academic and professional matters. Thus, while the governing board or its designee(s) may initiate proposals for changing policies or procedures related to academic and professional matters, the overall intent of the regulation is that the academic senate should be involved once the proposal moves beyond the conceptual stage.

13. Question. Is a governing board required to consult with the academic senate before delegating its authority over academic and professional matters?

Answer. No. Pursuant to Education Code Section 70902(d), a district governing board may, by majority vote, delegate any power (other than one which is expressly nondelegable) to the chief executive officer or any other employee or committee. However, the board action must specify the limits on the delegation. Moreover, the term "academic and professional matters" does not include whether or in what manner a board delegates *its authority* to staff. Accordingly, an action by a board delegating *its authority* over curriculum to the district chancellor or superintendent is not something requiring "collegial consultation" or mutual agreements with the academic senate. However, the governing board's representative would then have the obligation to reach mutual agreement or consult collegially with the senate on curriculum matters. In addition, the academic senate should be given the opportunity to make recommendations or give input with respect to actions of the governing board which involve delegation of *Board authority* over academic and professional matters.

14. Question. Is the governing board required to consult collegially before it can establish a committee?

Answer. In general, the governing board is free to set up new committees without going through the collegial consultation process. However, some degree of consultation will be required if the purpose of the committee is to develop policy or procedures related to an academic and professional matter. Title 5, Section 53200(c)(6) lists "district and college governance structures, as related to faculty roles" as an academic or professional matter, so consultation with the academic senate would be required if a committee is to be established as a part of the basic governance structures set forth in the board's general policy on shared governance. Otherwise, the degree of consultation required will depend on whether the Board has chosen to use the "rely primarily" or the "mutual agreement" process for consulting with the academic senate on the particular academic and professional matter which the committee will address.

If the board will rely primarily on the judgment of the academic senate in a given area, it would be inconsistent with the regulations for the board to rely primarily on the recommendations of a committee which is not established by the academic senate. If the committee is not established by the academic senate, the board could use the committee's work to assist it in weighing the recommendations of the academic senate, but the senate's recommendation would normally be accepted. If a committee of the academic senate is developing the recommendation, the board will need to ensure that students and/or staff are represented on the committee if the committee will be dealing with issues which, in addition to being academic and professional matters, are also matters which have a significant effect on students or staff. (See answers to Questions 28 and 34 below.)

Where the governing board has decided to use the mutual agreement method of consultation, the board could establish a special committee to formulate its position for purposes of subsequently meeting with the academic senate to reach agreement on a particular issue. It would still be good practice to give the academic senate an opportunity to express its views regarding the creation of such a special committee, but this is not required by the regulations.

It should also be noted that the regulations do require that appointment, of any faculty members to committees dealing with academic or professional matters are to be made by the academic senate after consultation with the chief executive officer or his/her designee. Of course, committees not dealing with academic or professional matters would not be subject to this limitation.

15. Question. Can the local board choose the academic senate to be the organization that represents faculty in matters that have previously been collectively bargained or are within the legal scope of bargaining? Can the local board accept recommendations from the academic senate or reach agreements with the academic senate which contradict a collective bargaining agreement?

Answer. No. The governing board may not legally delegate to the senate any responsibilities or functions which belong to the exclusive representative. AB 1725 did not change the collective bargaining law (Government Code Section 3540 et seq.). Moreover, Title 5, Section 53204 specifically points out that nothing in the Board of Governors' regulations should be construed to "detract from any negotiated agreements between collective bargaining agents and district governing boards."

16. Question. Can a board and union, through a collective bargaining agreement, change a policy previously adopted by a board based upon recommendation of the academic senate or mutually agreed to with the academic senate?

Answer. Yes. Matters appropriately within the scope of collective bargaining may be negotiated between collective bargaining representatives and district governing boards regardless of previous policies. It should be noted, however, that in rare cases a matter may be removed from the scope of bargaining if there is a provision in the Education Code which clearly preempts bargaining. For example, Education Code Section

87359(b), when referring to the equivalency process to be used in hiring those who do not meet minimum qualifications, states, "The process, as well as criteria and standards by which the governing board reaches its determinations, shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board." Because of this explicit language requiring agreement with the academic senate, the Public Employment Relations Board or the courts might well find that a governing board is precluded from bargaining with an employee organization on equivalency policies.

17. Question. May the collective bargaining agent delegate matters within the scope of bargaining to the local senate and may the senate delegate matters within the scope of the ten defined areas of "academic and professional matters" to the collective bargaining agent?

Answer. Yes, to the extent permitted by collective bargaining laws. Section 53204 states that the intent of the regulations is to "respect agreements between academic senates and collective bargaining representatives."

