D R A F T TEXT **November 5, 2012**

REPORT TO COMMITTEE A ON ACADEMIC FREEDOM AND TENURE FROM ITS SUBCOMMITTEE ON FINANCIAL EXIGENCY, PROGRAM DISCONTINUANCE, AND TERMINATION OF TENURED FACULTY APPOINTMENTS

THE ROLE OF THE FACULTY IN CONDITIONS OF FINANCIAL EXIGENCY

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EXECUTIVE SUMMARY

In recent years, American institutions of higher education have begun closing programs that should be part of any serious educational institution's curricular portfolio, and implementing policies that further erode the ranks and the discretionary power of the tenured professoriate. Program closures on the scale we have recently witnessed represent a massive transfer of power from faculty to administration over curricular matters that affect the educational missions of institutions, for which the faculty should always bear the primary responsibility; in most cases the decisions to close programs are not only unilateral and therefore procedurally illegitimate, but also driven by criteria that are not essentially educational in nature and therefore substantively illegitimate as well. Increasingly, administrators are making unilateral budgetary decisions that profoundly affect the curricula and the educational missions of their institutions; rarely are those decisions recognized *as* decisions about the curriculum, even though the elimination of entire programs of study (ostensibly for financial reasons) has obvious implications for the curricular range and the academic integrity of any university.

This report responds to this state of affairs in two ways: one, by strengthening shared governance and faculty consultation with regard to program closure, and two, by addressing the gap between Recommended Institutional Regulation 4c on financial exigency and Recommended Institutional Regulation 4d on program discontinuance.

First, as to governance and consultation, this report insists that faculty members must be involved in consultation and deliberation at every stage of the process, beginning with a determination that a state of financial exigency exists. We offer specific recommendations for such faculty involvement:

1. Before any proposals for program discontinuance on financial grounds are made or entertained, the faculty should have the opportunity to render an assessment in writing on the institution's financial condition.

2. The faculty body may be drawn from the faculty senate, or elected as an ad hoc committee by the faculty; it should not be appointed by the administration.

3. Faculty should have access to, at minimum, five years of audited financial statements, current and following year budgets, and detailed cash flow estimates for future years.

4. In order to make informed proposals about the financial impact of program closures, faculty need access to detailed program, department, and administrative unit budgets.

5. Faculty should determine whether "all feasible alternatives to termination of appointments have been pursued," including expenditure of one-time money or reserves as bridge funding, furloughs, pay cuts, deferred-compensation plans, early-retirement packages, deferral of nonessential capital expenditures, and cuts to non-educational programs and services, including expenses for administration.

6. Faculty members in a program being considered for discontinuance because of financial exigency should be informed in writing that it is being so considered, and given at least thirty days in which to respond. Both tenured and nontenured faculty should be involved in these determinations.

Second, this report proposes a more detailed and specific definition of "financial exigency" that will extend the standard of exigency to situations not covered by our previous definition. As set forth in the introduction, our new definition names a condition less dramatic than that in which the very existence of the institution is immediately in jeopardy, but is significantly more serious and threatening to the educational mission and academic integrity of the institution than ordinary (short-term and long-term) attrition in operating budgets. Financial exigency can legitimately be declared only when substantial injury to the institution's academic mission will result from prolonged and drastic reductions in funds available to the institution, and only when the determination of the institution's financial health is guided by generally accepted accounting principles. In proposing this new definition, however, we insist that financial exigency is not a plausible complaint from a campus that has shifted resources from its primary missions of teaching and research toward employing increasing numbers of administrators or toward unnecessary capital expenditures.

The AAUP has long acknowledged that a college or university can discontinue a program of instruction, but our standard has been that if the discontinuation is not undertaken for financial reasons, it must be shown to enhance the educational mission of the institution as a whole; we have long acknowledged that programs can be cut in times of financial exigency, but only if an appropriate faculty body is involved in the decisionmaking process from the very beginning, with the determination of whether an institution is experiencing bona fide financial exigency. But by and large, the program closings of recent years do not meet any of these standards. That is why they represent a violation of the principles on which American higher education should operate, and that is why they must be contested by a vigorous, principled, and informed faculty.

I. INTRODUCTION

The past forty years have witnessed a decisive shift in power in American colleges and universities.[1] Increasingly, institutions that were once governed jointly by faculty and administrators have become overwhelmingly or wholly dominated by their administrations, as the faculty senates at these institutions have withered into insignificance. For the most part, faculty members retain jurisdiction over the system of peer review and the protocols of scholarly communication, but astonishingly, they have begun to lose control over the one central aspect of higher education where they have long been presumed to have invaluable expertise– the curriculum. Administrators are making unilateral budgetary decisions that profoundly affect the curricula and the educational missions of their institutions; rarely are those decisions recognized *as* decisions about the curriculum, even though the elimination of entire programs of study (ostensibly for financial reasons) has obvious implications for the curricular range and the academic integrity of any university.

As decision-making power has shifted to administrators, public universities have felt intensified financial pressures because of the dramatic reduction in and even withdrawal of state support for higher education, especially in the wake of the financial crisis of 2008. Because the effects of the crisis have been especially pronounced for state budgets, public universities from coast to coast have seen severe if not draconian cuts in state appropriations and corresponding increases in tuition. States have been gradually shifting costs from state funding to tuition payments for a generation, but the new pressures have arrived at a time

[1] In this report we will henceforth use the term "universities" interchangeably with "institutions," though we are aware that the term often applies to institutions that would ordinarily be designated as "colleges."

when public and legislative complaints about college tuition are on the rise, and concerns over student debt have become national news. The perfect storm thus generated–declining financial support combined with rule to a larger degree by administrative fiat– affords university administrations the potential to manufacture a sudden "crisis" where none exists. For example: shifting costs from state revenues to student tuition payments does not in itself constitute an immediate financial crisis. We believe doing so is bad public policy, but it is a way of avoiding a funding shortfall, not creating one. Similarly, although many university endowments suffered substantial losses during the recession, very few institutions actually rely on endowment income for a major portion of their budgets. For that matter, endowments have by now largely recovered, as have the markets on which they are dependent. Claims of financial crisis based on the performance of the market should thus be met with especial skepticism.

As the AAUP discovered in its investigation of how New Orleans institutions responded to the effects of Hurricane Katrina, public perception of a crisis opens a window of opportunity for campus managers to make some of the cuts and programmatic changes they have in fact long wanted to make.[2] An institution's desire to shift priorities is not the same as a fiscal crisis, and one should not mistake the former for the latter. As we will detail below, claims that a campus is facing either a crisis or a form of slow fiscal starvation need to be investigated thoroughly, and neither faculty nor staff can conduct such an investigation without access to detailed financial data. There are widely accepted metrics for analyzing an institution's financial health, metrics that make objective, reliable conclusions possible. We stress *objective*

[2] "Report of an AAUP Special Committee: Hurricane Katrina and New Orleans Universities," *Academe* 93,3 (May-June 2007) 59-125.

conclusions, because administration assertions about financial challenges cannot always be accepted at face value. That is not to say that small liberal arts colleges and some public institutions are not facing real financial pressures. It is to say that all members of the university community deserve to participate in relevant discussions of those pressures– and to do so on the basis of sound and detailed information.

The immediate occasion of this report is that some university administrations have decided to cut costs by eliminating entire programs– and terminating the positions of tenured faculty in those programs. The University at Albany, State University of New York, has been the best-known example, having made international news in 2010 when it announced the closing of its French, Italian, Russian, classics, and theater degree programs; the AAUP had begun an investigation but suspended it after two potentially affected French professors agreed to retire and the closing of the several degree programs was not followed by the involuntary termination of any tenured faculty appointments. Though it received much less national attention at the time, Southeastern Louisiana University also eliminated its undergraduate French majors (in French and French Education) in 2010, dismissing the program’s three tenured professors with a year’s notice– and then offering one of them a temporary instructorship at a sharply reduced salary. In April 2012, an AAUP investigating committee’s report on the University of Louisiana System, with its focus on Southeastern Louisiana University and Northwestern State University, was published online, and Committee A presented statements on these two institutions in the nine-university system to the 2012 Annual Meeting which imposed censure. In addition to the discontinuance of the French majors at Southeastern, with the resulting action against the three tenured professors, the chemistry major at the University of Louisiana at Monroe was discontinued but without notification of termination to anyone among five threatened chemistry professors; and the discontinuance of the doctoral program in cognitive sciences at the University of Louisiana at Lafayette, while followed by notification to two tenured professors of appointment termination, resulted in steps to avoid implementation. At Northwestern State, however, a wide range of programs suffered discontinuance and more than twenty tenured professors suffered termination of appointment through the ending of programs, including economics, German, journalism, philosophy, and physics. The sweeping, across-the-board actions were shortly followed by news of massive cuts at the University of Northern Iowa, which announced the elimination of more than fifty programs in March 2012. An AAUP investigation at Northern Iowa has resulted in a report being published online in November. Massive layoffs at National Louis University, a private institution in Chicago, also triggered an appointment of an AAUP investigating committee, which conducted its site visit in October. Likewise, the Nevada system is under severe duress: state general fund appropriations have been cut by more than 30 percent since 2009, representing over $200 million in annual support lost. At the University of Nevada, Reno, the system's oldest campus, twenty-three degree programs have been closed and dozens of faculty members have been released, including nearly twenty tenured faculty. At the University of Nevada, Las Vegas, president Neal Smatresk contemplated seeking a declaration of financial exigency in the spring of 2011 when state cuts appeared to be even more severe. (Since 2010, UNLV has lost $73 million in annual state support, eliminated over 300 total positions and cut eighteen degree programs but avoided layoffs of tenured professors and of most faculty members with appointments probationary for tenure.)

Those institutions, however, have by and large declined to issue declarations of financial exigency. The sole recent exception is Southern University, Baton Rouge, where the AAUP is currently investigating a declaration of financial exigency that led to the termination of the appointments of at least ten professors with tenure. It has therefore become clear that the AAUP needs to address program closures that are made in the absence of declarations of exigency, and to revisit our *Recommended Institutional Regulations on Academic Freedom and Tenure* accordingly.

The current Recommended Institutional Regulation 4c sets a very high bar for terminations on grounds of financial exigency:

> Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur under extraordinary circumstances because of a demonstrably bona fide financial exigency, i.e., an imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means.

Recommended Institutional Regulation 4d, by contrast, provides procedures for tenure terminations as a result of program closings not mandated by financial exigency: “Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur as a result of bona fide formal discontinuance of a program or department of instruction.” Regulations 4d(1) and 4d(2) set out the conditions for discontinuing programs and tenure commitments:

> (1) The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.
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> [Note: “Educational considerations” do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance.]
>
> (2) Before the administration issues notice to a faculty member of its intention to terminate an appointment because of formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable position. If placement in another position would be facilitated by a reasonable period of training, financial and other support for such training will be proffered. If no position is available within the institution, with or without retraining, the faculty member’s appointment then may be terminated, but only with provision for severance salary equitably adjusted to the faculty member’s length of past and potential service.
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> [Note: When an institution proposes to discontinue a program or department of instruction, it should plan to bear the costs of relocating, training, or otherwise compensating faculty members adversely affected.]

Neither of these regulations appears adequate to the situation in which many institutions now find themselves. In part that is because the standard of “exigency” was initially drawn from small, private, impecunious institutions, not large state universities, few of which can plausibly be said to have faced imminent crises that threaten their very existence. In recent decades, and especially in recent years, colleges and universities in the public sector are more commonly experiencing intermediate conditions that may have significant impact on aspects of the academic mission of the institution but do not threaten the survival of the institution as a whole. Thus most colleges and universities are not declaring financial exigency even as they plan for widespread program closings and terminations of tenured and nontenured faculty appointments. They are refusing to do so for ostensibly good reasons (namely, that their financial conditions are not so dire as those invoked by Regulation 4c, or that a declaration of financial exigency would itself worsen the institution's financial condition) and for arguably bad reasons (namely, so that they can operate in severe-financial-crisis mode, bypassing AAUP standards of faculty consultation and shared governance without the bad publicity of declaring exigency). This report seeks to address this phenomenon, and to propose sound procedures for program review under conditions captured neither by Regulations 4c nor 4d as they are currently written.

