

Background information on the original version of the University “Accommodations” Policy.

Revision 19 of University Policy 6-100—Section 16.

Compiled by Bob Flores for the Institutional Policy Committee.

The original version of the University Accommodations Policy took effect Fall semester 2005. It was adopted in March 2005 as part of PPM 9-7- Sec.16 (also known as Faculty Regulations Chapter VII Sec. 16). Renumbered in 2008 as Policy 6-100- Section 16.

1. Context.

This Accommodations Policy was adopted by the University as part of a negotiated settlement of a lawsuit, commonly known as the Axson-Flynn lawsuit, filed in the United States District Court for the District of Utah. Further information about the lawsuit may be seen in the published court records. See, e.g., *Axson-Flynn v. Johnson*, 151 F.Supp.2d 1326 (D.Utah 2001), reversed on appeal, 356 F.3d 1277 (10th Cir 2004), verdict and settlement summary on file at District Court (July 14, 2004). Also, the litigation attracted extensive news media attention locally and nationally, and many published media reports are available.

The terms of the settlement included the requirement that the University “adopt and implement a comprehensive religious accommodation policy.” The process for satisfying that requirement included establishment of an ad hoc committee, co-chaired by a faculty member (Prof. Kate Coles--former President of the Academic Senate) and General Counsel John Morris, which conducted a series of ‘town meetings’ within the University community over several months, and finally developed and brought forward a proposal to the Academic Senate and Board of Trustees.

2. Excerpt from agenda of the Academic Senate.

Executive Committee – November 22, 2004, Academic Senate – December 6, 2004,

Academic Senate – January 10, 2005, Academic Senate – February 7, 2005

ACCOMMODATIONS POLICY: HISTORY AND CONTEXT

I. The Legal Case

In January 2000 Christina Axson Flynn, a student in the University’s professional Actors Training Program, sued the University, through several ATP faculty, claiming that the faculty violated her rights to free speech and the free exercise of religion. Axson Flynn was a student in the ATP during the fall 1998 and spring 1999 semesters. In her lawsuit she claimed that she was forced to leave that program because she refused to perform scripts that contained language which, she said, offended her deeply held religious beliefs. Axson Flynn also claimed that the ATP granted “accommodations” to other students who requested similar exceptions. Axson Flynn withdrew from the ATP early in the spring 1999 semester. The ATP faculty disputed these claims and denied that they had forced Axson Flynn to perform materials she objected to.

In February 2004, the federal Court of Appeals for the Tenth Circuit held that university faculty may impose curricular requirements, even if they offend a student's religious beliefs, as long as (1) the curricular requirements have a reasonable relationship to legitimate pedagogical objectives; (2) the requirements are not a pretext for religious discrimination; and (3) any system of individualized exceptions to the curricular requirements include exceptions for religious beliefs. The Court held that there were issues of fact on the pretext and individualized exception issues and remanded the case to the district court for trial of those issues.

II. The Settlement

During spring 2004 the University initiated settlement discussions with plaintiff's attorneys. The timing of these discussions was driven, in part, by the impending discovery schedule which was going to cause the parties to incur significant additional litigation expense. Also, as in all litigation, there was uncertainty about the ultimate outcome. University senior administration consulted with various groups during the negotiation process, including the President of the Academic Senate, the Executive Committee of the Academic Senate and the Council of Academic Deans.

On July 13, 2004 the parties entered into a settlement agreement. (The full text of the Agreement may be found at [the Senate website or <http://web.utah.edu/news/releases/04/jul/AxsonFlynnSettlement.pdf> .

There has been widespread misunderstanding of what the settlement agreement does and does not do.

WHAT THE SETTLEMENT DOES DO:

- (1) Axson Flynn's lawsuit was dismissed.
- (2) The University agreed to appoint a Committee to develop a policy dealing with requests for religious accommodations.
- (3) The University offered readmission to Axson Flynn, an offer which she previously turned down in writing.
- (4) Axson Flynn received a refund of tuition for two semesters.
- (5) The State Risk Manager, the University's insurer, agreed to pay Axson Flynn's attorney fees.

