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04E

The Inextricably Intertwined Travails of Title IX: A Survey of Hot Topics

THE INEXTRICABLY INTERTWINED TRAVAILS OF TITLE IX: A SURVEY OF HOT TOPICS

June 27 – 30, 2023

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I. John DiPaolo, *Cross-Examination of Parties and Witnesses: Conflict Between OCR Directors and Certain Legal/Constitutional Requirements* (NACUA 2023 Annual Conference)

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III. Dana Scaduto, Maureen Holland, Bridget Maricich, Gina Maisto Smith, Michael C. Sullivan, *When Love and Learning Collide: Faculty-Student Relationships Under Title VII and Title IX* (NACUA 2016 Annual Conference).

CROSS-EXAMINATION OF PARTIES AND WITNESSES: CONFLICT BETWEEN OCR DIRECTIVES AND CERTAIN LEGAL/CONSTITUTIONAL REQUIREMENTS

June 27-30, 2023

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I. Introduction

Title IX, as currently interpreted by OCR, requires consideration of "all relevant evidence" by a decisionmaker in a sexual misconduct grievance, even if the witness providing that evidence is not available for cross examination. This will also be true under OCR's proposed rules in its 2022 Notice of Proposed Rule Making (NPRM) as well. However, this approach conflicts with requirements under some interpretations of the federal constitution and under some state law, which holds that such witnesses be subject to live cross-examination, at least in certain circumstances. How should this conflict be resolved? This paper discusses (A) federal and state requirements for cross examination; (B) current OCR directives on this issue; (C) anticipated OCR directives based on the Title IX NPRM issued in 2022; (D) the conflicts that arise from these different requirements; and (E) possible approaches institutions can take to these conflicts.

A. Federal and State Cross-Examination Requirements

At least two federal circuits have held that the U.S. Constitution's Due Process Clause gives a respondent at a public institution a right to some kind of cross-examination of opposing witnesses, at least in some circumstances. A Sixth Circuit panel has held that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder," "before imposing a sanction as serious as suspension or expulsion," *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018). And a First Circuit panel has held that "due process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel." *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) (internal quotation marks omitted).

In contrast, an unpublished Fourth Circuit decision held, "Counsel for [the appellant] at oral argument suggested that a trial-like proceeding, with the attendant right to call and cross-examine witnesses, should have been afforded. However, we find no basis in the law, nor does [appellant] provide one, for importing such a requirement into the academic context." *Butler v. Rector & Bd. of Visitors of Coll. of William & Mary*, 121 F. App'x 515, 520 (4th Cir. 2005). The facts that this case was unpublished (and hence, citing it to the court would be "disfavored," U.S. Ct. of Appeals for the 4th Cir. Rule 32.1) and that the student conduct alleged was dishonesty in obtaining

[1] John DiPaolo has been general counsel at UC Law San Francisco (formerly UC Hastings) since 2019. He has worked on education matters throughout his career. From 2011 to 2017, he served in the U.S. Department of Education as chief of staff and deputy assistant secretary for policy for the Office for Civil Rights and then as deputy general counsel for postsecondary education for the Office of the General Counsel.

approval for a practicum site and threatening and stalking toward students and faculty, rather than sexual misconduct, limits the weight of this case in establishing the legal rule in the Fourth Circuit for sexual misconduct hearings.[2]

Some states also require some kind of cross examination in certain student conduct matters for public as well as private schools. For example, in California the case of *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019) stands for the proposition that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, the university must provide a mechanism by which the accused may cross–examine those witnesses. In Pennsylvania, the court in *Doe v. Univ. of the Sciences*, 961 F.3d 203 (3d Cir. 2020) stated, "notions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her."

B. Current OCR Directives

Although the current Title IX regulations state that decision-makers must disregard statements of a party or witness who does not submit to cross-examination, 34 CFR §106.45(b)(6)(i), that provision was vacated for failure to satisfy rulemaking requirements under the Administrative Procedures Act in *Victim Rights Law Center, et al. v. Cardona*, 552 F.3d 104 (D. Mass. 2021). As noted by OCR in a dear colleague letter issued soon thereafter, "A decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process." *Letter to Students, Educators and other Stakeholders re Victim Rights Law Center et al. v. Cardona*, August 24, 2021, U.S. Department of Education, Office for Civil Rights, https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf (last visited February 28, 2023).