As we note in more detail below, this report is in some respects a continuation of a debate begun in the mid-1970s, the last era of major retrenchment in American higher education. Then, W. Todd Furniss, a staff officer of the American Council on Education, had criticized the gap between Regulations 4c and 4d, writing, "good sense tells us that in the real world there are far more conditions between imminent bankruptcy on the one hand and, on the other, program change that would 'enhance' the 'educational mission of the institution as a whole' in the absence of a financial emergency."[3] At the time, AAUP Committee A chair and former president Ralph S. Brown had replied that "'discontinuance' may be invoked in hard

[3] W. Todd Furniss, "The 1976 AAUP Retrenchment Policy," *Educational Record* 57.3 (1976), 135.

times as a substitute, perhaps a subterfuge, for an exigency crisis that cannot be convincingly asserted."[4] The relevance of Furniss's and Brown's concerns to current conditions is obvious. But the widespread and systemic nature of the challenges facing American universities in the second decade of the twenty-first century compels us to revisit and revise the terms of the debate begun a generation ago. We are therefore proposing a new definition of "financial exigency" that is more responsive to actual institutional conditions, and that will extend the standard of exigency to situations not covered by our previous definition. Under this new definition, an institution need not be on the brink of complete collapse in order to declare exigency. Rather, it needs to demonstrate that substantial injury to the institution's academic mission will result from prolonged and drastic reductions in funds available to the institution, and it needs to demonstrate dispositively that the determination of its financial health is guided by generally accepted accounting principles.

Our definition of "financial exigency" is as follows:

> ***Financial exigency*** *names a severe financial crisis that threatens the academic mission of the institution as a whole and that cannot be alleviated by less drastic means*.

Below, we will expand on this definition and provide detailed recommendations for the faculty deliberations necessary for a legitimate declaration of exigency that warrants program closure. But we want to make it clear at the outset that many current "crises" represent shifts in priorities rather than crises of funding. Financial exigency is not a plausible complaint from a campus that has shifted resources from its primary missions of teaching and research toward employing increasing numbers of administrators or toward unnecessary capital expenditures. A

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[4] Ralph S. Brown, Jr., "Financial Exigency," *AAUP Bulletin* (Spring 1976), 13.

campus that can reallocate resources away from teaching and research is not a campus that can justify cuts in its core mission on financial grounds. Discussions of a campus's financial state cannot be fairly or responsibly conducted without faculty consultation about budgetary priorities. Cuts in teaching and research must be a last resort, after, *inter alia*, the administrative budget is reviewed and reduced and supplements for athletics and other nonacademic programs are eliminated. Moreover, colleges and universities need more objective, quantitative standards for claiming financial exigency– such as an index that uses ratios that incorporate institutional debt level and reserves, along with other data, to come up with a composite score to assess and establish institutional financial health. The Ohio Board of Regents, for example, uses such an index and requires that the composite score fall below a certain level for two consecutive years before classifying an institution as being in serious financial difficulty. (Appendix II to our report describes the components of an index that is similar to the OBR index and can be used to guide determinations of an institution's financial condition.)

The report that follows provides guidance for how legitimate claims of financial exigency can be reviewed and substantiated, and how institutions should proceed with program closures under such conditions. Nothing in this report weakens academic freedom, tenure, and shared governance as they are now understood and protected in the AAUP's current *Recommended Institutional Regulations*. On the contrary, this report urges that institutions increase the level of faculty consultation and deliberation at every stage of the process, beginning with the guideline that is currently a note to Regulation 4c(1), stipulating that "there should be a faculty body that participates in the decision that a condition of financial exigency exists or is imminent, and that all feasible alternatives to termination of appointments have been pursued."

To close this introduction, we want to make explicit the reasons why the faculty should be centrally involved in deliberations about exigency. Certainly this is not the model in the corporate world, where downsizings and layoffs are simply announced and severance packages issued; why then should academe be any different? The answer goes to the heart of the rationale for tenure as the basis for academic freedom, and indeed to the heart of the rationale for institutions of higher education. As Matthew Finkin and Robert Post have written, "institutions of higher education serve the public interest ... they promote the common good. The common good is not to be determined by the arbitrary, private, or personal decree of any single individual; nor is it to be determined by the technocratic calculation of rational and predictable profit incentives. *Faculty, by virtue not only of their educational training and expertise but also of their institutional knowledge and commitment, have an indispensable role to play in the debate.*"[5] Program closures are matters of curriculum, central to the educational missions of colleges and universities– missions over which the faculty should always have primary responsibility. Closures ordered by administrative fiat, even– or especially– when they are ordered by administrators who believe they have done due diligence in program review– are therefore inimical not only to the educational mission of higher education but also to the social contract according to which faculty expertise, academic freedom, and tenure serve the public good.

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[5] Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of Academic Freedom* (New Haven: Yale University Press, 2009), 125. Emphasis added.

We believe it is crucial to keep the larger picture in view. After World War II, the United States embarked on the world's most extensive experiment in mass higher education. That experiment was a success, if one measures success by the fact that the American system of higher education was commonly described, over the ensuing decades, as the envy of the rest of the world; and it was a success as an expansion of the promise of democracy, as well. But in recent years the social contract underwriting that experiment has been largely rewritten. Tenure has been eroded by the growth of the ranks of non-tenure-track faculty, and it is no coincidence that academic decision-making has moved more and more emphatically into the hands of administrations. Tenure itself has increasingly been understood as a private, individual affair, a merit badge guaranteeing that a faculty member has undergone peer review and is entitled to academic freedom in his or her teaching and research; few in academe or out appreciate the broader principle that tenure serves the public good by allowing for independence of inquiry and an incentive to intellectual exploration. At the same time, state legislatures have steadily disinvested in institutions of higher education, offloading costs onto individuals and families and characterizing education as a private investment rather than a public good.

The recent wave of program closures represents the confluence of all these long-term trends: the erosion and redefinition of tenure, the massive growth in the ranks of contingent faculty outside the tenure system, and the nationwide disinvestment in public higher education. It is time for faculty members to reclaim and reassert their proper roles as the stewards and guardians of the educational missions of their institutions– for the good of American higher education, and for the greater good of all.

II. THE HISTORY OF THE FINANCIAL EXIGENCY CLAUSE

Origins and Context

The Association's seminal 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* provided the groundwork for the system of academic tenure in American higher education. It proceeded from the standpoint of high principle and practical application but was not concerned with the relationship of tenure to institutional financing. A decade later, the American Council on Education sponsored a conference in Washington devoted to the formulation of a set of shared principles. In addition to the Council, representatives from the American Association of University Professors, the Association of American Colleges, the Association of American Universities, the Association of Governing Boards, the Association of Urban Universities, the Association of Land Grant Colleges, the National Association of State Universities, and the American Association of University Women took part. The bases for discussion were drafts prepared by the Association of American Colleges (AAC) in 1922 and 1923; the conference participation was weighted heavily on the side of academic administration. The resulting 1925 *Conference Statement* set forth the following provisions on "Academic Tenure" pertinent to the issue before us:

> Termination of permanent or long-term appointments because of financial exigencies should be sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution. Situations which make drastic retrenchment of this sort necessary should preclude expansions of the staff at other points at the same time, except in extraordinary

circumstances.

Concerns about the inadequacies of the 1925 document within the AAUP ran deep. According to the leading historian of the subject, the very manner of its promulgation was viewed by AAUP leaders as a "charade."[6] But these reservations ran to issues other than the financial exigency clause which, as will be seen momentarily, was understood by Committee A to be all of a piece with the provision in the succeeding jointly formulated 1940 *Statement*.

Negotiations with the Association of American Colleges on a successor document began in 1937, not only in the wake of the Great Depression, but also in light of an intensive study of higher education's response to the Depression commissioned by the AAUP which appeared that year.[7] The study surveyed the universe of institutions that comprised higher education at the time: most were private, small, under denominational or local control, and penurious.[8] Institutional mortality was common. "[E]ven in prosperous times," five to ten colleges

[6] Walter P. Metzger, "The 1940 Statement Principles on Academic Freedom and Tenure," *in Freedom and Tenure in the Academy* 3, 27 (William Van Alstyne ed., 1993).

[7] Malcolm Willey et al., *Depression, Recovery, and Higher Education* (1937).

[8] This was set out in tabular form:

Colleges by Size of Student Body and Faculty 1931–1932

Student body size	*No. of institutions*	*% of total*	*No. of faculty*	*% of total*	*Enrollment*	*% of total*
I (1–499)	514	55.2	13,348	14.8	129,496	12.6
II (500–999)	204	21.9	12,065	13.4	141,232	13.8
III (1,000–2,499)	131	14.1	19,262	21.3	208,288	20.3
IV (2,500 up)	82	8.8	45,557	50.5	545,723	53.3
Total	931	100.0	90,232	100.0	1,024,739	100.1

Source: (Willey et al., *id.* at 10)

"normally disappear or merge each year."[9] The mortality rate accelerated as the Depression deepened; in 1935, twenty-nine colleges closed.

The authors of the study were not fazed by the prospect of institutional closure,[10] but they were by strategies for institutional survival, especially in the aggregate effect:

> Are the ultimate purposes of higher education best served by adjusting institutional finances to depression circumstances through the process of decreasing the numbers of young men and women at the lowest ranks, and at the same time restricting the entrance into the profession of other young men and women who would normally come up through the rank of instructor? The faculty of tomorrow depends upon the recruits of today. Temporarily the problems of diminishing budgets may be solved by releasing some of the young men and appointing but few others. The older men carry on, and institutional prestige is maintained. But will this prove to be sound procedure in the end?[11]

"The alternative," the authors quickly added, "is not the discharge of older men, in favor of instructors."[12]

The AAUP-commissioned study summarized institutional response to the Depression as follows:

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9 *Id.* at 211.

10 *Id.* at 171–72: "The . . . data raise a question concerning the justification of seeking to maintain colleges and universities, of any size, that may finance themselves with minimum adequacy in prosperity periods, but cannot do so during years of depression. . . . Why should two neighboring, financially weak schools each attempt to offer the same programs? Competition for students may have brought the duplication, but it is apparent that sooner or later many of these inadequately supported institutions will be compelled to face the facts of economic existence more realistically, and to examine them in terms of social need as well as in connection with the obligation to the student."

11 *Id.* at 34.

12 *Id.*

> The character of educational institutions has changed in the past thirty years. Business, professional, and vocational interests have assumed a more important place. An aura of practicality hangs over the campus. The educational institution is more of the world than ever before. . . . As all the data thus far have shown, the ups and downs of the world of business have their counterpart in academic matters. Men are hired or dropped, salaries are raised or cut, and tenure is more or less secure as general economic conditions fluctuate between prosperity and depression.[13]

The authors called for greater "faculty cohesion"—and, presumably, institutional cohesion as well—on "principles they regard as essential to the welfare of higher education."[14]

The drafters of the 1940 *Statement* sought to achieve just that cohesion, but the final text, on its face, was actually less instructive on this issue than its 1925 predecessor. The 1940 *Statement* provided in its entirety that: "Termination of a continuous appointment because of financial exigency should be demonstrably bona fide." Even so, a gloss of meaning is supplied in the remarks of the AAC's lead negotiator, Henry Wriston, president of Brown University, in presenting the document for AAC adoption. On the clause itself, he remarked:

> The plain fact is that dismissals directly due to financial emergency are really very rare. Speaking now as an administrative officer, it is much easier for me to say "no" to a man by pleading the exigencies of the budget than by denying a request on the merits. The displacement of a teacher on continuous appointment should not be merely an "economy move" but should be done only because of a genuine emergency involving serious general retrenchment. . . . It is a reminder that purity of purpose is no defense

[13] *Id.* at 452.
[14] *Id.* at 451.

> in the public eye, unless the purity is demonstrable. The provision is a protection to the administrative officer because it reminds him to establish the record so clearly that the exigency is as obvious to the public as it is to him.[15]

And on the larger, cohesive purpose of the document he echoed and emphasized its stated premises:

> Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extra-mural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Upon freedom and economic security, and hence upon tenure, depends the success of an institution in fulfilling its obligations to its students and to society. There is a statement of the philosophy of tenure. *Tenure is not an end in itself*.[16] (Emphasis added.)

Fast upon the adoption of the 1940 *Statement*, the AAUP investigated two institutions in light of the newly fashioned financial exigency clause. This early engagement anticipates the Association's thinking later on; it treats administrative behavior that has recurred over the years.

The first investigation concerned the decision by the president of New York's Adelphi College in 1939 to dismiss five senior faculty members, all department heads.[17] The institution was in bankruptcy. There was no question of an existing state of financial exigency and the AAUP's committee of investigation said as much: "Manifestly, financial difficulty had become such as to compel consideration of the necessity of faculty dismissals." Faculty salaries had

[15] Bulletin of the Association of American Colleges (March, 1939).
[16] *Id.* at 113.
[17] "Adelphi College," *AAUP Bulletin* 27.4 (October 1941), 494-517, 494.

been reduced by 25 percent since 1930. But more had to be done. A special committee of the board of trustees, on which the president served, reviewed the unit cost of those departments giving academic credit, but also considered the president's plan for future curricular development and for the direction of the college. The result was the dismissal of the highest paid person in each department sharing the highest unit cost, but not quite. The chair of the Department of Sociology and Economics was dismissed even as his department ranked fifteenth in unit costs.