WHAT THE SETTLEMENT DOES NOT DO:

- (1) It does not affect the right of the faculty to determine the curriculum.
- (2) It does not create a new policy; that is for the Committee to develop and the University, including the Academic Senate, to adopt.
- (3) It does not create a new process; that is for the Committee to develop and the University, including the Academic Senate, to adopt.
- (4) It does not create criteria for accommodations; whether to have them and what they should be is for the Committee to develop and the University, including the Academic Senate, to adopt..
- (5) It does not create a new bureaucracy; the committee will disband as soon as it drafts a policy which will be reviewed by the Academic Senate and the Board of Trustees.
- (6) It does not admit fault.

III. The Committee

On July 27, 2004 then Interim President Lorris Betz appointed a seven member Religious

Accommodation Policy Committee (recently renamed Accommodation Committee) with the charge “to create a process for making and acting upon these requests while recognizing that decisions on such accommodations are within the discretion of individual faculty members.” Committee members are Katharine Coles, Professor of English and former president of the Academic Senate; Ibrahim Karawan, Professor of Political Science; Wayne Samuelson, Professor of Medicine; Stephen Nebeker, local attorney and former president of the University of Utah Alumni Association; three students, Erin Arnold from the School of Law, Devan Hite from the Interfaith Council, and Alex Lowe, ASUU President; and two ex-officio members, John Morris, the University’s General Consul, and Tom Loveridge, representing the staff.

IV. The Process

The Committee set a goal of finishing the policy by the end of the 2004-2005 academic year. With this goal in mind, it devoted the month of September and the first part of October to education and to information gathering. Committee Chair Kate Coles and/or the University’s General Consul John Morris met with the Council of Academic Deans, the ASUU Executive Committee, several college Executive Committees and departments, and various other groups. In addition, the Committee held two open meetings, one on upper campus and one on lower campus, to which all members of the campus community were invited. The purpose of these meetings was twofold: first to educate the University community about the lawsuit and settlement, and second to receive feedback from the community about the policy. In total, as of October 20th, members of the Committee have met with more than 15 groups on campus. Finally, Stephen Nebeker, the Committee’s Community Representative, requested reactions from prominent individuals associated with various religious, civic, and other community groups. All respondents were asked to address a brief questionnaire asking a) what values they wished the policy to reflect, b) how they prioritized those values, and c) what other concerns they had about the policy.

In addition to the many (approximately 50) community members who spoke during the formal meetings, about twenty responded in writing and a dozen via email. Many people chose to speak privately and informally to committee members about their concerns, which closely matched the concerns of those who responded publicly. The majority of the responses from all groups and in all forms rated as the most important values of the university those of academic freedom and integrity. Also very high on the list (in descending order of priority) were the values of respect and diversity, of freedom of speech and expression, and of the need for faculty to have the flexibility to deal with students as individuals. Other concerns included the right not to be exposed to offensive materials such as R-rated movies (2 responses), the right not to engage in vivisection (4 responses), and the necessity of upholding the Ten Commandments (1 response).

The intention of the committee has been to reflect the values and concerns of the community. Hence, its priorities in drafting the policy have been as follows:

1. To uphold academic freedom and integrity.
2. To uphold the values of respect and diversity within our community.
3. To uphold rights to individual freedom of expression.
4. To preserve the flexibility of faculty and their ability to treat students as individuals.

3. Memorandum to the University Community—March 21, 2005

UNIVERSITY OF UTAH ACCOMMODATIONS POLICY

Background

During its January-March 2005 meetings, the University of Utah Academic Senate reviewed, discussed and modified the proposed Accommodations Policy which is being developed pursuant to the July 2004 settlement of the Axson-Flynn litigation. The senate consists of faculty and students elected by their peers. The draft policy is not final until approved by both the Academic Senate and the Board of Trustees. This procedure is used when developing all University policy and is not unique to this circumstance.

The Accommodations Policy Committee, chaired by Kate Coles, Professor of English, developed this policy after more than 20 meetings with students, faculty and community members. In addition to Professor Coles, there were three student, two faculty, one staff, and one community member on the Committee.

Originally the Committee's focus was accommodations made to students solely on the basis of religion. The Committee, however, broadened its focus to include accommodations made for all reasons in order to ensure that the eventual policy would deal coherently and similarly with all accommodation requests.

