

## **FACULTY SENATE MINUTES**

### **January 27, 2005**

The Faculty Senate of the University of North Alabama met January 27, 2005 in the Faculty/Staff Commons of the University Center at 3:30 p.m.

President Blose called the meeting to order. The following senators were present: Adams, Adler, Atkinson, Bates, Blose, Brewton, Brown, Bruce, Crisler, Davidson, Fennell, Foote, Ford, Gaston, Gaunder, Hallock, Holley, Leonard, Loew, Makowski, Martin, McDaniel, Myhan, Parris, Robinson, Rock, Roden, Takeuchi, Thorne, Tunell, Turner, VanRensselaer, Wallace, Webb, and Wilson.

The following senators were absent without proxy: Cai, Gorham, Richardson, and Ward.

Senator Makowski moved the adoption of the agenda. Senator Webb seconded. The motion passed unanimously.

President Blose welcomed President Cale to UNA and invited him to address the senate. President Cale reported that he and Mrs. Cale moved into the President's residence on January 8. When the renovations are complete with some donated furnishings, they plan to host an open house. He stated that it was a great pleasure to be a part of the University of North Alabama. He is currently involved in dialog with the people of UNA, learning the campus. He has a campus gathering of faculty and staff planned for next week in order to discuss his vision. The building of academic programs is at the top of the pyramid of his plans. Everything we do should contribute to the building of academic programs.

President Blose stated that President Cale has an open invitation to address the senate.

Senator Adler moved the approval of the November 18, 2004 minutes with the change in the second line of page three to read "will work" instead of "has been working". Senator Thorne seconded. The motion passed unanimously.

### **ANNOUNCEMENTS:**

- A. President Blose reported that the Senate Executive Committee had a meeting with the STAMATS consultants gathering input with regard to recruitment and retention. A date for a report back from the consultants is unknown.
- B. The SGA has not endorsed the recommendation from our last meeting to change the Academic and Student Affairs Committee of the Shared

Governance Structure. They asked for more time to consider the issue. They expressed a concern that they would have reduced representation. According to the recommendation however, they would in fact have more.

- C. President Blose reported that Gordon Stone from the Higher Education Partnership will be with us for our February meeting before Higher Ed Day.

**OLD BUSINESS:**

A. Senate Committee Reports:

1. The Academic Affairs Committee is continuing to work on the honors program and the withdrawal policy.
2. Dr. Craig Robertson reported that the Faculty Affairs Committee is continuing to work on the tenure and promotion policy with a rough draft being circulated among the committee members. They hope to have a recommendation for the February meeting. Dr. John Clark has been charged with getting information from peer institutions and feedback from faculty and departments concerning the issue of office hours and would like to have a recommendation by the February meeting.
3. The Faculty Attitude Survey Committee has sent out email soliciting feedback and encouraged senators to supply the committee with feedback from their departments concerning the priorities they would like to address with the survey. Issues listed included the ADA policy, the office hours policy, and a cheating policy.
4. Senator Makowski reported the State Political Relations Committee has not yet met this year. He reported that there is additional money in the Educational Trust Fund but the General Fund has a deficit. At this time it seems that the Educational Trust Fund will be protected.

B. Shared Governance Committee Reports:

1. The Strategic Planning and Budget Committee along with the Faculty/Staff Welfare Committee is looking at other institutions with regard to pay scales for the different ranks and how to fund the increases for faculty and staff salaries. They hope to make a recommendation in June. President Cale will attend the next meeting of the committee. The Strategic Planning and Budget Committee is also looking at the Non-technology Equipment Fund and presented a copy of the resolution which instituted the fund. (See Attachment A). The policy to access the funds: faculty request to the chair, chair request to the dean, dean request to the VPAA. The Committee will begin review of next year's budget. The Committee members were encouraged that Board of Trustees member Steve Pierce has taken great interest in the budget.