The investigating committee was critical of the use of unit cost as the sole metric[18] and was especially critical of the educational consequence of removing the most senior and experienced members of the faculty. It noted that the faculty had proposed other economies with which recommendations the administration did not seriously engage. Several members of the faculty argued that courses in art, dance, and music should be eliminated before reductions in the liberal arts, but these courses apparently were in keeping with the president's vision for the direction of the college. And the actual saving to the college was less than the sum of the salaries of those dismissed as the result in part of the appointment of a dean, an office heretofore vacant. The committee concluded that, "[N]ot all permissible alternatives short of dismissal had been explored and given full consideration."[19] And the committee found that "factors other than financial were influential": that the degree to which faculty members did not agree with the administration played a role in singling them out for release. None of those dismissed was provided a hearing.

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[18] *Id.* at 515 *citing* University Unit Costs, *U.S. Office of Education Bulletin* No. 21 (1937) (emphasizing the complexities of interpreting unit costs).

[19] *Id.* at 516.

The second investigation dealt with the decision of the president of Memphis State College in 1942 to terminate the appointments of two professors of long service—one in a history, one in English—as "an economy measure" after having stated to the faculty that the college was facing a "financial emergency."[20] The college had experienced a 27 percent drop in enrollment with a consequent loss of tuition revenue only half of which would be made up out of reductions in the operational budget. The president argued that the instructional budget would have to be reduced by 14% to make up the shortfall, but a salary reduction of that dimension would fall disproportionately on the lower paid. The State Board of Education approved the terminations even as it approved the appointment of two new teachers in English; in addition, a football coach was hired who had no team to coach but who taught courses on a part-time basis that had been deemed "redundant" in the release of one of the faculty members.

The Association's general secretary had written to the president suggesting measures that might be taken to avoid the terminations; these the administration rejected out of hand. The investigating committee took them up: A "proportional and equitably graduated reduction" of professional and administrative salaries, save those in the lowest brackets; redistribution of teaching duties without filling vacancies; termination of temporary and short-term appointments; or some combination of these. Without denying the existence of the shortfall, the investigating committee doubted that the dismissals were driven by the administration's concern for economy. In the case of one of the dismissed faculty members, the investigating committee agreed that her department was "overstaffed," but, it opined,

[20] "Academic Freedom and Tenure: Memphis State College," *AAUP Bulletin* 29.4 (October, 1943), 550-580, 550.

> If dismissals were necessary in this department, they should have been made of those most recently appointed, but the evidence shows that these recent appointees were "flexible" (one of them doubled in coaching football and the other directed intramural sports).[21]

As in the Adelphi case, there was incontrovertible evidence that faculty members were singled out for release because of presidential displeasure—for their having been "uncooperative" and critical of the administration. Again, no hearing was provided; nor were the faculty's views solicited or considered.

These early applications of the financial exigency clause evidence the temptation to justify a dismissal of an out-of-favor faculty member as an "economy move."[22] But more

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[21] *Id.* at 572.

[22] A decade and a half later, Texas Technical College would dismiss three tenured faculty members who had displeased the institution's board of directors because of their political or civic activities. The appointment of one faculty member was terminated after the program he led, in adult education, supported by outside funds, was discontinued for "reasons of economy." "Texas Technical College," *AAUP Bulletin* 44.1 (March 1958), 170-187, 170, 174. This might well be the AAUP's first reported case of release of a tenured professor on grounds of program discontinuance. A member of the board was quoted in the press as follows:

> It was the further view of the Board that the so-called adult education program as formerly sponsored by the Ford Foundation was of little academic importance, considering the need for money in other vital and well-established fields. Hence, the adult education program, largely suspect of genuine academic value by many patrons of Texas Tech and by the most distinguished segments of the faculty, should be discontinued. Personally, I've always viewed it as a bit of plush academic boondoggling that any institution genuinely dedicated to the great academic traditions, and the really consecrated teachers who pursue it, can ill afford. In keeping with its duties established by law, the Board decided to terminate it permanently.

Id. at 181. In response to this, the investigating committee observed:

> Persons with whom the committee talked treated with skepticism the claim of economy, pointing out that only about one-third of one per cent of the total College budget was involved, and that the money taken from the Adult Education Program was simply transferred to the general account and not to some other pressing need. Neither is the claim of economy consistent with the fact that the next ranking person on the staff of the Program, who had the title of Executive Assistant, was not affected in the same manner as Professor Stensland [the released faculty member], but is still retained on the faculty.

importantly, they underline the need to explore alternatives to a financial shortfall, to retain experienced faculty of long service, and to ventilate the ground of discharge in a hearing. The investigating committees' emphasis on the educational unwisdom in terminating the services of senior (tenured) faculty, while adjunct, part-time, or junior faculty are retained, even as those terminated might be the higher paid, be less "flexible," circles back to the 1940 *Statement*'s justification for tenure: that the academic profession cannot be made attractive to the most promising if, after passing a lengthy and exacting period of probation in which their academic merit has been made manifest, the security of the academic post is to be made contingent on possibly evanescent shifts in student enrollment or arbitrary redirection of resources or programmatic restructuring, undertaken by administrative fiat lacking any faculty participation or review and so lacking the critical element of transparency argued as essential by Brown's President Wriston.[23] As he contended and as the 1940 *Statement* makes clear, these elements are a matter of public policy, not of special solicitude for the tenured.

The 1970s and the Era of Retrenchment

Regulation 4 was initially drafted in 1957 but did not become the focus of extended discussion until the 1970s, when the Association witnessed a wave of cases involving declarations of financial exigency. Former AAUP Committee A chair and president David Fellman summarized the phenomenon in a 1984 essay for *Academe*:

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[23] At both Adelphi and Memphis State, for example, the dismissals were effected while the presidents were attempting to effect significant reorganizations of their own devising to which the released faculty members were not sympathetic.

> As the national economic recession of the 1970s gathered momentum, the administrations of many colleges and universities began to invoke pleas of financial difficulty, in some cases defined by them as "financial exigency," to justify terminating the appointments of tenured faculty members and persons in probationary status before the end of their terms. Beginning with Bloomfield College in New Jersey in 1973, a steady stream of serious cases has come to the attention of the Association. From the spring of 1974 until March 1984, ten cases involving issues relating to financial exigency that were investigated by *ad hoc* committees led to reports published under the auspices of Committee A in the Association's journal....
>
> Retrenchment has taken many forms, but the release of tenured and nontenured faculty members has presented the academic profession with its most acute problem.[24]

The Association's last sustained analyses of the financial exigency clause stem from that era, and most of the findings of those analyses remain relevant today. Then as now, the financial crisis was real– and deep: it was a time when the nation's largest city came close to declaring bankruptcy. But time and again, Committee A investigations found that institutional authorities declared financial exigency under circumstances that bordered on the ludicrous. At Bloomfield College, infamously, the administration abolished the tenure system and dismissed a large proportion of the tenured faculty while simultaneously hiring a similar number of nontenured new faculty, and the president's determination that the college had a net worth of $12,000,000 did not take into account the college's ownership of two golf courses valued at $15,000,000. At

[24] Fellman, "The Association's Evolving Policy on Financial Exigency," *Academe* (May-June 1984), 14.

Sonoma State University in California, "the investigating committee noted that while the [twenty-four] layoffs were occurring a new presidential assistant was appointed with a substantial salary and two new associate deanships were created without consulting the faculty."[25] At Metropolitan Community Colleges in Missouri, "where sixteen full-time tenured faculty members were laid off, the investigating committee stressed that the local faculty hearing committee had concluded that the alleged financial crisis was only 'a projected or hypothetical one based on predicted events which never occurred.'"[26] Then as now, "crises" were announced as pretexts for decisions that effectively eroded the institution of tenure; then as now, those decisions were made almost entirely without faculty input or consultation. "In most of the cases reported by Committee A for publication," Fellman concluded, "faculty involvement was either nonexistent or grossly inadequate."[27]

However, noting that declared emergencies were often not real emergencies, and pointing out that faculty were largely ignored in administrators' responses to such "emergencies," merely kicks the can down the road. Such faculty determinations need to be made– and this report strongly recommends that faculty be intimately involved in the initial determinations of the extent of their institution's financial conditions– but a structural problem remains with Regulations 4c and 4d. That problem was first pinpointed in W. Todd Furniss's critique, "The 1976 AAUP Retrenchment Policy," in which Furniss cites his March 28, 1975, letter to AAUP general secretary Joseph Duffey. Speaking for the Commission on Academic Affairs of the American Council on Education, Furniss had written:

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[25] *Id. at* 16.
[26] *Id.* at 17.
[27] *Id.* at 20.

> The definitions of financial exigency and the conditions for programmatic change given in the regulation are, in the view of the Commission, too skimpy to be useful.... [T]he definitions as written imply that termination for financial exigency is legitimate *only* when an entire institution is on the brink of bankruptcy, and those for program change *only* when there are no financial considerations (which would require the procedures for financial exigency). Good sense tells us that in the real world there are far more conditions between imminent bankruptcy on the one hand and, on the other, program change that would "enhance" the "educational mission of the institution as a whole" in the absence of a financial emergency.[28]

Ralph S. Brown's important essay, "Financial Exigency" (to which Furniss was partly responding), acknowledges that program discontinuance

> meshes only imperfectly with financial exigency terminations. Recognition of it has developed independently, and without any explicit foundation in the 1940 *Statement of Principles*....
>
> The imperfect fit of discontinuance with financial exigency comes from an impractical desire to keep the two wholly separated. This desire arises from the observation that "discontinuance" may be invoked in hard times as a substitute, perhaps a subterfuge, for an exigency crisis that cannot be convincingly asserted. A little redefinition here, a showing of declining enrollments there, and– presto– the

[28] W. Todd Furniss, "The 1976 AAUP Retrenchment Policy," *Educational Record* 57.3 (1976), 133-139, 135.

> Professor of Italian is terminated, because the Italian program in the Romance Languages Department has been discontinued.[29]

Brown's concerns remain our concerns, which is why we remain so vigilant about the possibility that any attempt to devise Association guidelines for bridging the gap between 4c and 4d will be taken as license to grease the skids for program closings in hard times. But we note that Brown immediately added, "it is entirely natural that the educational value of fields of instruction or research should be viewed with a colder eye in bad times than in good. The only way to keep the process from getting out of hand is to insist on good faith educational judgments, and to hope that the faculty, exercising its primary responsibility in such matters, will make them."[30] Furniss's criticism of Regulation 4 includes the objection that the phrase "primary responsibility" is ambiguous ("the Commission found itself questioning whether 'primary' means 'initial,' 'chief,' or 'exclusive,' and requested that Committee A modify the phrase or define it");[31] similarly, it will not escape anyone's attention that "good faith educational judgments" is also a phrase that invites a wide range of interpretations. Indeed, as we noted in the introduction, it is plausible to read this report as an attempt to address the arguments made more than thirty years ago by Brown and Furniss, and to offer guidance regarding the lingering ambiguities of the terms of Regulations 4c and 4d. The task is rendered only more urgent by the seismic changes in the academic workforce between the mid-1970s and today– namely, the end of mandatory retirement and the explosive growth in the number of contingent, non-tenure-track faculty members, the latter of whom can be seen as the legacy

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29 Ralph S. Brown, Jr., "Financial Exigency," *AAUP Bulletin* 62.1 (Spring 1976), 5-16, 13.
30 *Id.*
31 Furniss, 137.

of the era of retrenchment, as retiring tenured faculty were increasingly replaced with various forms of adjunct (including full-time non-tenure-track) positions. Additionally, the need to revise AAUP guidelines on financial exigency and program discontinuance is complicated by the fact that over the past four decades the political climate has become markedly more hostile to the institution of tenure at all levels, with a fair amount of the hostility coming from university administrators. Last but not least, as we have noted above, over the past four decades the practice of shared governance has been weakened considerably in much of American higher education. This report hinges on, and emphatically advocates, a reversal of that trend, and a reassertion of the fundamental principle that the faculty should play the primary role in determining the educational mission of their institutions.