OCR later turned the consideration of evidence provided by non-testifying witnesses into something of a requirement. In a 2022 update to a Q&A document, OCR stated that an institution could not "choose" to maintain a requirement that only evidence whose source had been cross-examined could be considered. Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021, updated June 28, 2022) (PDF) (ed.gov) at 29. OCR referred to another part of the Title IX regulation that required "an objective evaluation of all relevant evidence,'" and stated, "[t]o the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation's relevance rules, they must be considered in any postsecondary school's Title IX grievance process that is initiated after July 28, 2021." Id. (quoting 34 C.F.R. § 106.45(b)(1)(ii)).

[2] *Compare Henson v. Honor Comm. of U. Va.,* 719 F.2d 69, 74 (4th Cir. 1983) (finding university honor code process, which included cross-examination, met federal due process standards in student dismissal case, while stating the court was not suggesting that this process "represent[ed] a model for assuring constitutional due process in all administrative settings").

C. The Rule in the 2022 Title IX NPRM

The Title IX NPRM issued by the Department of Education in 2022 and slated for publication in the fall of 2023 would encode in regulation, for the most part, the directive from the 2022 Q&A. It requires "an objective evaluation of all relevant evidence" in the grievance process, NPRM 34 CFR §106.45(b)(6), meaning evidence that "may aid a decisionmaker in determining whether the alleged sex discrimination occurred." NPRM 34 CFR §106.2. The one exception it makes is with regard to parties to a grievance. NPRM 34 CFR §106.46(f)(4) says, "If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position."

D. Conflict with Federal and State Law

The "all relevant evidence" rule obviously conflicts with a rule that evidence be excluded if its source is not available for cross examination. If the cross-examination requirement springs from federal due process, the resolution of this conflict is straightforward. Under the Supremacy Clause, a federal due process requirement, such as that articulated in *Doe v. Baum* and *Haidak* for any public institution, preempts any regulation or guidance to the contrary.[3] Thus, in the First and Sixth circuits, this requirement as stated in case law clearly controls. In many other circuits, however, this issue has not been addressed and remains an open question of law.

Putting the federal due process requirement aside, it is not clear how to resolve a conflict between OCR's current "all relevant evidence" rule and a state law cross-examination requirement. A federal regulation preempts state law, and one might read the "all relevant evidence" requirement, still in the regulations, but now without the counterbalancing regulation requiring cross-examination, as meaning that any state rule that would limit relevant evidence is preempted. On the other hand, there was clearly no intent in the original regulation to enact such a preemption, calling into question a preemption that comes into play simply because one part of the rule was vacated.

OCR's subregulatory guidance does not bring clarity on this question. Is an institution that complies with a state law cross-examination requirement "choos[ing]" to do so, and thus violating OCR's 2022 guidance? Or is such state law compliance not a choice until OCR promulgates a regulation that clearly preempts state law on this topic?

[3] OCR appears to have been careful to avoid addressing this issue in its 2022 Q&A. That document said that an institution could not *choose* to maintain a cross-examination requirement. This appears to elide the issue of what happens if an institution is legally *required* to maintain this requirement. OCR likely does not want to endorse the holdings in cases such as *Doe v. Baum* and *Haidak,* since it clearly has a policy preference for the consideration of all relevant evidence; but OCR likely also does not want to attempt to contest the requirements of constitutional due process with a federal appellate court. Thus, instead, it limited its guidance to institutions that might *choose* to maintain a cross-examination rule – presumably private institutions not subject to federal due process requirements and possibly public institutions in circuits without a holding that federal due process requires cross-examination.

An OCR field office declined to answer the question of how its 2022 Q&A applies to a state law cross-examination requirement. In January 2022, the San Francisco OCR office received the following question:

> Questions D and 55… at p. 29 in Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) (PDF) (ed.gov), which were added in June 2022, say a school may not "choose" to bar consideration of statements by a party or witness who does not submit to cross examination at a Title IX hearing. This raises the question as to whether it is meant to preempt California case law that does bar such consideration, where credibility is at issue and it is a high-stakes matter. Is following that state law "choosing" to bar consideration of such statements? It doesn't quite seem like a choice.

Email from John DiPaolo, General Counsel, UC Law San Francisco, to OCR Region IX Office, San Francisco (Jan. 10, 2022).

OCR eventually provided the following cryptic reply:

> OCR has not spoken to the specific scenario you posed in your question, but in general, the 2020 Title IX regulations "require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence— and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness." 34 C.F.R. § 106.45(b)(1)(ii). The Department explained in the Preamble to the 2020 regulations that "the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties." Preamble at 30294. Please note that the Preamble to the 2020 regulations clarifies OCR's interpretation of Title IX and its regulations but does not have the force and effect of law. Likewise, OCR's Questions and Answers on the Title IX Regulations on Sexual Harassment states that it "does not have the force and effect of law and is not meant to bind the public or regulated entities in any way. This document is intended only to provide clarity to the public regarding OCR's interpretation of existing legally binding statutory and regulatory requirements. As always, OCR's enforcement of Title IX stems from Title IX and its implementing regulations, not this or other guidance documents." We hope this information is helpful.