2. The Academic and Student Affairs Committee has met twice with the STAMATS consultants. They are investigating the ADA policy and the withdrawal policy.
3. The Shared Governance Committee has reviewed the charge and membership of the seven original committees. They will begin reviewing the organizational provisions of the Shared Governance Document. If there are any concerns or areas not working, the Committee asked for feedback.

### **NEW BUSINESS:**

- A. Senator Wilson moved to refer the issue of examining and possibly revising the final exam schedule to the Academic Affairs Committee. Senator Adler seconded. The motion passed unanimously.
- B. Dr. Newson addressed the issue of the readmission policy. Currently there are one semester, one year, and five year suspensions. Ten peer institutions have been studied with regard to suspensions. None were found to have a five year suspension. He asked that we reevaluate our current policy. Senator Gaston moved to refer the issue to the Academic Affairs Committee. Senator Brewton seconded. The motion passed unanimously.
- C. Mr. David Cope presented three issues concerning the Americans with Disabilities Act (ADA).(See Attachment B) The federal court system (through case law) establishes the standards for classifying an impairment as a disability within the meaning of the ADA. These standards are applicable in any context in which a claim of disability occurs (employment, university environment, public accommodations, etc), according to the Supreme Court. He cited the words of Supreme Court Justice Ginsburg in 1999 who quoted Congress: "individuals with disabilities are a discrete and insular minority, persons subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society". She further stated that "Congress' use of the phrase 'discrete and insular' is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged class."

There is considerable confusion and misinterpretation on campus concerning the disability policy. The Faculty Handbook stated that we conform to all federal laws. It is important that we know what the law is and to give accommodation to deserving students but not certify a student as being disabled who fails to meet the rigorous standard for disability established by federal courts. He stated that he has attempted to communicate with Dr. Lovett concerning this issue and had met a stalemate. He met with President Potts who stated that we did in fact

need outside counsel to guide the University. After President Potts met with the Executive Council, he changed his mind and stated that he would submit this issue to a committee on campus. This resulted in the legal opinion of Dr. Lovett being used to determine whether the legal opinion of Dr. Lovett was in fact correct. The University does in fact need outside counsel to determine if our policy is in accord with federal law. It is important that we get correct legal advice and formulate a policy that conforms to the law. Today there is only one person on campus who determines who has a disability and what accommodation should be made. It was recommended that there be a committee created to oversee this issue. Three things are needed: 1. Outside counsel, 2. University policy created and understood by the faculty. 3. A Committee charged with the review and oversight of the ADA policy.

President Cale stated that he would like to study this issue further. Senator Thorne moved to table this issue until next month. Senator Brewton seconded. The motion passed unanimously.

Senator Thorne moved that the meeting be adjourned. Senator Roden seconded. The motion passed unanimously. The meeting adjourned at 5:00 p.m.

## ATTACHMENT A

## ATTACHMENT B

### The two versions of the Americans with Disabilities Act (ADA)

I have been conducting extensive research into the ADA for more than a year. I have been assisted in this effort by three senior attorneys with the U.S. Department of Education, who have provided me with their written legal opinions on ADA issues. At the suggestion of these attorneys, I have read numerous decisions about the ADA in federal courts, including the U.S. Supreme Court. As a result of this research I have concluded that there are **two** versions of the ADA: the federal version and the UNA version. These two versions differ substantially on three fundamental issues involved in the process of granting accommodations to students at our University based upon a student's claim of a disability. I would like to share with you some information about these discrepancies.

ISSUE I How severely must a student be impaired before meeting the legal standard for qualifying as being disabled within the meaning of the ADA?