III. RECOMMENDATIONS FOR INSTITUTIONS EXPERIENCING FINANCIAL EXIGENCY

Determination of the Financial Condition of the Institution

In what follows, we review AAUP policy on the role of faculty members in the determination of their institutions' financial condition. We believe that our policy documents and reports provide decisive guidance in these matters, and we note at the outset that it seems to be increasingly difficult to find institutions in which faculty have been afforded the primary responsibility— or, since that phrase is ambiguous, *any* responsibility– to conduct those determinations. Once again, this is not to say that the crises facing many institutions are not real; it is to say only that the critical protocol established in a note to Regulation 4c(1), stipulating that "there should be a faculty body that participates in the decision that a condition of financial exigency exists or is imminent, and that all feasible alternatives to termination of appointments have been pursued," is often being ignored. Frequently, a crisis is simply declared and steps are taken to meet it– steps that sometimes, but not regularly, involve substantial consultation with an appropriate faculty body. In too many cases, "faculty consultation" seems to consist merely of informing faculty what will be done to them.

The 1966 "Statement on Government of Colleges and Universities" was jointly written with the American Council on Education (ACE) and the Association of Governing Boards of Universities and Colleges (AGB). The AAUP adopted the document as official policy, and the other two organizations commended it to the attention of their membership. The statement recognizes a division of labor among trustees, presidents, and faculty members, and offers the following recommendation with regard to 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, current budgets and expenditures, and short- and long-range budgetary projections.[32]

The statement further specifies that the judgment of the faculty "is central to general educational policy." Although that passage speaks of "faculty status and related matters" such as "appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal,"[33] we hold that program closure is very much a matter of educational policy and that the faculty should therefore be accorded an *initial and decisive* role– to answer Furniss's question about the meaning of "primary"– in any deliberations over program closure and release of tenured faculty members.

Additionally, our statement on "The Role of the Faculty in Budgetary and Salary Matters," adopted in 1972, reads as follows:

The faculty should participate both in the preparation of the total institutional budget and (within the framework of the total budget) in decisions relevant to the further apportioning of its specific fiscal divisions (salaries, academic programs, tuition, physical plant and grounds, and so on). The soundness of resulting decisions should be enhanced if an elected representative committee of the faculty participates in deciding on the overall allocation of institutional resources and the proportion to be devoted directly to the academic program. *This committee should be given access to all*

[32] *AAUP Policy Documents and Reports*, 10th edition (Washington, DC: AAUP), 137.
[33] *Id.* at 139.

> *information that it requires to perform its task effectively, and it should have the opportunity to confer periodically with representatives of the administration and governing board.*[34] (Emphasis added.)

Established AAUP policies therefore provide clear and unambiguous support for the position that faculty consultation and participation should be integral to the budget process, quite apart from any consideration of the financial status of the institution. Faculty consultation and participation in budget matters should simply be part of the ordinary course of business, in good times or in bad. In other words, we are not proposing a radical new platform of emergency measures whereby faculty committees are summoned to review university budgets only when institutions are experiencing financial exigency; we are reaffirming the principles that inform policies in place for forty years and more, recommending that faculty participate in the budget process at every stage– even as we acknowledge that on many campuses, these policies would in fact lead to radical changes in business as usual.

But AAUP policy also speaks specifically to occasions on which institutions are experiencing financial exigency and in response to which emergency measures are contemplated. The first recommendation in its statement, “On Institutional Problems Resulting from Financial Exigency: Some Operating Guidelines,” reads as follows:

> There should be early, careful, and meaningful faculty involvement in decisions relating to the reduction of instructional and research programs. The financial conditions that

[34] *Id.* at 149.

bear on such decisions should not be allowed to obscure the fact that instruction and research constitute the essential reasons for the existence of the university.[35]

Although the call for "early, careful, and meaningful faculty involvement" might seem to be clear on its face, we believe that recent developments with regard to program closures have rendered it necessary for us to specify "faculty involvement" in greater detail. We therefore propose the following procedures for "faculty involvement" in program closures.

Before any proposals for program discontinuance on financial grounds are made or entertained, the faculty must be afforded the opportunity to render an assessment in writing on the institution's financial condition. The faculty body may be drawn from an elected faculty senate, or elected as an ad hoc committee by the faculty; it should not be appointed by the administration. At institutions governed by collective bargaining agreements, the leadership of the union is an elected body of its faculty members, and should have a role in the assessment as well. (Should the faculty refuse to participate in a process that might result in faculty layoffs, they effectively waive their right to do so.) We recommend, in order to make those determinations, that the faculty should have access to, at minimum, five years of audited financial statements, current and following year budgets, and detailed cash flow estimates for future years. Beyond that, in order to make informed proposals about the financial impact of program closures, faculty need access to detailed program, department, and administrative unit budgets; but *the determination of the financial position of the institution as a whole must precede any discussion of program closures*. As in Regulation 4c(1), faculty should determine whether "all feasible alternatives to termination of appointments have been pursued,"

[35] *Id.* at 147.

including expenditure of one-time money or reserves as bridge funding, furloughs, pay cuts, deferred-compensation plans, early-retirement packages, and cuts to non-educational programs and services.

We note ruefully that this recommendation speaks to practices to which few institutions now adhere, and will doubtlessly be read as a radical departure from business as usual– even though it follows clearly from AAUP principles. We anticipate, as well, that it will meet with resistance from some administrators who will claim that faculty members do not have requisite expertise in these matters. We acknowledge that faculty members who engage in detailed consultation of this kind will necessarily have to be or become literate in budgetary matters. But there are two critical points that need to be considered. The first is that every institution of higher education that offers a full curriculum of instruction necessarily includes faculty members who specialize in accounting, finance, and economics more generally. Their expertise is directly relevant to the determination of financial exigency. The second is that outside the disciplines of accounting, finance, and economics, faculty members long experienced in the analysis of complex data relevant to their particular disciplines as well as to their own departments and schools can be expected to bring seasoned judgment to bear on institutional finances and their impact on the future of educational programs.

However, when we speak of “the financial position of the institution as a whole” we are not simply returning to the standard of “an imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means” than the termination of appointments. Again, we are proposing a new definition of “financial exigency,” which we believe corresponds more closely to the facts on the ground for most institutions of higher education. Financial exigency can be catastrophic and corrosive even when it does not threaten (as it rarely does) the survival of the institution as a whole. But because this definition of "financial exigency" does not require that an institution be faced with the prospect of immediate closure and bankruptcy, it must be accompanied by greater safeguards for faculty members and more stringent guarantees that it will not be abused.

Neither Regulation 4c nor 4d requires an institution to consult with or seek input from faculty members in programs slated for termination. This seems to us a significant oversight, particularly since our guidelines on institutional problems resulting from financial exigency insist that such consultation is imperative: "Given a decision to reduce the overall academic program, it should then become the primary responsibility of the faculty to determine where within the program reductions should be made. Before any such determination becomes final, those whose life's work stands to be adversely affected should have the right to be heard."[36] It may be objected that the results of such a recommendation would be predictable, insofar as very few affected faculty members would argue for their own program's elimination and/or their own release. However, some arguments for a program's elimination or preservation are better than others, and we believe that faculty must be entrusted with the right to make and assess those arguments. Regulation 4c(2) affords a faculty member whose position is terminated "the right to a full hearing before a faculty committee," and Regulation 4d(3) provides that a faculty member whose position is terminated for reasons other than exigency "may appeal a proposed relocation or termination resulting from a discontinuance and has a right to a full hearing before a faculty committee." But there is no provision for consultation

[36] *Id.*

with such faculty members before the decision is made. In the future, we propose, faculty members in a program being considered for discontinuance because of financial exigency should be informed in writing that it is being so considered, and given at least thirty days in which to respond. We recommend that Regulations 4c and 4d be revised accordingly.

Another Suitable Position

Regulation 4d(2) states as follows:

> Before the administration issues notice to a faculty member of its intention to terminate an appointment because of formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable position. If placement in another position would be facilitated by a reasonable period of training, financial and other support for such training will be proffered. If no position is available within the institution, with or without retraining, the faculty member's appointment then may be terminated, but only with provision for severance salary equitably adjusted to the faculty member's length of past and potential service.

This provision is key to determining whether a program is being discontinued for sound, legitimate educational reasons, or whether it is being discontinued simply in order to shed its tenured faculty: an institution that makes no substantial effort (or, as is often the case, no effort at all) to find "another suitable position" for faculty affected by program closure is effectively using program closure as a convenient way to terminate tenured appointments.

The problem, of course, lies in specifying what “another suitable position” might be. It is obviously beyond the capacity of this subcommittee to imagine every kind of possible program discontinuance and the potentially suitable positions for which affected faculty should be considered; the challenge lies in developing overarching principles that can have innumerable specific applications. The question is further complicated when one considers the case of *Browzin v. Catholic University*, as Ralph Brown explained in 1976:

> What is a program? What is a department? Here also we must rely on good faith, and on faculty involvement. An example of questionable judicial definition, albeit to a good end, is found in the *Browzin* case.... The issue was whether an adequate attempt had to be and had been made to place Professor Browzin in another suitable position. The trial in the lower court had concentrated on financial exigency. An ambiguity in the 1968 RIR seemed to relate the obligation to seek a suitable position only to cases of abandonment of program. Judge Wright, striving to give effect to what he thought were underlying goals, concluded that “financial exigency is in the case, but so is *abandonment of a program of instruction*" (italics Judge Wright’s). Since courses in Soil Mechanics and Hydrology, “Browzin’s particular responsibility," were given up, “The University did discontinue Browzin's program of instruction “. If the issue had been solely whether Browzin could be terminated because of a program discontinuance, I do not think we would want to accept this notion of a one-man program. The case would then seem to be a simple breach of tenure, in the absence of financial exigency.
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> Why then is a larger carnage acceptable? Only because it does not seem to be right to require a university to maintain a program, and the people in it, when a serious

educational judgment has been made, in the language of [Regulation 4d (1)'s] note, that "the educational mission of the institution as a whole will be enhanced by the discontinuance."[37]

We see no reason to abandon or revise the AAUP's longstanding position on one-person programs, which seem to us administrative devices for cherry-picking tenured faculty members for release. In the AAUP's 1983 report on Sonoma State University, for instance, the investigating committee commented decisively on that institution's use of "Teaching Service Areas" to define individual faculty members as one-person programs. "Through the device of the Teaching Service Area," the committee wrote, "the newly engaged nontenured faculty members may be reappointed while the appointment of a tenured professor with many years of service may be terminated. The administration need only decide to reduce the 'biology' Teaching Service Area by one person and leave 'microbiology' and 'molecular biology' alone."[38] The committee therefore found, and we concur, that such a procedure "is prone to abuse by the administration and serves to undermine academic freedom, tenure, and due process."[39] Whatever name such procedures go under (or, as is more likely, when they carry no official designation at all), we hold that they are not "program closures" as we understand the term, but, rather, an illegitimate means for targeting and terminating individual faculty appointments.

We therefore want to try to answer Brown's question– *what is a program?*– without relying exclusively on good faith and faculty involvement (though both are clearly necessary).

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[37] Brown, *id.* at 13, citing *Browzin v. Catholic University of America, 527* F.2d 843, 174 U.S. App. D.C. 60.

[38] "Academic Freedom and Tenure: Sonoma State University," *Academe* 69.3 (May-June 1983), 8.

[39] *Id.* at 9.

First and foremost, programs cannot be defined *ad hoc*, at any size; programs must be recognized academic units that existed prior to the declaration of financial exigency. The term “program” should designate a related cluster of credit-bearing courses that constitute a coherent body of study within a discipline or set of related disciplines. Ideally, the term should designate a department or similar administrative unit that offers majors and minors; at the University of Northern Iowa in 2012, by contrast, the administration’s definition of “program area” was not agreed to by United Faculty, the local AAUP collective bargaining unit, and was indeed so fluid and capricious as to allow for multiple cherry-picking operations. One important way to determine whether a program closure is bona fide is to ask whether the courses in the program continue to be offered after the program is “closed,” as was the case at Southeastern Louisiana University after it “closed” its majors in French and French Education. In other words, the elimination of a major or minor in a course of study is, of itself, no excuse for the release of tenured faculty members if courses are still on the books (presumably to be taught instead by non-tenure-track faculty, or by faculty members who have been stripped of tenure).[40]

As the court in *Browzin* held,

> [T]he obvious danger remains that “financial exigency” can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood– a way for the university to rid itself of an unwanted teacher but without according him his important procedural right. The “suitable position” requirement would stand as a partial check against such abuses. An institution motivated only by financial

[40] This is not to say that a faculty member should be guaranteed the same courses he or she taught prior to the declaration of financial exigency. If the elimination of a major or minor entails the elimination of advanced courses in a subject, so be it. We will not seek to uphold the right of a Spanish professor to continue teaching small seminars on Cervantes instead of lower-division language-instruction courses. We are concerned here only with preserving the positions of tenured faculty members, not with dictating the content of their course loads.