The Policy is grounded in University community held values of academic freedom and integrity as well as respect for diversity and individually held beliefs. The Policy creates a structure for responding to accommodation requests grounded in these values.

The Policy, which is attached, deals with two distinct areas: 1) Attendance Accommodations and 2) Content Accommodations. The Policy does not cover accommodations under the Americans with Disabilities Act or similar statutes, which are already covered in University policy.

The Accommodations policy is, with minor exceptions, the existing University policy which has functioned well for a number of years. Under the Attendance Accommodation policy, students who must be absent from class for University activities or religious obligations are permitted to make up assignments and examinations.

Content accommodations – modifications of otherwise applicable reading, writing, viewing or performing requirements – are subject to the discretion of the instructor; instructors may deny accommodation requests as long as the subject course requirement has a reasonable relationship to a legitimate pedagogical goal. Instructors may grant content accommodation requests after considering the difficulty of administering an accommodation; the burden on the student's sincerely-held beliefs; the importance of the

particular requirement to the course; and only if there is a reasonable alternative means of satisfying the curricular objective.

Under the policy, students are required to make content accommodation requests during the first two weeks of the semester unless the student could not have known of the conflict during that time. Denial of a content accommodation request may be appealed to the Dean who will only overturn an instructor's decision if it was arbitrary and capricious.

What the policy DOES:

- Treats requests for scheduling accommodations and content accommodations separately.
- Leaves faculty in charge of establishing the content of the curriculum and of specific courses.
- Requires students to understand and be able to articulate ideas and theories that are important to the discourse within and among academic disciplines whether or not they agree with or believe those ideas or theories.
- Places the burden on the individual student for determining when and if the content of a course conflicts with a sincerely-held core belief.
- Provides a procedure to follow in case a student requests a scheduling or content accommodation.
- Permits instructors to deny any request for a content accommodation as long as the course content has a reasonable relationship to a legitimate pedagogical goal.
- Permits instructors to grant any such request, only if a reasonable alternative means of satisfying the curricular requirement is available, only if that alternative is fully appropriate for meeting the academic objectives of the course, and only if the instructor considers all such requests during the same course equally.

What the policy DOES NOT DO:

- Require faculty to alter course content.
- Permit students to "opt out" of course assignments for religious or any other reason.
- Oblige faculty to grant accommodation requests, except in those cases when a denial would be arbitrary and capricious or illegal.

- Require faculty to predict what course content may conflict with a student's deeply held core beliefs.
- Require faculty to judge either the sincerity or the validity of a student's beliefs.
- Guarantee that all students will be able to complete all classes or majors at the University.

4. Copy of the lawsuit settlement agreement.

SETTLEMENT AGREEMENT

This Settlement Agreement (this "agreement" or this "settlement agreement") is made and entered into by and between Christina Axson-Flynn (the "student" or the "plaintiff student" or the "plaintiff"), the student's heirs, and assigns (collectively, the "student") and the University of Utah (the "University") this 13th day of July, 2004 (the "date of this settlement").

NOW, THEREFORE, in consideration of the mutual promises contained in this agreement, and in light of correspondence between plaintiff and the University, it is acknowledged and agreed as follows:

1. The University of Utah enjoys a rich and time-honored tradition of diversity within the University community. The University community is comprised of students, faculty, staff, and administration from a wide array of racial and ethnic groups, geographic and socioeconomic backgrounds, cultural and religious heritages, and political and social perspectives. These differences present both opportunities and challenges in such a diverse community. One such challenge is to overcome preconceptions and biases and to accept and to value all people regardless of their differences. Unfortunately, even as we embrace diversity, conduct that is insensitive, inappropriate or even illegally discriminatory can still sometimes occur. The University of Utah's tradition of diversity is best safeguarded by an ongoing commitment to tolerance, to education about bias, to civil discourse on matters about which we disagree, to the continued reduction of insensitive and inappropriate behavior, and to the elimination of illegal discrimination.

2. The University has been charged with violating the student's constitutional free speech and free exercise of religion rights stemming from her participation in the University's Actor Training Program during the 1998-1999 academic year. At its core, the case is a dispute about whether the plaintiff student was illegally required to perform classroom exercises that violated or offended her deeply held and sincere religious beliefs. The case involves two separate issues which the Court of Appeals for the Tenth Circuit resolved as follows:

- a. "[The Court] may override an educator's judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive...[such as religious bias]"
- b. "[W]here a [University's] facially neutral rule contains a system of individualized exemptions, a state 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason'."