Email from Anamaria Loya, Chief Regional Attorney, OCR Region IX Office, to John DiPaolo (May 10, 2023).

The uncertainty as to how to resolve the conflict between the "all relevant evidence" rule and any state law requirement to the contrary will be essentially eliminated if the rules from the current NPRM are enacted. At that point, there would be a valid federal regulation unambiguously setting forth the "all relevant evidence" rule without qualification (except that applying to parties at NPRM 34 CFR §106.46(f)(4)), and it appears it would preempt any state law rule to the contrary.

E. Possible Paths Forward

Many institutions may have several reasonable options to address these conflicts, though it depends on the public/private status of the school as well as in what jurisdiction it is located. In choosing among options, an institution will want to consider the risks each exposes it to, including enforcement by OCR and lawsuits from unhappy parties.

Any public institution in a circuit that has ruled that the federal due process clause requires the opportunity to confront an opposing party or witness must follow such a holding. Beyond this, however, any public institution in a circuit without binding law on the question could legitimately be persuaded by the rulings from other circuits and thus determine that it must provide for some kind of cross examination if evidence is to be considered. It would be somewhat surprising if OCR were to formally oppose such a position, as this would put it in public opposition to the only published circuit-level interpretations clearly addressing this issue. Or such an institution could take the opposite view and follow the OCR rule – it seems unlikely OCR would object to that, either.

In terms of a state law rule – if an institution did not believe it was bound under federal due process – OCR seems to have left it up to whether such state law is preempted by OCR's current guidance. It may be worth considering, however, that OCR may feel more at liberty to assert that its rule preempts state law than that federal circuit courts have misinterpreted federal constitutional law. In any event, new regulations that mirror the NPRM would fairly clearly preempt state law.

Any school that determines that the federal or state cross examination right articulated in caselaw controls, rather than OCR's "all relevant evidence" rule, should attend carefully to the nuances of those opinions. As noted above, for example, the California caselaw says that the right to cross examination applies where severe disciplinary sanctions may be imposed, *Doe v. Allee*, 242 Cal. Rptr. 3d at 136. Thus, there is no California rule for lesser discipline matters. Furthermore, in any application of federal or state rules regarding cross examination, certain limitations are implicit. Even in criminal law, out-of-court statements by parties not appearing in court are admissible in many situations. There would be no reason for a respondent in a College discipline proceeding to receive greater protections than a criminal defendant in court. Thus, even though opinions such as *Doe v. Baum* state the due process right to cross examination in a general and fairly unequivocal way, it seems that there must at least be the same exceptions to such a right as exist to the right in a criminal proceeding. It would follow that in the case of such exceptions, there would not be constitutional due process right to preempt OCR's "all relevant evidence" rule, so that rule would control. This leads to the probably unwelcome conclusion that a school that is applying a cross examination right where a source of evidence is not available should consider whether any hearsay exception applies to the evidence before excluding it.

THE INTERSECTION OF PROHIBITED OR "CONSENSUAL" RELATIONSHIPS POLICIES WITH TITLE IX

June 27-30, 2023

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I. Introduction

At NACUA's 2016 Annual Conference, I was part of a panel discussion titled "When Love and Learning Collide: Faculty-Student Relationships Under Title VII and Title IX."[1] Much has changed in the seven years since our 2016 presentation. First, the U.S. Department of Education's Office for Civil Rights (OCR) rescinded guidance that essentially articulated a presumption of non-consent in relationships between employees and students. Second, in 2020, the Department promulgated new Title IX regulations which limited schools' ability to address conduct under Title IX (though allowing schools to address non-Title IX conduct under their own rules and codes). While the 2020 regulations themselves did not expressly address employee-student relationships, the preamble suggested that the Department did not believe it had authority under Title IX to issue a blanket prohibition against employee-student relationships and that, instead, it would regulate those relationships only to the extent that they qualified as sexual assault (including statutory rape), or *quid pro quo* harassment, or met the heightened hostile environment standard under the regulations requiring behavior to be severe, pervasive, *and* objectively offensive.[2] Third, high-profile public accounts of *quid pro quo* sexual harassment and assault have inspired dialogue about in the impact of power and authority on consent. In the wake of these events, many colleges and universities have developed or strengthened policies addressing relationships between employees and students outside of, or in conjunction with, formal Title IX policies.