> considerations would not hesitate to place the tenured professor in another suitable position if one can be found, even if this means displacing a nontenured instructor.[41]

We note, however, that in the years since *Browzin,* and Brown's response thereto, academic programs themselves have undergone substantial transformation. This represents both a danger and an opportunity. First, the meaning of "another suitable position" has changed radically since the 1930s with the post-World War II expansion of American higher education. Second, and more specifically, since the 1970s, in every field of intellectual endeavor, from the arts and humanities to the social, speculative, and applied sciences, colleges and universities have heralded the virtues of interdisciplinarity– and have created a wide variety of innovative inter-departmental programs, centers, and institutes in order to encourage interdisciplinary research, teaching, and collaboration. On the one hand, this transformation of the curricular landscape would appear to make it easier for administrations to define "programs" whose proposed discontinuance is simply a means of terminating one troublesome tenured professor. But on the other hand, the expansion or redefinition of the traditional disciplines, together with the creation of new interdisciplinary programs, should also make it easier for institutions to find "another suitable position" for faculty members in discontinued programs.

Two examples will help illustrate what we are suggesting. At SUNY-Albany, the tenured faculty in French, Italian, Russian, and classics could very well have been consolidated in a department of languages and literatures that would also include Spanish and lesser-taught other languages. If the SUNY-Albany administration did not consider this possibility, it would be but one of many ways in which the standards of the AAUP were ignored. At Pennsylvania State

[41] *Browzin v. Catholic University*, 527 F.2d 843 (U.S. App. D.C.) at 847 (footnote omitted).

University, the termination of the university's Science, Technology, and Society program– itself the creation of faculty from the colleges of Earth and Mineral Sciences, Engineering, Liberal Arts, and Science in 1969-70– affected five tenure-track faculty members working on a wide variety of subjects, such as the history of autism and networks created by families with autistic children, the politics of food security, and the history of Chinese ecological science and environmental governance, with a focus on climate policy and urban development. The faculty members involved clearly can be housed in any number of academic units, from the traditional Department of Human Development and Family Studies to newer interdisciplinary units such as the Huck Institutes of the Life Sciences, the Penn State Institutes of Energy and the Environment, and the International Center for the Study of Terrorism.[42] American universities have found many ways of creating such centers and institutes, using them as devices for establishing new areas of research and teaching, and for engaging new faculty members. We are aware that few of these centers and institutes were created with the intention that they would include faculty lines for tenured faculty and those probationary for tenure. But because we hold that tenure is held in the institution rather than any department, college, program, or other subdivision within the institution, we believe that it is incumbent upon institutions to be at least as creative in finding ways to relocate faculty members whose programs have been discontinued.[43] In some cases, this may involve provost-level negotiations, if for instance a

[42] Penn State conducted its program closures, which were announced in 2011, by means of a "Core Council" that included minimal faculty input, none of which concerned the financial state of the university. There was no attempt to find "another suitable location" for the probationary faculty in the Science, Technology, and Society program until after its closure had been decreed, though arrangements were eventually made for some– not all– of the faculty members affected.

[43] See, e.g., "Comments by the AAUP on 'Facing Change: Building the Faculty of the Future,' A Report Issued by the American Association of State Colleges and Universities," January 12, 1999, particularly the following:

faculty member’s line is to be transferred between colleges. But in all cases, the first sentence of Regulation 4d(2) must be observed: the institution must make every effort to place the faculty member concerned in another suitable position *before the administration issues notice to a faculty member of its intention* to terminate an appointment because of formal discontinuance of a program or department of instruction. The effort to find another suitable position must *precede* the announcement of an institution’s *intent* to terminate a program; it cannot follow the announcement as faculty and administrators scramble to put together a Plan B.

If an undergraduate major or a graduate program is eliminated but lower-level courses continue to be offered (as is the case with many reductions of foreign language programs), the professor who is reassigned from upper-level courses to lower-level courses is not considered to be relocated “elsewhere.” Tenure rights enable the professor to assume the teaching of lower-level courses that have been taught by nontenured faculty members; departments and

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The [AASCU] report recommends that "institutions should establish [the] locus of tenure upon hiring tenure-track faculty and should consider varying the locus of tenure for faculty, appropriate to differences in discipline/assignment and institutional need." The report adds that institutions may wish to "rethink" the locus of tenure to "increase flexibility," and that "varied loci of tenure within a single institution may be desirable." Questions about the locus of tenure typically arise when administrations move to terminate faculty appointments for financial or programmatic reasons. Under Association standards, administrations are expected to make every effort to place faculty members elsewhere in the institution before actually terminating an appointment on grounds of financial exigency or program or department discontinuance not mandated by financial concerns. Why make every effort? Because tenure is held in the institution and not in one's department or academic specialty, and, as one court has held, the "university's obligation is not discharged unless it has considered other departments and schools” as well as the displaced teacher's. [The quoted language is from *Browzin*, note 7 to paragraph 14.] Obviously, if the locus of tenure is not the institution but some part of it, then the obligation to make every effort at relocation is correspondingly diminished. Indeed, the obligation may disappear completely, for the AASCU report opens the way to having a single faculty position identified as the locus of tenure. If the individual's appointment is terminated, the locus vanishes and the administration's obligation to make every effort is lost, too. There is also the concern that a malleable locus of tenure will leave faculty members vulnerable to an administration's discretion to narrow or expand the locus, thus diminishing their sense of security to the detriment of academic freedom.

colleges should not assume that if upper-level courses are eliminated, the tenured faculty members who taught them need to be released as well. All relocations of tenured faculty members should allow those faculty members to retain their tenure rights, including eligibility for service on department, college, and institution-wide committees; no relocated professor should suffer a reduction in his or her salary, unless across-the-board salary reductions are part of an institution's response to its financial condition, and no relocated professor should suffer demotion from his or her previously earned academic rank.

Again, the AAUP holds that the locus of tenure is in the institution as a whole, not in any subdivision (department, college, program) thereof. Therefore, the elimination of a program in which a faculty member has tenure does not entail the elimination of that faculty member's tenure rights; that is why he or she retains the right to be relocated.

We note also that an increasingly common justification for program closure is "low completion rates," that is, low numbers of graduates per year. We believe that gauging enrollment simply by counting the number of student majors is especially inimical to sound academic judgments. Often, modern languages such as French and German are unduly penalized by such calculations, because they discount the number of students who meet language requirements by taking courses in French and German without majoring in those subjects; but in the University of Louisiana System and at the University of Northern Iowa, this kind of bean-counting affected the sciences as well, as when UNI slated a physics program for closure without considering how many majors in the other sciences needed to take courses in physics. So-called "data-driven" program closures should be eschewed in favor of comprehensive, orderly reviews of the full profile of an institution's curricular offerings, reviews that are guided not solely by enrollment numbers but also by sound, rational, and justifiable determinations of the intellectual strengths and weaknesses of each program.

Lastly, we reaffirm the provisions of Regulations 4d(2) and 4d(3), requiring institutions to offer a reasonable period of training for faculty members affected by program discontinuance; financial and other support for such training; severance pay equitably adjusted to the faculty member's length of past and potential service; the right to appeal a proposed relocation or termination; and the right to a full hearing before a faculty committee.

Personnel Priorities

Regulation 4c(1) states that "judgments determining where within the overall academic program termination of appointments may occur involve considerations of educational policy, including affirmative action, as well as of faculty status, and should therefore be the primary responsibility of the faculty or of an appropriate faculty body. The faculty or an appropriate faculty body should also exercise primary responsibility in determining the criteria for identifying the individuals whose appointments are to be terminated. These criteria may appropriately include considerations of length of service." In earlier versions, this clause read "considerations of age and length of service," but was revised to conform to the Age Discrimination Employment Act of 1967. Since the end of mandatory retirement in academe, this issue has become only more complex, and it is complicated still further by the multiple demographic changes in the academic workforce over the past four decades: the professoriate contains far more women and minorities than it did in 1970 (a development we welcome), and far fewer tenured faculty as a proportion of all faculty (a development we deplore). Forty years ago, roughly three-quarters of all faculty were tenured or probationary for tenure; today, roughly three-quarters of all faculty do not have, and have little hope of gaining, the protections of tenure.

When programs are discontinued and faculty members face relocation or release, priority must be given to the tenured, or tenure itself will lose meaning. It is worth reviewing this imperative with regard to the consideration of "seniority" in our revised definition of financial exigency. Thanks to the dramatic expansion and institutionalization of the nontenured ranks, it is possible to find non-tenure-track faculty members with significant seniority– amounting even to decades– over newly tenured members of the faculty. Similarly, our operating guidelines on institutional problems resulting from financial exigency state that "as particular reductions are considered, rights under academic tenure should be protected. The services of a tenured professor should not be terminated in favor of retaining someone without tenure who may at a particular moment seem to be more productive."[44]

However, Regulation 4c(3) complicates matters somewhat:

> The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, *except in extraordinary circumstances where a serious distortion of the academic program would result*.

Matters are complicated still further by AAUP policy holding that non-tenure-track faculty members who have at least seven years of service acquire the protections of tenure and are considered to be in the cohort of the tenured. All full-time faculty members who have exceeded seven years of service are considered to be within the cohort of the tenured,

[44] *Id.* at 147.

regardless of whether they have undergone formal tenure procedures. As such, their rights to the protections of academic due process that accrue with tenure are identical to those of faculty who have undergone formal tenure procedures. It is only for the purpose of defining professional standards for relocating or releasing tenured faculty in programs facing discontinuance that we draw a distinction between these categories. In every event, the institutions must make every effort to relocate both formally and informally tenured faculty to other academic programs. What should be strictly forbidden, in any case, are decisions to terminate faculty appointments based on quantitative or otherwise reductive assessments that do not consider the breadth and versatility of a faculty member's research and teaching, since these determinations effectively create a system of punishment and reward that does not answer to essentially educational considerations, and is easy to manipulate by appeal to evanescent fluctuations in enrollments and research funding, or evanescent fluctuations in the productivity of individual faculty members.

Further, we want to enhance the role of all full-time faculty in decisionmaking just as we want to enhance the role of all faculty. We call attention to a critical passage in the AAUP statement, "The Role of the Faculty in Budgetary and Salary Matters," which grants to them a key role in the determination of financial exigency, consonant with the role we recommend for tenured faculty:

> Circumstances of financial exigency obviously pose special problems. At institutions experiencing major threats to their continued financial support, the faculty should be informed as early and as specifically as possible of significant impending financial difficulties. The faculty– *with substantial representation from its nontenured as well as*

> *its tenured members, since it is the former who are likely to bear the brunt of any reduction*– should participate at the department, college or professional school, and institution-wide levels in key decisions as to the future of the institution and of specific academic programs within the institution.[45]

The reference to faculty being “informed as early and as specifically as possible” is potentially misleading; although administrators have a fiduciary responsibility to alert the campus to impending challenges, in a properly collaborative and consultative environment, faculty would have a detailed and ongoing sense of the institution’s financial health. In a similar vein, AAUP operating guidelines on institutional problems resulting from financial exigency specify that “the granting of adequate notice to nontenured faculty should also be given high financial priority.” We propose that “adequate notice” be understood in relation to a non-tenure-track faculty member’s length of service. For instance, in Regulation 13e(1), the following provision is made for “part-time faculty members who have served for three or more terms during a span of three years”:

> (1) Written notice of reappointment or nonreappointment will be issued no later than one month before the end of the existing appointment. If the notice of reappointment is to be conditioned, for example, on sufficiency of student enrollment or on financial considerations, the specific conditions will be stated with the issuance of the notice.

We propose that this provision be extended to all non-tenured faculty members who are released as a result of a declaration of financial exigency; non-tenured faculty with more than seven years of service have longstanding affiliations with an institution, and they may have to

[45] *Id.* at 150; emphasis added.

make major life changes– switching careers, moving families– in order to seek new positions. Non-tenured faculty with three or more years of service but less than seven should be granted six months of additional appointment after notice of termination on the same grounds. Tenured faculty, if they are released on the grounds that they are not as qualified to execute the fullest possible range of the program's educational and institutional mission as others in their cohort, should be provided with an additional year of appointment after they have been given notice of termination for financial considerations.[46] We note that this provision is especially germane to our revised definition of financial exigency, insofar as a campus that is not experiencing an imminent financial crisis that threatens the survival of the institution as a whole (but, rather, a *severe* financial crisis that threatens the *academic mission* of the institution as a whole) presumably will have the time and resources necessary to give its long-serving faculty adequate long-term notice of termination. As noted, non-tenured faculty with three or more years of service but less than seven should, by the same rationale, be granted six months of additional appointment after notice of termination.