In the federal version, the legal standard that a person must meet in order to qualify as being disabled under the ADA has been addressed most thoroughly in the case Toyota v. Williams, decided by the U.S. Supreme Court in January, 2002. The court ruled in a unanimous decision that the terms in the ADA that define a disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled." The court rejected Ella William's claim of having a disability in performing manual tasks, despite the fact that she was diagnosed as suffering from painful neuromuscular problems and was certified by her treating physicians as unable to perform work of any kind. The court ruled that she was not disabled under the ADA in performing manual tasks because she could still perform such everyday tasks as brushing her teeth, bathing, and combing her hair. A disability, according to the Supreme Court, must be an impairment that "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

While the Toyota case involved a claim of disability in the specific major life activity of performing manual tasks, subsequent rulings by U.S. Courts of Appeals have held that this demanding standard for qualifying as disabled must be applied in **every** major life activity (for example, see Fenney v. Dakota, Minnesota, & Eastern Railroad Company, 2003). The U.S. Department of Education has acknowledged in written communications with me that it follows Supreme Court precedent, as well as decisions by U.S. Courts of Appeals, in enforcing the ADA and that this demanding standard for disability should be applied at our university. However, in the UNA version of the ADA our University Counsel maintains that Developmental Services can apply a much less

demanding standard of impairment in certifying a student as being disabled under the ADA, despite the legal opinions to the contrary from authoritative federal sources.

ISSUE II What medical/clinical documentation is required by law in order to confirm the existence of a disability?

In the federal version, where the legal standard for disability is demanding, U.S. Courts of Appeals have ruled that this documentation must be prepared by a physician or psychologist having expertise in the diagnosis and treatment of the disability under consideration. The clinical professional must provide appropriate test results to confirm the diagnosis and to demonstrate that the impairment “prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” According to the U.S. Supreme Court in Toyota v. Williams , “It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those claiming the Act’s protection to prove a disability by offering evidence that the extent of the limitation caused by their impairment is substantial.” In ADA cases, federal courts routinely reject the claim of a disability when the documentation provided by a medical authority fails to meet the appropriate standards of rigor (see, for example, Powell v. National Board of Medical Examiners, 2003).

Additionally, the documentation of disability is required by law to verify that the impairment substantially limits a major life activity of the individual, despite the effects of corrective measures (medication, therapy, etc) used by the individual to alleviate the impact of this impairment. The Supreme Court in Sutton v. United Airlines (1999) ruled that “The determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment.” The Court further ruled that “A disability exists only where an impairment substantially limits a major life activity, not where it might, could, or would be substantially limiting if mitigating measures were not taken.”

A review of ADA cases decided in federal courts in 1999 and cited in the *Employment Law Review*, May 21, 2003, revealed that the individuals claiming a disability lost in 96% of these cases, even before the more demanding standard for disability was established by the Supreme Court in 2002. My own survey of cases in U.S. Courts of Appeals found that it is especially difficult to prove a disability in the major life activity of learning, since courts have demanded a rigorous protocol of testing in order to demonstrate that a learning impairment rises to the level of a disability under the ADA. “ Indeed, many specific *learning disabilities* are impairments, rather than actual disabilities, under the ADA.” (See Betts v. University of Virginia, 1999).

Our university, by contrast, requires only a diagnosis of an impairment or disease by a medical or clinical practitioner as validation of a disability. There is no requirement at our university that the medical authority provide any test results to support a medical opinion or even have expertise in the diagnosis or treatment of the disability claimed. For example, several semesters ago one of my students was diagnosed as needing accommodations for a disability in **concentration** (a learning disorder) by a physician who treats respiratory diseases. This physician offered no test results to measure this student's actual ability to concentrate. In comparison to UNA, many other universities (including the University of Alabama) apply the rigorous documentation standards of the national organization AHEAD, the Association on Higher Education And Disability. These standards specify for each category of disability what type of medical specialist is qualified to make a diagnosis, what tests must be performed, and what the test results must confirm in order to adequately document a disability. These standards help to ensure that the documentation of a disability fully addresses the requirements of federal law and that disabilities are not "overdiagnosed" by physicians under pressure from a student or parent of a student to provide a requested medical opinion.

ISSUE III What opportunity does the law permit for a faculty member to review the medical/clinical documentation of a student's disability on file in the Office of Developmental Services?