18. Question. Must the district consult collegially on the administrative organization chart of the college?

Answer. No. Neither the governing board nor its designee(s) are required to "consult collegially" with the academic senate regarding organization of the district administration, but the board would certainly have the discretion to do so if it wished. Indeed, it would probably be good practice for the governing board or the chief executive officer to provide faculty, students, and staff with information concerning a proposed reorganization and solicit their views before finalizing the reorganization.

19. Question. Another one of the ten areas of "academic and professional matters" is "processes for institutional planning and budget development." Does this regulation relate to the institutional plans and budgets themselves, or only to the process by which plans and budgets are developed for presentation to the board?

Answer. The regulation relates only to the process. The academic senate's role is in helping to shape the processes used for developing the plans and budget to be acted upon by the governing board. The board is not required to either "rely primarily" on the senate's recommendations or reach agreement with the senate on the plans and budgets themselves.

20. Question. Do these regulations have the force of law?

Answer. Yes. If a district board does not make a good faith effort and does not ultimately abide by these regulations it would be in violation of law.

21. Question: Does the Board of Governors or the Chancellor's Office have the authority to enforce the regulations regarding the role of academic senates in district governance?

Answer. Yes. Education Code Section 70901 mandates that the Board of Governors establish minimum conditions entitling districts to receive state aid. (Title 5, Section 51000, et seq.) One of these minimum conditions, set forth in Section 51023, requires districts to adopt procedures for consulting collegially with academic senates consistent with Sections 53200-53204. Thus, a district which does not comply with this requirement would potentially be subject to having its state aid withheld.

22. Question. If a local senate feels that it has exhausted all sincere internal efforts to work cooperatively with the local governing board and believes the regulations continue to be ignored, what remedies can be sought?

Answer. First, the statewide Academic Senate may be contacted for useful advice and direct support. Also, the local senate can make some initial contact with the Chancellor's Office to seek informal resolution if possible.

Secondly, if the local academic senate believes that there is clear and consistent noncompliance, the local senate may contact the Legal Affairs Division of the Chancellor's Office and file a written complaint alleging violation of the minimum condition regulation (Section 51023) concerning consultation with academic senates.

STUDENTS:

23. Question. What obligation does a governing board have to consult with students in developing district policy?

Answer. Title 5, Section 51023.7 requires governing boards to provide students with an opportunity to participate in the formulation of district and college policies and procedures which "have or will have a significant effect on students." The regulation goes on to state that, for this purpose, the governing board "shall recognize each associated student organization or its equivalent within the district."

24. Question. Which policies and procedures have "a significant effect on students"?

Answer. Section 51023.7(b) lists those policies and procedures which have a significant effect on students. These include:

- (1) grading policies;
- (2) codes of student conduct;
- (3) academic disciplinary policies;
- (4) curriculum development;
- (5) courses or programs which should be initiated or discontinued;

- (6) processes for institutional planning and budget development;
- (7) standards and policies regarding student preparation and success;
- (8) student services planning and development;
- (9) student fees within the authority of the district to adopt; and
- (10) any other district and college policy, procedure, or related matter that the district governing board determines will have a significant effect on students.

25. Question. Do students have a right to participate in decisions about funding for services to students?

Answer. Yes, to a limited degree. As noted above, "student services planning and development" is specifically recognized as an area in which the associated student organization has a right to be involved in policy development. This does not give students the right to be involved in decisions about specific budgetary allocations for student services, but policies and procedures for deciding on the allocation of funds are certainly an important aspect of the planning and development of student services. Section 51023.7(b) also indicates that student organizations have a right to participate in formulating policies and procedures related to student fees which, in many cases, are used to fund services to students. In addition, other provisions of law give student organizations a special role in determining the use of certain student fee revenues. For example, Education Code Section 76060.5 states that revenue from the student representation fee shall be disbursed by the chief fiscal officer of the district "upon the order of the governing body of the student body association."

26. Question. How does this obligation differ from the requirement to consult collegially with the academic senate?

Answer. One difference is that the governing board is not required to "rely primarily" or "reach mutual agreement" with the student government on matters that have a significant effect on students. Section 51023.7 simply says that students must be provided an opportunity to participate in the "formulation and development" of policies and procedures. This means that the student government must have the opportunity to be involved in the formative stages of developing policies or procedures related to matters of significance to students and that their views are to be given "every reasonable consideration," but the governing board is not obliged to rely on this advice or to reach agreement with the student government before it can act.

27. Question. What if the board needs to act and there isn't time to give students an opportunity to participate in development of the policy?