Finally, there is the question of how departments should prioritize terminations of tenured faculty appointments with regard to educational considerations. Particularly in fields that have undergone substantial intellectual transformations in recent decades, these decisions can pit established fields against emerging fields– to the detriment of the former, if too much weight is given to recent developments in a discipline, or to the detriment of the latter, if too much weight is given to traditional areas and forms of scholarship. This committee finds it

[46] We find it exceptionally vexing to have to set a standard for providing adequate notice of nonreappointment for non-tenure-track faculty members with more with seven years of service when our policies do not recognize the legitimacy of an institution's having any full-time faculty members in this category. But we want to provide some protection for the full-time faculty members in this category even where we do not accept the legitimacy of their positions off the tenure track.

exceptionally difficult to recommend specific courses of action in such cases; we cannot say, as a general rule, whether (to take a salient example from the Furniss-Brown exchange) a department should prefer to keep its three senior tenured scholars of European history or terminate one of them in favor of keeping the younger tenured scholar in Asian studies. Such decisions will be wrenching regardless of their outcomes, and may lead to substantial redefinition of a department's or program's core educational mission. We propose, therefore, that any decisions about the priority of subfields within a discipline be made with respect to the long-term health and viability of the discipline as an educational enterprise, as this should be determined by deliberations in good faith, balancing the virtues of both established and emerging fields and asking which areas of study, and which methodologies, will best serve the discipline and prospective student populations for the foreseeable future.

There are good reasons for our hesitation in this matter. We do not wish to compel, or to give administrators the right to compel, individual departments to accept refugees from closed programs. We consider it illegitimate to try (for example) to force a chemistry department to appoint a pharmacist from a discontinued program, or for law schools or economics departments to accept business professors who teach law or economics if the law school and/or economics department in question deems those professors to be unqualified for appointment. However, *every good faith effort must be made to find another suitable position for displaced faculty members with tenure*, and if one department blocks an appointment, it must provide a written statement of its rationale. Whenever a department refuses the reappointment of a faculty member, the burden remains on the administration to try to find another plausible department as a home. Every presumption should be in favor of preserving the tenured position; as we noted above, interdisciplinary programs, centers, and institutes might well accommodate displaced faculty members, particularly if their work crosses disciplinary boundaries. No invidious reasons should be accepted for a department's decision not to accept a displaced faculty member; a department cannot insist that it does not want to hire another woman, or demur on ideological grounds that would violate a faculty member's academic freedom. If a faculty member believes that his or her rejection by a proposed relocation department is invidious, spurious, or in violation of AAUP principles, that faculty member should have the right to appeal to an appropriate faculty committee. But that committee's recommendation should be advisory, not binding; and we do not grant deans and provosts the right to override the wishes of departments if those departments' decisions are based on legitimate educational and intellectual grounds.

Proposed Changes for Individual Institutions

At institutions not covered by collective bargaining agreements, the foregoing policy statements, like all AAUP guidelines, are recommendations: they represent our careful consideration of best practices for colleges and universities, and they offer a definitive measure by which institutions can gauge their adherence to the standards that should govern American higher education. Faculty and administrations at institutions not governed by collective bargaining should therefore work together to include the report's policy statements and recommendations in their institutional regulations and faculty handbooks.

Collective bargaining institutions that incorporate some or all of AAUP's previous recommendations related to this report into their collective agreements, or which seek in the future to negotiate new or revised agreements that incorporate these recommendations, should provide also that disputes regarding the interpretation and enforcement of the policies and procedures may be resolved through a grievance process that includes binding arbitration. In the best cases the enforceable procedures that result include an opportunity for faculty, acting through the union and/or the faculty senate, to participate in the determination of whether a bona fide financial exigency exists. In such cases, the parties may need to determine whether to continue with their existing understanding of "financial exigency" or to adopt our revised recommendation. , Similarly, those institutions whose agreements specifically include AAUP-recommended program review and closure procedures that entail faculty participation in these decisions, or incorporate such AAUP recommended procedures by reference, should update their agreements to incorporate these revised recommendations. Further, we recommend that collective bargaining institutions take special care to ensure that faculty members without tenure are granted the right to participate in determinations of financial exigency and program discontinuance, since they are likely to bear the brunt of program closures and layoffs.

Too often, however, faculty collective bargaining agreements fall short of the faculty involvement that constitutes best practice, due to the imposition of excessively narrow interpretations of negotiable terms and conditions of employment. Contracts that do not provide the safeguards provided by faculty participation in decisions respecting financial exigency and program closure typically must then rely entirely on layoff and recall provisions to protect academic integrity and faculty rights. In view of the flexibility provided by the vast increase in instruction by part-time and short-term appointees, and the deleterious consequences for academic freedom and educational quality that may be expected to result, there is no excuse for layoff procedures that permit routine reliance on the layoff of faculty within the term of their appointments in order to meet short-term financial or enrollment concerns. Where proposed layoffs involve dismissal of faculty with tenure or tenure-like positions, or term appointees within the term of their appointments, agreements should adopt at minimum AAUP recommended procedures regarding the order of layoff, the length of notice, fair consideration for alternative suitable positions, and severance pay. These agreements ought particularly to ensure, through seniority provisions and appeal procedures, that layoffs cannot be based on considerations inconsistent with academic integrity and academic freedom.

IV. CONCLUSION

This report has sought to address the gap between Regulation 4c on financial exigency and Regulation 4d on program discontinuance by redefining “financial exigency.” As we set forth in the introduction, our new definition names a condition less dramatic than that in which the very existence of the institution is immediately in jeopardy, but is significantly more serious and threatening to the educational mission and academic integrity of the institution than ordinary (short-term and long-term) attrition in operating budgets. Financial exigency can legitimately be declared only when substantial injury to the institution’s academic mission will result from prolonged and drastic reductions in funds available to the institution, and only when the determination of the institution's financial health is guided by generally accepted accounting principles. In proposing this new definition, however, we insist again that financial exigency is not a plausible complaint from a campus that has shifted resources from its primary missions of teaching and research toward employing increasing numbers of administrators or toward unnecessary capital expenditures.

In order to ensure that our definition of “financial exigency” not become an excuse for program elimination and the termination of tenured faculty positions when less drastic responses to institutional crisis are available, this report urges that faculty members be involved in consultation and deliberation at every stage of the process, beginning with a determination that a state of financial exigency exists. We offer specific recommendations for such faculty involvement:

1. Before any proposals for program discontinuance on financial grounds are made or entertained, the faculty should have the opportunity to render an assessment in writing on the institution's financial condition.
2. The faculty body may be drawn from the faculty senate, or elected as an ad hoc committee by the faculty; it should not be appointed by the administration.
3. Faculty should have access to, at minimum, five years of audited financial statements, current and following year budgets, and detailed cash flow estimates for future years.
4. In order to make informed proposals about the financial impact of program closures, faculty need access to detailed program, department, and administrative unit budgets.
5. Faculty should determine whether "all feasible alternatives to termination of appointments have been pursued," including expenditure of one-time money or reserves as bridge funding, furloughs, pay cuts, deferred-compensation plans, early-retirement packages, deferral of nonessential capital expenditures, and cuts to non-educational programs and services, including expenses for administration.
6. Faculty members in a program being considered for discontinuance because of financial exigency should be informed in writing that it is being so considered, and given at least thirty days in which to respond. Both tenured and nontenured faculty should be involved in these determinations.

We reaffirm the AAUP's longstanding opposition to the elimination of "one-person" programs, which allows for selective, arbitrary termination of tenured faculty members; and we reaffirm the principle that tenured faculty members hold tenure in the institution as a whole, not in any college, department, program or other subdivision thereof. We also affirm longstanding AAUP policy that all full-time faculty who have taught at an institution for over seven years are considered to be within the cohort of the tenured, whether or not they have undergone formal tenure procedures. It is precisely because tenure resides in the entire institution that tenured faculty members have the right to another suitable position within the institution, and we urge institutions to be creative in finding ways to relocate faculty members whose programs have been discontinued. Above all, we reiterate that the institution must make every effort to place the faculty member concerned in another suitable position *before* the administration issues notice to a faculty member of its intention to terminate his or her appointment because of formal discontinuance of a program or department of instruction. We reaffirm the principle that tenured faculty must not be released and then replaced with nontenured faculty. And we recommend that faculty without tenure who are released as a result of program closure be given notice of nonreappointment commensurate with their length of service to the institution. Finally, we recommend that current and prospective collective bargaining units adopt the recommendations of this report to the fullest extent possible.

We affirm these principles and make these recommendations not as a rearguard measure, not as a last-ditch attempt to keep the flickering flame alive before the forces of austerity engulf American higher education. We do believe that the forces of austerity are threatening to engulf American higher education; certainly this is why institutions are closing programs that should be part of any serious educational institution's curricular portfolio and implementing policies that further erode the ranks and the discretionary power of the tenured professoriate. But we do not issue this report in a defensive mode. On the contrary, we believe that the erosion of the ranks and of the discretionary power of the tenured professoriate is not only bad for American higher education but also bad for the future of the United States and society as a whole. Program closures on the scale we have recently witnessed represent a massive transfer of power from faculty to administration *over curricular matters that affect the educational missions of institutions*, for which the faculty should always bear the primary responsibility; in most cases the decisions to close programs are not only unilateral and therefore procedurally illegitimate, but also driven by criteria that are not essentially educational in nature and therefore substantively illegitimate as well. Moreover, program closures on this scale appear to reflect– and to implement– a widespread belief that when finances are tight, educational programs should be among the *first* things to cut from the budget, not the last. This belief seems to rest in turn on a belief that faculty and instructional costs are the first expenditures an institution should seek to trim, as opposed to expenditures on administration or capital projects.

We cannot say this strongly enough: the widespread closure of academic programs, when undertaken by administrations unilaterally or with only a fig leaf of faculty participation, represents a significant threat to the foundations of American higher education. These initiatives essentially transform colleges and universities from educational to managerial institutions, in which instruction in a course of study is simply another deliverable and where programs are so many inventory items to be discounted, downsized, or discontinued according to a reductive logic of efficiency and the imperative to lower labor costs whenever possible. We are not opposed to program closures as a rigid matter of principle. The AAUP has long acknowledged that a college or university can discontinue a program of instruction, but our standard has been that if the discontinuation is not undertaken for financial reasons, it must be shown to enhance the educational mission of the institution as a whole; we have long acknowledged that programs can be cut in times of financial exigency, but only if an appropriate faculty body is involved in the decisionmaking process from the very beginning, with the determination of whether an institution is experiencing bona fide financial exigency. But by and large, the program closings of recent years do not meet any of these standards. That is why they represent a violation of the principles on which American higher education should operate, and that is why they must be contested by a vigorous, principled, and informed faculty.

APPENDIX I

Proposed New Recommended Institutional Regulations 4 And 8

American Association of University Professors

Recommended Institutional Regulations on Academic Freedom & Tenure

4. Termination of Appointments by the Institution

a. Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may be effected by the institution only for adequate cause.

b. If termination takes the form of a dismissal for cause, it will be pursuant to the procedures specified in Regulation 5.

C. Financial Exigency[1]

c. (1) Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur under extraordinary circumstances because of a demonstrably bona fide financial exigency, i.e., a severe financial crisis that threatens the academic mission of the institution as a whole and that cannot be alleviated by less drastic means.

[Note: Each institution in adopting regulations on financial exigency will need to decide how to share and allocate the hard judgments and decisions that are necessary in such a crisis.

As a first step, there should be a faculty body that participates in the decision that a condition of financial exigency exists or is imminent, and that all feasible alternatives to termination of appointments have been pursued, including expenditure of one-time money or reserves as bridge funding, furloughs, pay cuts, deferred-compensation plans, early-retirement packages, deferral of nonessential capital expenditures, and cuts to non-educational programs and services, including expenses for administration.[2]

Judgments determining where within the overall academic program termination of appointments may occur involve considerations of educational policy, including affirmative action, as well as of faculty status, and should therefore be the primary responsibility of the faculty or of an appropriate faculty body.[3] The faculty or an appropriate faculty body should also exercise primary responsibility in determining the criteria for identifying the individuals whose appointments are to be terminated. These criteria may appropriately include considerations of length of service.