II. Rescinded Guidance

OCR rescinded its April 4, 2011, "Dear Colleague Letter," and its April 29, 2014, "Questions and Answers about Title IX and Sexual Violence," on September 22, 2017, when a new administration issued a separate Dear Colleague Letter that provided additional due process protections in place. OCR also rescinded its January 19, 2001, "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," on August 26, 2020, around the time when the updated Title IX regulations became effective. Several now-rescinded guidance documents provided insight into how the Department viewed relationships between employees and students and expected institutions to respond to such relationships.

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[1] The written materials for that panel are appended here but should be read as a supplement to this paper.

[2] This had previously been interpreted and defined as severe, persistent, *or* pervasive, with the "or" often being a critical factor in application. That is, under prior interpretations a single instance of sexual assault could be severe, while lower-level conduct may not be severe but it potentially could be persistent or pervasive. The replacement of "or" with "and" was not a pedantic change; rather, it now requires both standards (severe and pervasive) be satisfied subjectively and objectively before an individual may be adjudicated as responsible for the harassing behavior in question.

In its 2014 Q&A, for example, OCR suggested that faculty-student relationships were inherently nonconsensual, regardless of whether or not the faculty member was grading, evaluating, or otherwise had authority over the student. In that document, OCR wrote, "In cases involving a student who meets the legal age of consent in his or her state, there will be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual."[3]

In its 2001 Guidance, OCR stated, "The extent of a recipient's responsibilities if an employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students."[4] In analyzing whether harassment occurred in the context of the employee's provision of aid, benefits, or services to students, OCR wrote that it would consider a set of factors, including "whether, in light of the student's age and educational level and the way the school is run, it would be *reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.*"[5]

III. 2020 Title IX Regulations

The 2020 Title IX regulations themselves do not address employee-student relationships. The preamble to the regulations, however, notes that some commenters urged the Department to state that even a seemingly consensual relationship between a K-12 teacher and student would qualify as sexual harassment because the relationship is an abuse of the teacher's power over the student. The Department declined to make such a pronouncement. By declining to impose a blanket prohibition on K-12 teacher-student relationships, the Department necessarily indicated an unwillingness to address the issue of employee-student relationships in higher education. Instead, for both K-12 and higher education, the Department bounds its authority under Title IX to addressing sexual assault, *quid pro quo* harassment, or conduct that meets the heightened hostile environment standard under the regulations. The preamble text is reproduced below:

> *One commenter urged the Department to clarify that in the elementary and secondary school context, even a consensual, welcome sexual relationship between a student and teacher counts as sexual harassment because such a relationship is an abuse of the teacher's power over the student; the commenter asserted that the teacher-student relationship in* Gebser *may have been consensual but was still sexual harassment.*
>
> *Discussion: The Department appreciates the opportunity to clarify that the first prong of the § 106.30 definition, describing* quid pro quo *harassment, applies whether the "bargain" proposed by the recipient's employee is communicated*

[3] *See* OCR's "Questions and Answers on Title IX and Sexual Violence," at p. 4 (Apr. 29, 2014) (emphasis added).

[4] *See* OCR's "Revised Sexual Harassment Guidance," p.10 (Jan. 2001).

[5] *See* OCR's "Revised Sexual Harassment Guidance," pp.10-11 (Jan. 2001) (emphasis added). While the 2001 guidance used the word "school," as opposed to "educational institution," the guidance also stated, "These factors are applicable to all recipient educational institutions, including elementary and secondary schools, colleges, and universities." *Id.* at 11.

> *expressly or impliedly. Making educational benefits or opportunities contingent on a person's participation in unwelcome conduct on the basis of sex strikes at the heart of Title IX's mandate that education programs and activities remain free from sex discrimination; thus, the Department interprets the* quid pro quo *harassment description broadly to encompass situations where the* quid pro quo *nature of the incident is implied from the circumstances. For the same reason, the Department declines to require that* quid pro quo *harassment be severe and pervasive; abuse of authority in the form of even a single instance of* quid pro quo *harassment (where the conduct is not "pervasive") is inherently offensive and serious enough to jeopardize equal educational access, and although such harassment may involve verbal conduct there is no risk of chilling protected speech or academic freedom by broadly prohibiting* quid pro quo *harassment because such verbal conduct by definition is aimed at compelling a person to submit to unwelcome conduct as a condition of maintaining educational benefits. The Department notes that when a complainant acquiesces to unwelcome conduct in a* quid pro quo *context to avoid potential negative consequences, such "consent" does not necessarily mean that the sexual conduct was not "unwelcome" or that prohibited* quid pro quo *harassment did not occur. The Department believes that the* quid pro quo *harassment description is appropriately and sufficiently broad because it applies to all of a recipient's employees, so that it includes situations where, for instance, a teacher, faculty member, or coach holds authority and control over a student's success or failure in a class or extracurricular activity, and the Department declines to expand the description to include nonemployee students, volunteers, or others not deemed to be a recipient's employee.*[6]