Answer. Section 51023.7(a)(2) indicates that the board cannot act without providing students an opportunity to participate in development of policy, but an exception is provided for "unforeseeable emergency situations."

28. Question. What should a governing board do when considering an issue such as grading policy which is an "academic and professional matter" on which it must consult collegially with the academic senate, as well as a matter which will have a "significant effect on students" on which it must consult with the student government?

Answer. In such a case, the governing board must engage in consultation with both the associated student organization and the academic senate. When the board ultimately acts it should take the views of both groups into account. The governing board should develop shared governance procedures which enable the associated student organization and academic senate to work together to develop recommendations. In fact, Section 51023.7 specifically states that the student organization should be involved in "jointly developing recommendations" for action by the governing board. This means that representatives of the student organization should work with administrators and, where appropriate, with faculty in developing recommendations to the governing board. This should help to avoid or resolve situations where students and faculty have differing views on the same subject. However, if differences cannot be resolved, the governing board will have to make the final decision and will be required to rely primarily on the views of the senate or reach mutual agreement with the senate before it acts. This does not mean that the governing board cannot adopt the position advocated by the student government, but in order to do so, it would be required to justify such a decision in the manner discussed in the answers to questions 7 and 10.

29. Question. What can a student organization do if it believes the governing board has failed to comply with the shared governance regulations?

Answer. The first step would be to carefully document the situation where the student organization believes the regulations were violated and bring the matter to the attention of the governing board. The statewide Student Senate might also be contacted for advice on handling such issues. However, if the problem cannot be resolved or if the student organization believes that there is an ongoing pattern of noncompliance, a written complaint should be filed with the Legal Affairs Unit in the Chancellor's Office which will investigate the matter as a possible violation of Section 51023.7, which is a minimum condition for receipt of state aid.

STAFF:

30. Question. What is the obligation of the governing board with respect to involving staff in district governance?

Answer. Title 5, Section 51023.5 requires the governing board to establish processes to provide district employees, other than faculty, with an opportunity to participate effectively in developing policies and procedures which "have or will have a significant effect on staff." The board is to define the categories of staff who will be involved in district governance, but management and nonmanagement positions must be separately defined or categorized.

31. Question. Which policies and procedures have a significant effect on staff?

Answer. Section 51023.5 does not give a specific list of policies and procedures which significantly affect staff. Instead, it states that staff have a right to participate in developing those policies and procedures which "the governing board reasonably determines, in consultation with staff, have or will have a significant effect on staff." Thus, the board has considerable discretion in determining those areas where staff should be involved in policy development, but the organizations representing staff should be consulted in identifying these areas. It should also be noted that Section 51023.5(b) makes clear that the process for involving staff in district governance cannot intrude on matters within the scope of collective bargaining.

32. Question. Who represents staff in the governance process?

Answer. Section 51023.5 requires the board to consult with the representatives of existing staff councils, committees, employee organizations and other bodies. If no such group exists for a particular category of employees, the board is to inform all staff in that category about the issue and provide them an opportunity to express their views on the subject. However, it is important that the board's effort to consult with staff does not interfere with or dominate any employee organization or encourage employees to join one organization in preference to another. A district may not contribute financial or other support to any employee organization.

33. Question. What happens when the board needs to act and there isn't time to involve staff in developing the policy?

Answer. As with the other shared governance regulations, Section 51023.5 provides that the governing board cannot act without considering the views of staff, but an exception is allowed in "unforeseeable emergency situations."

34. Question. What should a governing board do when considering an issue which significantly affects staff and also affects students or constitutes an academic and professional matter within the purview of the academic senate?

Answer. As discussed in the answers to Questions 14 and 28, the governing board may sometimes be required to consult with both staff and students, with staff and faculty, or perhaps even with all three groups. Again, Section 51023.5 states that staff should be provided the opportunity to "jointly develop recommendations" to the governing board. Thus, those representing staff should work with administrators and, in appropriate cases, with the academic senate or the associated student organization to jointly develop recommendations.

35. Question. What should an organization representing staff do if it believes the governing board has failed to comply with its obligation to consult with staff?

Answer. As indicated in the answers to Questions 22 and 29, an issue regarding a board's failure to comply with shared governance regulations should, in the first instance, be handled at the local level by documenting the problem and bringing the matter to the attention of the governing board. However, like the other shared governance regulations, Section 51023.5 is a minimum condition for receipt of state aid. Thus, if the problem cannot be resolved or staff believe there is an ongoing pattern of noncompliance, a written complaint can be filed with the Legal Affairs Unit in the Chancellor's Office, which will investigate the matter.