The responsibility for identifying individuals whose appointments are to be terminated should be committed to a person or group designated or approved by the faculty. The allocation of this responsibility may vary according to the size and character of the institution, the extent of the terminations to be made, or other considerations of fairness in judgment.]

The case of a faculty member given notice of proposed termination of appointment will be governed by the following procedures.

(2) Before any proposals for program discontinuance on grounds of financial exigency are considered or made, the faculty or an appropriate faculty body will have opportunity to render an assessment in writing on the institution's financial condition.

[Note: Academic programs cannot be defined *ad hoc*, at any size; programs must be recognized academic units that existed prior to the declaration of financial exigency. The term "program" should designate a related cluster of credit-bearing courses that constitute a coherent body of study within a discipline or set of related disciplines. When feasible, the term should designate a department or similar administrative unit that offers majors and minors.]

(i) The faculty or an appropriate faculty body will have access to at least five years of audited financial statements, current and following year budgets, and detailed cash flow estimates for future years.

(ii) In order to make informed proposals about the financial impact of program closures, the faculty or an appropriate faculty body will have access to detailed program, department, and administrative unit budgets.

(iii) Faculty members in a program being considered for discontinuance because of financial exigency will promptly be informed of this in writing and provided at least thirty days in which to respond. Nontenured as well as tenured faculty members will be invited to participate in these deliberations.

(3) If the administration issues notice to a particular faculty member of an intention to terminate the appointment because of financial exigency, the faculty member will have the right to a full hearing before a faculty committee. The hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5, but the essentials of an on-the-record adjudicative hearing will be observed. The issues in this hearing may include:

(i) The existence and extent of the condition of financial exigency. The burden will rest on the administration to prove the existence and extent of the condition. The findings of a faculty committee in a previous proceeding involving the same issue may be introduced.

(ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered presumptively valid.

(iii) Whether the criteria are being properly applied in the individual case.

(4) If the institution, because of financial exigency, terminates appointments, it will not at the same time make new appointments except in extraordinary circumstances where a serious distortion in the academic program would otherwise result. The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result.

(5) Before terminating an appointment because of financial exigency, the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the institution.

(6) In all cases of termination of appointment because of financial exigency, the faculty member concerned will be given notice or severance salary not less than as prescribed in Regulation 8.

(7) In all cases of termination of appointment because of financial exigency, the place of the faculty member concerned will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and at least thirty days in which to accept or decline it.

4d. Program review for Educational Reasons[4]

Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur as a result of bona fide formal discontinuance of a program or department of instruction. The following standards and procedures will apply.

(1) The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.

[Note: "Educational considerations" do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance.]

(2) Faculty members in a program being considered for discontinuance for educational considerations will promptly be informed of this in writing and provided at least thirty days in which to respond. Nontenured as well as tenured faculty members will be invited to participate in these deliberations.

[Note: Academic programs cannot be defined *ad hoc*, at any size; programs must be recognized academic units that existed prior to the decision to discontinue them. The term "program" should designate a related cluster of credit-bearing courses that constitute a coherent body of study within a discipline or set of related disciplines. When feasible, the term should designate a department or similar administrative unit that offers majors and minors.]

(3) Before the administration issues notice to a faculty member of its intention to terminate an appointment because of formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable position. If placement in another position would be facilitated by a reasonable period of training, financial and other support for such training will be proffered. If no position is available within the institution, with or without retraining, the faculty member's appointment then may be terminated, but only with provision for severance salary equitably adjusted to the faculty member's length of past and potential service which should go beyond but not be less than as prescribed in Regulation 8.

[Note: When an institution proposes to discontinue a program or department of instruction based essentially on educational considerations, it should plan to bear the costs of relocating, training, or otherwise compensating faculty members adversely affected.]

(4) A faculty member who contests a proposed relocation or termination resulting from a discontinuance has a right to a full hearing before a faculty committee. The hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5, but the essentials of an on-the-record adjudicative hearing will be observed. The issues in such a hearing may include the institution's failure to satisfy any of the conditions specified in Regulation 4c. In such a hearing a faculty determination that a program or department is to be discontinued will be considered presumptively valid, but the burden of proof on other issues will rest on the administration.

4e. Termination Because of Physical or Mental Disability

WITHDRAWN (see "Accommodating Faculty Members Who Have Disabilities," 2012 *Bulletin of the AAUP*, 30)

4f. Review

In cases of termination of appointment, the governing board will be available for ultimate review.

8. Terminal Salary or Notice[5]

If the appointment is terminated, the faculty member will receive salary or notice in accordance with the following schedule: at least three months, if the final decision is reached by March 1 (or three months prior to the expiration) of the first year of probationary service; at least six months, if the decision is reached by December 15 of the second year (or after nine months but prior to eighteen months) of probationary service; at least one year, if the decision is reached after eighteen months of probationary service or if the faculty member has tenure. This provision for terminal notice or salary need not apply in the event that there has been a finding that the conduct which justified dismissal involved moral turpitude. On the recommendation of the faculty hearing committee or the president, the governing board, in determining what, if any, payments will be made beyond the effective date of dismissal, may take into account the length and quality of service of the faculty member.

NOTES

1 See "The Role of the Faculty in Conditions of Financial Exigency." The definition of "financial exigency" offered in that report and adopted here is intended to be more responsive to actual institutional conditions, and intended to extend the standard of exigency to situations not covered by our previous definition.

2 See "The Role of the Faculty in Budgetary and Salary Matters," *Policy Documents and Reports*, 149–52, especially the following passages:

The faculty should participate both in the preparation of the total institutional budget and (within the framework of the total budget) in decisions relevant to the further apportioning of its specific fiscal divisions (salaries, academic programs, tuition, physical plant and grounds, and so on). The soundness of resulting decisions should be enhanced if an elected representative committee of the faculty participates in deciding on the overall allocation of institutional resources and the proportion to be devoted directly to the academic program This committee should be given access to all information that it requires to perform its task effectively, and it should have the opportunity to confer periodically with representatives of the administration and governing board. . . .

Circumstances of financial exigency obviously pose special problems. At institutions experiencing major threats to their continued financial support, the faculty should be informed as early and specifically as possible of significant impending financial difficulties. The faculty—with substantial representation from its nontenured as well as its tenured members, since it is the former who are likely to bear the brunt of the reduction—should participate at the department, college or professional school, and institution-wide levels in key decisions as to the future of the institution and of specific academic programs within the institution. The faculty, employing accepted standards of due process, should assume primary responsibility for determining the status of individual faculty members.

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3 See "Statement on Government of Colleges and Universities," *Policy Documents and Reports*, 135–40, especially the following passage:

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.

4 When discontinuance of a program or department is mandated by financial exigency of the institution, the standards of Regulation 4c above will apply.

5 For renewable term appointments not specifically designated as probationary for tenure, see "The Applicability of the 'Standards for Notice of Nonreappointment' to All Full-Time Faculty on Renewable Term Appointments," *Academe: Bulletin of the AAUP* 81 (September–October 1995): 51–54.

APPENDIX II
Measuring Financial Distress

The purpose of this appendix is to provide faculty with some guidance in understanding the financial condition of their institution. The composite index developed in this appendix is meant to be an indicator financial distress, but no one number can capture the entire financial condition of an institution. What this index does is to give an indication of whether an institution may be facing a condition of financial distress.

This index is useful in comparing how the financial condition of an institution has changed over time and can also be used to compare similar institutions. If the index falls below the threshold discussed in this appendix, it may indicate that the institution is facing financial exigency. However, just because the index is below the threshold does not automatically indicate that a state of financial exigency exists. If the composite index is below the threshold, it tells us is that an institution is experiencing financial distress. Therefore, this index should be seen as a necessary but not sufficient to declare that a state of severe financial distress exists at an institution. Even if an institution's composite index falls below the level which could indicate that a state of severe financial distress exists, the faculty committees as well as administrators at an institution should examine financial statements and other budget material with great care to insure that the factors causing the index to fall to a level that indicates financial distress are real and not transient.

The index that is described below is a variant of the index used by the Ohio Board of Regents to assess the financial health of public institutions of higher education in Ohio. The index uses four ratios a solvency ratio, an activity ratio and two margin ratios. A solvency ratio measures the ability of an institution to meet its debt obligations. An activity ratio measures the ability of an institution to cover its operating expenses. Finally, margin ratios measure the relationships between the inflow and outflow of resources from an institution.

There are several differences between how reserves, cash flow and net assets are measured at public and private institutions. The Governmental Accounting Standards Board (GASB) governs financial statements for public institutions whereas the Financial Accounting Standards Board (FASB) governs financial statements for private institutions.

The solvency ratio to be used in the index is known as the viability ratio that measures the ratio of reserves to the institution's long-term debt. In public institutions, reserves are defined as unrestricted net assets plus restricted expendable net assets. At private institutions, reserves are defined as unrestricted net assets plus temporarily restricted net assets. If a private institution does not separately show net assets invested in plant net of related debt, then the value of assets invested in plant net of accumulated depreciation minus the liability for long-term debt should be subtracted from unrestricted net assets. In addition, at institutions that offer post-retirement benefits, the liabilities for these post-retirement benefits should be subtracted from unrestricted net assets. The viability ratio shows the percentage of the institutions debt that could be paid off using reserves and is a primary indicator of solvency.

The activity ratio used in the composite index is known as the primary reserve ratio. It is the ratio of reserves (as defined in the previous paragraph) to operating expenses plus interest on capital asset related debt. The primary reserve ratio shows how many months an institution could continue its operations even if it had no sources of revenue.

The first margin ratio used in the composite index is the cash flow ratio, which is the ratio of operating cash flow to total revenue. Institutions of higher education use accrual accounting, which means that they have certain “non-cash” expenses such as depreciation and the losses on the disposal of assets. In addition, unrealized changes in the value of assets can either result in gains that are booked as income or losses that are booked as expenses. The existence of non-cash expenses and unrealized gains and losses on investments means that the income or (losses) before other revenues (net income) is not always a reliable indicator of net resources gained or lost by an institution. The operating cash flow ratio is therefore at times a better indicator of the inflow and outflow of resources that can support operations. At public institutions, operating cash flow is the sum of net cash used by operations and net cash provided by non-capital financing activities minus interest paid on capital debts and leases. At private institutions, operating cash flow is net cash provided by operating activities minus interest payments on capital debts and leases.

The second margin ratio is the net asset ratio, which is the change in net assets divided by the Total Revenue. The change in net assets is the most comprehensive indicator of the difference between revenues and expenses and is therefore one of the primary performance indicators for institutions.

To create a composite index, each of the ratios listed above is converted into a continuous score between 0 and 5 using ranges from Table 1 and the piecewise linear function shown in the equation below. (If one wishes, an index can be calculated with a step function simply by assigning scores for the various ratios using the table below and then taking a weighted average of those scores using the weights in Table 2.) The advantage of using the piecewise linear function $s(X)$ is that it results in a score for each ratio that changes continuously as each underlying ratio changes. Without the piecewise linear function, a very small change in a ratio can lead to a large change in the score when the underlying ratio crosses a threshold.

Table 1 Ratio Scores						
	0	1	2	3	4	5
Viability Ratio	< 0	0 to .29	.30 to .59	.6 to .99	1.0 to 2.5	> 2.5 or N/A
Primary Reserve Ratio	< -.1	-.1 to .049	.05 to .099	.10 to .249	.25 to .49	.5 or greater
Cash Flow Ratio	< -.05	-.05 to 0	0 to .009	.01 to .029	.03 to .049	.05 or greater
Net Asset Ratio	< -.05	-.05 to 0	0 to .009	.01 to .029	.03 to .049	.05 or greater

The following piecewise linear function creates a continuous score by using a linear function between the points where the $a_0 \dots a_4$ represent the viability, primary reserve and cash flow and net asset ratios:

$$
s(X)=\begin{cases}
0 & \text{if} \quad X \le a_0 - \dfrac{a_1 - a_0}{2} \\
\dfrac{X-a_0}{a_1-a_0}+.5 & \text{if} \quad a_0 - \dfrac{a_1-a_0}{2} \le X \le a_1 \\
\dfrac{X-a_1}{a_2-a_1}+1.5 & \text{if} \quad a_1 \le X \le a_2 \\
\dfrac{X-a_2}{a_3-a_2}+2.5 & \text{if} \quad a_2 \le X \le a_3 \\
\dfrac{X-a_3}{a_4-a_3}+3.5 & \text{if} \quad a_3 \le X \le a_4 + \dfrac{a_4-a_3}{2} \\
5 & \text{if} \quad X \ge a_4 + \dfrac{a_4-a_3}{2}
\end{cases}
$$

Figures 1-4 illustrate how this function works compared to a simple step function. The horizontal axis shows a ratio (viability ratio, primary reserve ratio, cash flow ratio and net asset ratio); moving up vertically to the line and then left to the vertical axis translates the ratio into a score.