The Court ultimately determined that in this case, there was a genuine issue of material fact as to whether or not the University's curricular requirements were pretextually applied to the plaintiff student or whether religiously-based curriculum exceptions had been denied to the plaintiff student but granted to others or even granted to the plaintiff student on other occasions. While the plaintiff student and the University disagree about these issues, they are nonetheless mindful that further legal proceedings would be time consuming, costly, and potentially detrimental to their common interests of promoting and fortifying the University's rich diversity.

3. Rather than continuing with this litigation, the parties have instead chosen to channel their efforts into supporting and expanding the University's commitment to diversity and to redoubling existing efforts to eliminate behavior that is insensitive, inappropriate, or illegally

discriminatory. For its part, the University will undertake affirmative measures to improve and refine its approach to these important issues, and pursuant to this settlement agreement, the plaintiff student agrees to dismiss the present legal action.

4. The University hereby commits to adopt and implement a comprehensive religious accommodation policy. The University will make a good faith effort to have this policy in place within 12 months of the date of this settlement and will do so in any event no more than 18 months from the date of this settlement. To this end, within one month of the date of this settlement, a seven-member ad hoc committee shall be appointed consisting of three faculty members, three students, and one at-large representative. The members of the committee shall be appointed by the President of the University after consultation with the plaintiff's counsel. The committee shall be broadly representative of the University community. The committee will be charged with preparing and presenting for approval and implementation a comprehensive religious accommodation policy and other recommendations it deems appropriate to the continued reduction of insensitive and inappropriate behavior, and to the elimination of illegal discrimination.

5. At a minimum, the religious accommodation policy prepared by the committee and adopted by the University shall address:

- a. The right of students to request a reasonable educational accommodation based upon sincerely held religious beliefs;
- b. A standardized process for requesting an accommodation, taking into account, among other things, the following factors:

- (1) the difficulty of administering an accommodation;

- (2) the burden on the student's sincerely held religious beliefs;
 - (3) the importance of the particular requirement to the curriculum; and
 - (4) the availability of reasonable alternative means of satisfying the objective of the curriculum while respecting the student's sincerely held religious beliefs.
- c. A timely response on such requests, ordinarily not to exceed two school days;
 - d. A faculty member's right to deny an accommodation request consistent with the guidelines and limitations set forth by the 10th Circuit Court of Appeals' decision in the present matter;
 - e. The right to appeal a faculty member's denial of an accommodation to a designated administrator at the level of dean, and the right to receive a timely response to such request, ordinarily not to exceed two school days; and
 - f. The right to appeal a dean's denial of an accommodation to the appropriate Senior Vice President, and the right to receive a timely response to such request, ordinarily not to exceed two school days.

The committee shall also suggest guidelines for determining the circumstances under which a student who is denied a religious accommodation may withdraw from a course and upon what academic and financial terms.

6. The policy recommendations of the committee shall be afforded deference and in good faith taken through the normal University policy making process.

7. On an ongoing basis, the University will ensure that policies and procedures directed at the elimination of religious bias and discrimination are adequate. The University shall on an ongoing and frequent basis, educate faculty and students concerning the religious

accommodation policy and its provisions.

8. The University recognizes that the plaintiff student in this case has deeply held and sincere religious convictions that prevented her and will in the future prevent her from using the name of her God in vain or using the "f" word when performing certain classroom exercises in the Actor Training Program. The University further recognizes that this student believed that there was pressure to withdraw from school because of this conflict. As a result of this withdrawal, the student believes that she experienced a significant emotional impact and suffered a setback in her educational and career plans. The student paid tuition and fees to the University during the 1998-1999 academic year, and incurred significant attorney fees in this dispute. In order to mitigate the impact of her withdrawal and the subsequent conflict, the University will refund the tuition and fees expended by the student during the 1998-1999 academic year, and through its insurer, the State Risk Manager, pay the student's reasonable attorney fees.