This information is used by Developmental Services in certifying a student as having a "legitimate, documented disability" within the meaning of the ADA and in determining appropriate accommodations to authorize for the student. Faculty members receive an ADA Accommodation Form notifying them of these authorized accommodations and requesting them to grant these accommodations without seeing any supporting documentation. A review of the medical/clinical documentation would allow a faculty member from whom accommodations have been requested to make an informed decision about granting or modifying the requested accommodations, based upon the evidence and extent of disability described by this documentation. Such a review was described to me as being a "best practice" in the accommodation process during a phone conversation with an attorney for the U.S. Department of Education.

The policy of our university restricts the faculty member in accessing this information, citing "federal confidentiality mandates." Furthermore, if a faculty member is allowed to review this documentation, the policy at UNA prohibits a faculty member from discussing the information contained therein with the administrators in the chain of authority, again by citing "federal confidentiality mandates." This policy warns of "sanctions against the University and against (the faculty member) personally" for violating this prohibition. Thus a faculty member who questions the appropriateness of the accommodations authorized by Developmental Services for a student is denied due process in appealing

these authorized accommodations through the administrative chain of authority, as specified in the *Faculty Handbook*. This handbook requires that the faculty member with a complaint about the disability standards applied by the Developmental Services Office must “first seek resolution or redress of the grievance informally through the established administrative channels.”

I submitted a copy of the UNA policy that cites these “federal confidentiality mandates” to the U.S. Department of Education and requested a legal opinion on the merits of claims about federal law made in this policy. I received in reply a three-page memorandum from the attorney in this agency who administers the federal law FERPA, which specifies the conditions under which such records may be released to the faculty and discussed with the administrators of a university. This attorney offered a point-by-point repudiation of the legal claims in this UNA policy and asserted that federal law **does** permit university officials who participate in the accommodation process, including faculty and administrators in the faculty member’s chain of authority, to inspect and to discuss the medical/clinical records that pertain to a student’s disability. The federal requirement for confidentiality is merely that the personally identifiable information contained in the disability documentation “must be used only for purposes directly connected with” the accommodation process. This opinion demonstrates that the current university policy, formulated jointly by the University Attorney and the Director of Developmental Services, grossly misrepresents federal law.

The *Faculty Handbook* requires all university officials, including the faculty, to comply with disability law “in accordance with all applicable federal and state constitutions, laws, and valid regulations.” Because of the numerous inconsistencies between the policies of this university and federal law, and because of the unwillingness of our University Counsel to resolve these inconsistencies, I ask the Faculty Senate to pass a resolution which endorses the need for an outside counsel to review the ADA policies at UNA and to prepare a report for the Faculty Senate on the findings of this review. The outside counsel should specialize in the practice called Employment Law—Employer, since faculty members are acting on behalf of their employer when they grant accommodations to the students of this university. The outside counsel should have recent experience in successfully representing employers (including universities) in federal court on ADA matters. This attorney should be aware that the decision in Toyota v. Williams has sharply limited the reach of the ADA. The Faculty Senate should participate in selecting this attorney.

When the review of our ADA policies has been completed, the outside counsel should prepare a document to be used by the faculty, staff, and administrators of the University as a handbook for ensuring the appropriate federal standards for ADA compliance.

Who qualifies as a person with a disability under the ADA is described by an attorney with the U.S. Department of Education as being the single most complex question in disability law. Despite the complexity of this issue and of the collateral issue of what constitutes reasonable accommodation, these key decisions in the accommodation process at our university are currently being made by just one staff member, the Director of Developmental Services. These decisions can impact 200 faculty members in their academic standards for testing, grading, and evaluating their students.

I would like to recommend that the accommodation process at UNA should be decentralized. A committee of faculty and staff with a thorough knowledge of disability law, in consultation with the faculty member from whom accommodations have been requested, should be responsible for making a decision about a student's eligibility for accommodations under the ADA. This decision should not be made by the judgment of just one individual. This committee approach, currently used at Rutgers University, is an integral part of shared governance. It could alleviate the distrust that many faculty members have concerning our present ADA policies.