While the Department's response also sought to address *Gebser* and situations that would also constitute statutory rape in a criminal context, the 2020 regulations represented a significant narrowing of the institution's Title IX responsibility and authority. Under the 2020 regulations, the institution initiates its Title IX grievance process upon the filing of a formal complaint, which may be filed by a Complainant or signed by a Title IX Coordinator. Following the receipt of a formal complaint, the institution must evaluate whether the report meets the jurisdictional requirements of the regulations. The institution *must* dismiss the formal complaint if 1) the conduct would not constitute sexual harassment as defined by the final regulations, even if proved; 2) the conduct did not occur within the recipient's education program or activity; or 3) the conduct did not occur against a person in the United States.[7] Further, the traditional *quid pro quo* and hostile environment sexual harassment definitions are narrower than they had been under most schools' pre-regulations policies. The *quid pro quo* definition under the new Title IX regulations reads:

> *An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.*[8]

The 2020 regulations also narrow the hostile environment sexual harassment definition to read:

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[6] 85 FR 30147 to 30148 (internal footnotes omitted).

[7] 34 C.F.R. § 106.45(b)(3)

[8] 34 C.F.R. § 106.45(b)(3)

> *Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.*[9]

Note that the *quid pro quo* definition only addresses the conduct of employees (not donors, trustees, volunteers, or alumni) and only addresses aids, benefits, and services of the subject institution (not other benefits that employees may have access to, such as personal connections, help transferring to another school, or assistance getting into another institution's graduate program). Also note that the hostile environment definition addresses only that conduct which is so severe, pervasive, *and* objectively offensive (as opposed to "severe, persistent *or* pervasive").[10]

Nothing in the Title IX regulations prohibits an institution from prohibiting or discouraging relationships between employees and students, even if the reported conduct does not meet the jurisdictional requirements or does not qualify as sexual assault, *quid pro quo* harassment, or conduct that meets the heightened hostile environment standard under the regulations. However, practically speaking, many of the reports of consensual relationships policy violations are first shared with the university by a complainant who identifies the conduct as non-consensual and therefore as an instance of sexual assault, *quid pro quo* harassment, or sexual harassment. In those instances, the institution should follow its Title IX grievance process and evaluate whether the conduct constitutes the Title IX policy violation alleged. For institutions that have a consensual relationships policy or some other relevant sexual misconduct policy that is broader than Title IX, the institution should consider combining the consensual relationships or other policy violation investigation with the Title IX investigation. By combining investigations, the parties benefit from a single process, as opposed to parallel investigations, which guards against the parties having to repeat their accounts to multiple investigators.

A consolidated investigation also avoids a claim of retaliation by the Respondent employee who may believe that parallel investigations are an attempt by the institution to deprive the Respondent of the procedural protections included in the Title IX grievance process. The risk of a retaliation claim is greatest when the institution completes its Title IX process, finds insufficient evidence to support a finding of responsibility, and *then* initiates a process to address the potential consensual relationships policy violation. In such an instance, the Respondent may claim that the institution retaliated against them for participating (or not participating) in the Title IX process. The regulations state:

> *No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual*

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[9] 34 C.F.R. § 106.45(b)(3)

[10] The "severe, persistent *or* pervasive" construct was articulated in OCR's 1997 Sexual Harassment Guidance. *See* "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 62 FR 12034 (Mar. 1997) (emphasis added).

harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.[11]

The above represents an expansion of the definition of retaliation and strongly incentivizes institutions to charge allegations arising from the same facts and circumstances together, even if the conduct violates multiple policies that are typically adjudicated under different processes by different offices on campus. There may, of course, be a strong defense against a resulting retaliation claim. The institution would put forward the need to enforce its consensual relationships policy as a legitimate, non-retaliatory reason for processing the potential violation of that policy. Assuming the institution has been relatively consistent in processing similar matters in the past, such a rationale should survive a claim that it is pretextual. All this said, however, simultaneous processes of the allegations under Title IX and a consensual relationships policy would weaken even further any potential retaliation claim.