9. The plaintiff student was in good standing at the time she withdrew from the University. The University, in light of the recitals, terms and conditions of this Agreement, extends to the plaintiff student an offer of readmission to the University and the Actor Training Program for the 2004-2005 academic year. The University agrees that it will not impose any penalty or punishment on the plaintiff student for prosecuting this legal action nor will the plaintiff student be subjected to any adverse treatment based upon her deeply held and sincere religious beliefs.

10. Plaintiff has the right now and in the future to apply to any program in the University.

11. The parties are entering into this settlement as a voluntary, consensual settlement

of the dispute between them. Nothing in this settlement agreement shall be understood as an admission of liability or fault on the part of the University of Utah or any members of its faculty or staff. The settlement is entered into as an act of good faith on the part of the University and the plaintiff student as an indication of their common interests in promoting the University's tradition of diversity while eliminating behavior that is insensitive, inappropriate, or illegally discriminatory.

12. The student, for herself and for all persons and entities claiming by, through, or under her, hereby completely and forever releases, waives, and discharges the University, its trustees, officers, agents, current and former employees, advisors, counsel, and consultants, in their official capacities and individually, and their respective successors in interest, transferees, and assigns (collectively, the "University Released Parties") from and against any and all complaints, claims, demands, causes of action, obligations, debts, liabilities, costs, and expenses (including reasonable attorney fees, except as expressly provided in this agreement) of any kind or nature whatsoever (collectively, the "student's claims") which the student had or now has against any or all of the University Released Parties in connection with any aspect of any agreements, relationships, understandings, dealings, transactions, or other events causing damages, injuries, or personal injuries of any kind or nature whatsoever arising out of or relating directly to (a) the student's participation in the University's Actor Training Program, (b) the matters contemplated and affected by this agreement, or (c) any other matter of any nature whatsoever by, between, among, or involving the student and any of the University Released Parties, which occurred as of or prior to the date of this settlement (it being understood that the foregoing release and discharge is intended to be general, broad, and all encompassing, and that

the foregoing enumeration of claims is illustrative only). Any provision herein to the contrary notwithstanding, the student does not waive any rights or claims that may arise after the date of this settlement.


13. The University, for itself and for all persons and entities claiming by, through, or under it, hereby completely and forever releases, waives, and discharges the student and her respective successors in interest, transferees, and assigns (collectively, the "Student Released Parties") from and against any and all complaints, claims, demands, causes of action, obligations, debts, liabilities, costs, and expenses (including reasonable attorney fees, except as expressly provided in this agreement) of any kind or nature whatsoever (collectively, the "University's claims") which the University had or now has against any or all of the Student Released Parties in connection with any aspect of any agreements, relationships, understandings, dealings, transactions, or other events causing damages, injuries, or personal injuries of any kind or nature whatsoever arising out of or relating directly to (a) the student's participation in the University's Actor Training Program, (b) the matters contemplated and affected by this agreement, or (c) any other matter of any nature whatsoever by, between, among, or involving the University and any of the Student Released Parties, which occurred as of or prior to the date of this settlement (it being understood that the foregoing release and discharge is intended to be general, broad, and all encompassing, and that the foregoing enumeration of claims is illustrative only). Any provision herein to the contrary notwithstanding, the University does not waive any rights or claims that may arise after the date of this settlement.


14. The University and the student acknowledge that they execute this settlement agreement intending to be legally bound by it. The student and the University acknowledge that

they have each had the opportunity to consult with and be represented by counsel of their own choosing prior to signing this agreement.

15. This settlement agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns. This agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes and cancels all prior negotiations, warranties, representations, undertakings, and agreements, if any, between the parties with respect thereto. This agreement may not be modified in any manner except by a written instrument signed by the University and the student. There are no oral agreements that modify or affect this agreement.

16. This agreement shall be governed by and interpreted in accordance with Utah law without reference to Utah choice of law rules. If any provision herein shall be invalid or prohibited under applicable law, such provision shall be ineffective to the extent of such invalidity or prohibition without invalidating the remainder of such provision or the remaining provisions of this agreement. All warranties, representations, indemnities, covenants, and other agreements of the parties set forth herein shall survive the execution and delivery of this agreement.

 Dated: July 13, 2004
Christina Axson-Flynn


A. Lorris Betz
Interim President
University of Utah

Dated: July 13, 2004