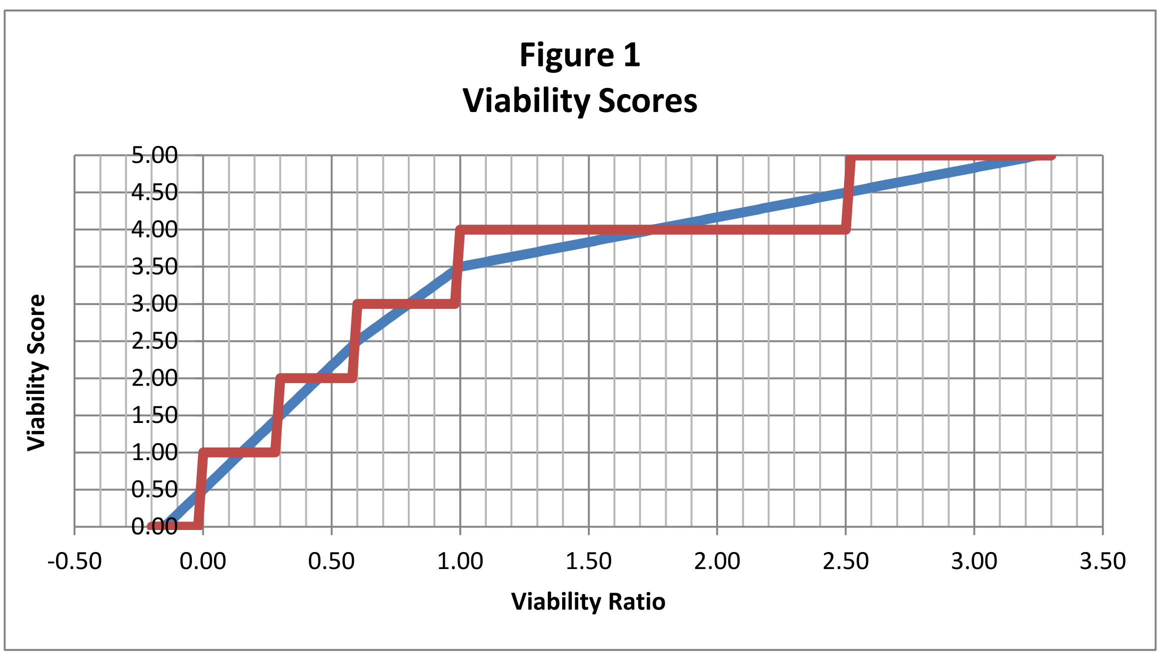


Figure 1
Viability Scores

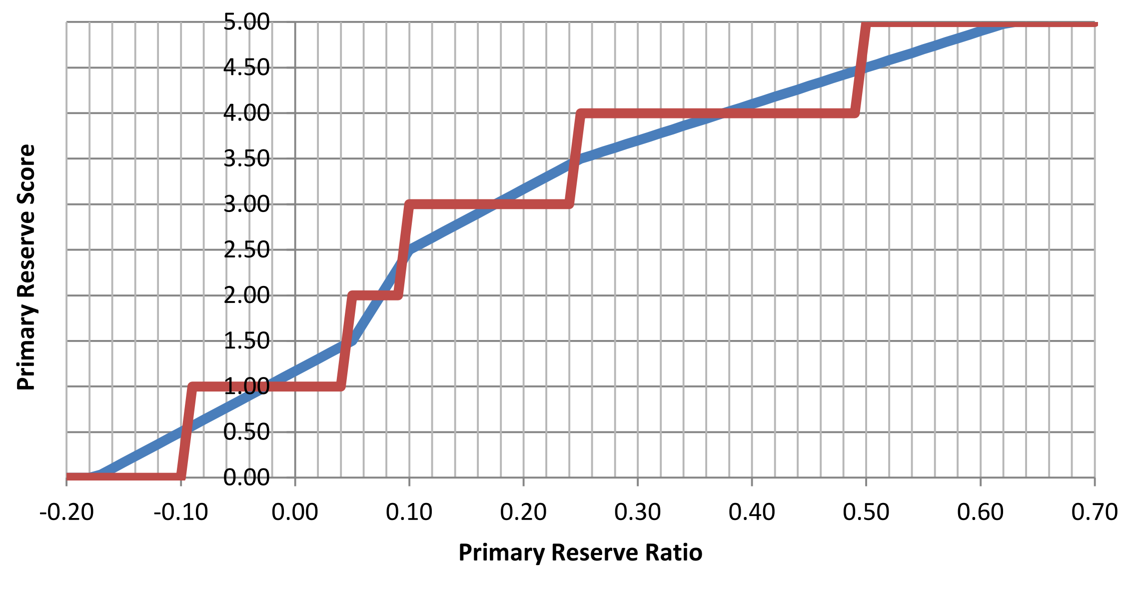


Figure 2
Primary Reserve Scores

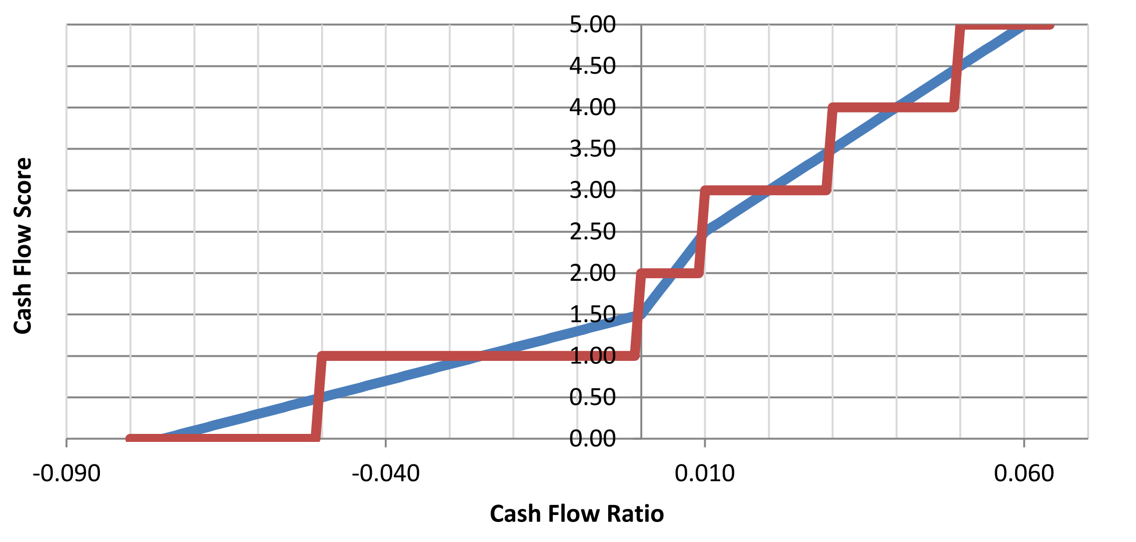
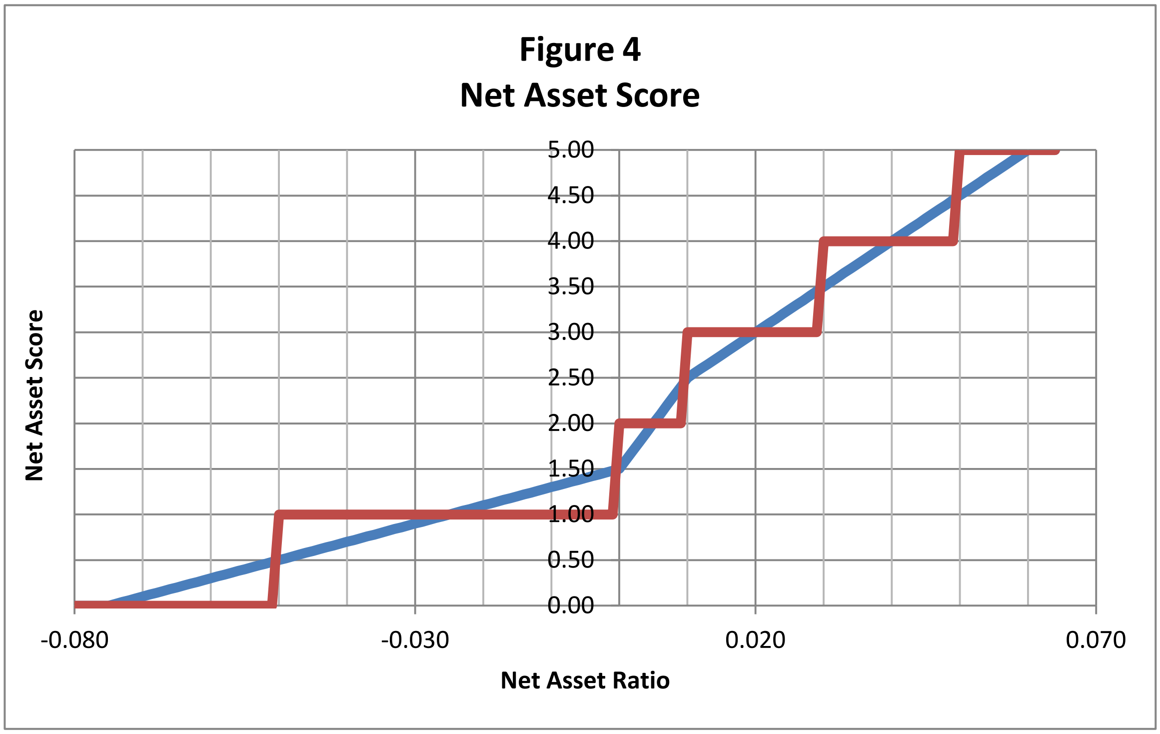


Figure 3
Cash Flow Score



The scores generated for each of the ratios using the either the piecewise linear function or the step function are then weighted as follows:

Table 2 Weights	
Score	Weight
Viability Score	0.225
Primary Reserve Score	0.4
Cash Flow Score	0.25
Net Asset Score	0.125

Multiplying each weight times its respective score and summing creates a composite index. In general, a score of 1.5 or below for two consecutive years would indicate the severe financial distress.

Discussion of Ratios

Viability Ratio

Definition: Reserves divided by Debt

Public Sector Reserves = Unrestricted net assets plus restricted expendable net assets.

Private sector Reserves = Unrestricted net assets plus temporarily restricted net assets.

What the ratio tells us:

Does the institution have sufficient reserves when compared to the amount of debt. If the ratio is greater than 1.0 then reserves are greater than debt, which indicates financial strength.

Primary Reserve Ratio

Definition: Reserves divided by total expenses

What the ratio tells us:

Whether the institution has sufficient reserves to handle unexpected declines in revenues or unexpected increases in expenses. If the ratio is 33%, then the institution can cover expense for 4 months (33% of 12 months). If this ratio is above 25%, it is considered strong.

Cash Flow Ratio

Definition: Operational cash flows divided by total revenues

What the ratio tells us:

Is the institution generating sufficient cash flows to meet obligations? Cash from operating activities includes cash inflows from tuition, grants and contracts and sales and outflows for compensation, payments to suppliers and payments for scholarships and fellowships. Cash flows form noncapital financing activities include state appropriations, grants for noncapital purposes (e.g. Pell grants) and gifts. This ratio gives us a pure measure of cash flows.

Net Asset Ratio

Definition: Change in net assets divided by total revenues

What the ratio tells us:

The change in net assets is total revenues less total expenses, so this ratio tells us if there was a "profit" or "loss" during the year.

Technical Definitions:

Unrestricted net assets are those for which the institution has financial freedom and flexibility. There is not a pot of cash sitting around, but if there are unrestricted net assets, then the institution has liquid assets (cash, investments, receivables) that can be tapped into.

Restricted expendable net assets are reserves that have been set aside for a particular purpose, such as payments for future debt obligations. The institution cannot use these reserves for any other purpose, but they are much better off having a fund set aside to cover future obligations than not to have one.

Temporarily restricted net assets are donations made that have a time component; for example, a donor states that the principal of a gift cannot be used for ten years; after the ten years have elapsed, the principal can be used.

Debt is interest-bearing debt.

Public sector operating cash flows consist of net cash (used) by operating activities, plus net cash provided by noncapital financing activities (mostly the state appropriation), minus interest expense.

Private sector operating cash flows consist of cash flows from operations minus interest expense.