IV. Notes from the Field

A May 2018 *Inside Higher Ed* article highlighted a "new wave" of institutions creating or strengthening policies prohibiting consensual relationships between faculty and students.[12] The article highlighted policies at Massachusetts Institute of Technology, the University of Pennsylvania, Columbia, and Duke, that were new as of Spring 2018, noting that those policies prohibited faculty from dating undergraduates across the board, not only where a supervisory relationship exists. The article noted that Syracuse University, Cornell, and Berklee College of Music were in the process of adopting similar policies.

I have revisited the consensual relationships policies highlighted in our 2016 NACUA materials and summarized developments in the below chart:

Institution	Policy as of 2016	Policy as of 2023
Northwestern	Advises faculty in a consensual relationship with a student to disclose their relationship status and take steps to remove themselves from evaluative positions to avoid conflict of interest	Prohibits relationships between faculty and all undergraduates, regardless of whether there is or is not a teaching, supervisory, or advisory relationship; prohibits relationships between faculty and graduate students where there is a supervisory relationship. If the faculty member and graduate student are in the same department or program, they must immediately disclose the relationship to the University. https://www.northwestern.edu/provost/policies-procedures/community-conduct/consensual-romantic-relationships.html

[11] 34 C.F.R. § 106.71

[12] Colleen Flaherty, "Relationship Restrictions: Academe Sees a New Wave of Faculty-Student Dating Bans in the Era of Me Too," *Inside Higher Ed*, (May 23, 2018), (last visited June 22, 2023) https://www.insidehighered.com/news/2018/05/24/academe-sees-new-wave-faculty-student-relationship-restrictions-era-me-too

Institution	Policy as of 2016	Policy as of 2023
Duke	Discourages faculty from entering into a relationship with a student and requires faculty to recuse themselves from any evaluation of the student	Prohibits relationships between faculty and all undergraduates, regardless of whether there is or is not a teaching, supervisory, or advisory relationship; prohibits relationships between faculty and graduate students *unless* a) faculty member has no role and is not expected to have any role in teaching, supervising, mentoring, or evaluating the graduate student, and the faculty member and graduate student are in different schools, or b) if the faculty member and graduate student are in the same school, the faculty member has no role and is not expected to have any role in teaching, supervising, mentoring, or evaluating the graduate student and the faculty member reports the relationship in writing immediately to the Dean. https://policies.provost.duke.edu/docs/faculty-handbook-appendix-l-faculty-student-relationships
Syracuse	Prohibits relationships between faculty and undergraduate students where there is a teaching, supervisory, or advisory relationship; Discourages relationships between faculty and graduate students where there is a teaching, supervisory, or advisory relationship	Prohibits relationships between faculty and all undergraduates, regardless of whether there is or is not a teaching, supervisory, or advisory relationship; prohibits relationships between faculty and graduate students where there is a supervisory or advisory relationship https://academicaffairs.syracuse.edu/faculty-affairs/policies-and-procedures/faculty-manual/4-1-inappropriate-conduct-by-faculty-members/
Stanford	Prohibits relationships between faculty and undergraduates and between faculty and students with whom faculty has had or is expected to have academic responsibility	← Same https://share.stanford.edu/policies-and-procedures/overview-stanford-policies/guidelines-consensual-relationships
Yale	Prohibits relationships between faculty and undergraduates and between faculty and students over whom the faculty have or might reasonably expect to have direct pedagogical or supervisory responsibilities	← Same https://catalog.yale.edu/dus/university-policy-statements/teacher-student-consensual-relations/

We recognize the complexity of these issues and their real-world impact on campus communities. As we collectively await the release of the new Title IX regulations, we acknowledge the immense challenge of developing values based policies in an ever-shifting legal landscape.

To be read in conjunction with June 27-30, 2023, update

WHEN LOVE AND LEARNING COLLIDE: FACULTY-STUDENT RELATIONSHIPS UNDER TITLE VII AND TITLE IX

June 26-29-2016

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San Diego, CA

I. What are the different kinds of policies institutions have regarding professor-student relationships?

While a university has no legal obligation to implement a policy regarding faculty-student relationships,[2] many institutions have decided to affirmatively address the issue, with policies ranging from simply advising faculty and students about the risks of consensual relationships to prohibiting any such relationship. Institutions may enact policies to minimize sexual harassment liability under Title VII and/or Title IX, to provide notice to faculty about an institution's view of such relationships, and to protect the academic reputation of the school. Generally, these policies will address the following questions:

- Are there any circumstances when faculty and students can engage in consensual relationships?
- Which members of the faculty are covered by the policy?
- Do the policies apply to all students, or only those students being graded/evaluated by a specific faculty member?

[1] Special thanks to Joanne Alnajjar Buser and Meredith Grant, Associates at Paul, Plevin, Sullivan & Connaughton LLP, for their contributions to this material.
[2] *Giffin v. Case Western Reserve Univ.*, 181 F.3d 100 (6th Cir. 1999).

- Does the school require faculty to disclose a consensual relationship?
- If a school prohibits faculty-student relationships, what are the consequences to the student and faculty?
- Is there a designated complaint or grievance procedure to address such issues?

Here, we review examples of such policies.

A. No Policy

Schools may elect not to implement a faculty-student relationship policy. In *Giffin v. Case Western Reserve Univ.*, the Sixth Circuit Court of Appeals upheld the dismissal of a case based on the school's failure to promulgate a distinct "consensual relations policy," holding there was no affirmative duty for the university to have one under Title IX.[3] A school might favor not having a policy if it does not want to interfere with the private, lawful off-duty activities of consenting adults. Indeed, some state laws prohibit interfering with lawful off-duty conduct.[4] Moreover, depending on the scope of a school's existing anti-harassment policy, such a policy may suffice. However, given the unique requirements set forth by the U.S. Department of Education, Office for Civil Rights ("OCR"), and the question of whether a professor and student inevitably have an unequal power relationship based on their status within a university (addressed *infra*), a standard employee harassment policy may not sufficiently protect an institution from claims of sexual harassment (by students or by the OCR).

B. Advisory Policy

A school that favors flexibility in discipline and approach, but wants to address the issue of faculty-student relationships, can enact an advisory policy that simply outlines important considerations for students and faculty to take into account. Such a policy highlights the potential dangers posed by such a relationship. For example, the American Association of University Professors ("AAUP") recommends the following advisory policy:

> Sexual relations between students and faculty members with whom they also have an academic or evaluative relationship are fraught with potential for exploitation. The respect and trust accorded a professor by a student as well as the power exercised by the professor in an academic or evaluative role, make voluntary consent by the student suspect. . . . In their relationships with students, members of the faculty are expected to be aware of their professional responsibilities and avoid apparent or actual conflict of interest, favoritism, or bias. When a sexual relationship exists,

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[3] *See Giffin*, 181 F.3d 100 (6th Cir. 1999).

[4] *See*, *e.g.*, Cal. Lab. Code § 96(k); Colo. Rev. Stat. § 24-34-402.5; N.Y. Lab. L. § 201-d.

> effective steps should be taken to ensure unbiased evaluation or supervision of the student.[5]

Notably, the AAUP example applies only to those situations where a student is evaluated/graded by a specific faculty member. The criticism of this approach is that it is too permissive and ineffective in preventing harm to the student and the university.

In fact, OCR goes one step further in suggesting that faculty-student relationships, *regardless* of whether the student is being evaluated/graded by a specific faculty member, are inherently nonconsensual: "In cases involving a student who meets the legal age of consent in his or her state, there will be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual."[6] Moreover, OCR considers "whether, in light of the student's age and educational level and the way the school is run, it would be *reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.*"[7] Thus, for OCR purposes, the professor's perceived role as professor may be enough to connote "responsibility over the student," whether or not the professor actually grades or evaluates the student. This approach has broader coverage than the AAUP policy, and should carefully be considered by Title IX recipients when electing advisory policies.

C. Discouraging Policy

Another option is enacting a policy that discourages sexual relationships between professors and students. This goes a bit further than an advisory policy, but also does not prohibit the behavior. Duke University uses this approach:

> No faculty member *should* enter into a consensual relationship with a student actually under that faculty member's authority. Situations of authority include, but are not limited to, teaching, formal mentoring, supervision of research, and employment of a student as a research or teaching assistant; and exercising substantial responsibility for grades, honors, or degrees; and considering disciplinary action involving the student. . . . If nevertheless a consensual relationship exists or develops between a faculty member and a student involving any situation of authority, that situation of authority must be terminated. Termination includes, but is not limited to, the student withdrawing from a course taught by the faculty member; transfer of the student to another course or

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[5] *See* "Sexual Harassment In the Academy: Some Suggestions for Faculty Policies and Procedures," Donna Euben, AAUP Counsel (Oct. 2002). *See also* Northwestern University policy, Jan. 13, 2014 (advising faculty in consensual relationships with students to disclose their relationship status and take steps to remove themselves from evaluative positions to avoid conflict of interest), *available at* http://policies.northwestern.edu/docs/Consensual_Relations_011314.pdf.

[6] *See* OCR's "Questions and Answers on Title IX and Sexual Violence," at p.4 (Apr. 29, 2014) (emphasis added).

[7] *See* OCR's "Revised Sexual Harassment Guidance," pp.10-11 (Jan. 2001) (emphasis added).

> section, or assumption of the position of authority by a qualified alternative faculty member or teaching assistant; the student selecting or being assigned to another academic advisor and/or thesis or dissertation advisor; and changing the supervision of the student's teaching or research assistantship. In order for these changes to be made and ratified appropriately, the faculty must disclose the consensual relationship to his or her superior, normally the chair, division head, or dean, and reach an agreement for remediation. In case of failure to reach agreement, the supervisor shall terminate the situation of authority.[8]

Duke's policy provides some flexibility, while also expressly discouraging faculty from exploring such relationships when an evaluative relationship exists. This approach also incorporates a recusal clause, which requires the faculty member to recuse himself or herself from any evaluative relationship with the student. Again, and as set forth in detail above, even if a professor recuses himself or herself from such an evaluative relationship with the student, OCR may still contend that the relationship is inherently nonconsensual, based solely on the professor's status within the university.

D. Prohibitive Policy

The most extreme version of a consensual relationship policy is a prohibitive policy, which is consistent with OCR's position concerning the inherent nonconsensual nature of any faculty-student relationship. The risk with this approach is that such relationships may inevitably occur, and the school is unlikely to successfully police every relationship to enforce the policy in a uniform fashion. Moreover, such a broad policy may be interpreted as improperly interfering with rights of privacy and lawful off-duty conduct.[9]

Because of these risks, a school may prefer a hybrid prohibitive/discouraging policy. For example, the school may delineate which relationships should outright be prohibited (*e.g.*, evaluative relationships), and then only enact discouraging policies for those relationships that are not outright prohibited (*e.g.*, where the faculty member has no evaluative relationship with the student).[10] Other schools have drawn the line between undergraduate and graduate students. For example, Syracuse University's policy prohibits employees from pursuing sexual relationships with undergraduate students, but only strongly discourages such relationships with graduate students:

> Sexual or romantic relationships that might be acceptable in other circumstances always pose inherent risks that they will result in sexual harassment when they occur between University Faculty Members and any person for whom they have a professional responsibility. These relationships, even when not harassing, may develop into professional conflicts of interest, or at least create the perception of such a conflict of

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[8] *See* Duke University policy (emphasis added), March 2002, *available at* https://web.duke.edu/equity/resources/documents/consensual_relationship_policy.pdf.

[9] *See supra* fn. 4.

[10] *See* policy examples, *supra* fn. 5.

> interest, that may make it difficult to carry out a role as educator or supervisor. The danger that difficulties, including harassment or abuse of power, will occur is particularly strong in relationships between teachers and students they are teaching and/or advising. The relationship puts the student in a vulnerable position and creates a problematic learning environment for other students who become aware of the relationship. . . . *This policy thus prohibits University Faculty Members from pursuing sexual relationships with undergraduate students they teach, advise or supervise. This policy also strongly discourages sexual relationships with graduate students and any subordinate whose work the individual supervises.* If such a relationship does develop, the University Faculty Member must take steps to ameliorate the conflict of interest *In the context of a complaint, there will be no presumption that the relationship was welcome to the complainant.*[11]

Importantly, Syracuse seems to adopt the approach advocated by the OCR, which is that there is no presumption of consensual conduct with a student.

In sum, although a written policy is not required by law, there is value to adopting some written policy addressing an institution's position on amorous relationships, if only to preserve the institution's right later to take disciplinary action against a faculty member who may have crossed a line. If a school does not want to take the prohibitive approach, even going so far as advising faculty (and students) of the considerations to be made before engaging in a relationship may help the institution to defend itself in litigation down the road.

II. What are an institution's obligations to pursue an investigation if the student is uncooperative?

Under Title VII and parallel state and local anti-discrimination laws, an employer has a duty to investigate when it receives a complaint or otherwise has constructive knowledge of alleged harassment.[12] Unlike Title VII, Title IX requires *actual* knowledge of the alleged harassment to

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[11] *See* Syracuse University policy (emphasis added), Sept. 2012, *available at* http://provost.syr.edu/faculty-support/faculty-manual/4-1-inappropriate-conduct-by-faculty-members/. *See also* Stanford University policy, Jan. 21, 2014, *available* at http://adminguide.stanford.edu/23_2.pdf (prohibiting faculty relationships with undergraduates and with students with whom faculty has had or is expected to have academic responsibility); Yale University policy, *available at* http://www.yale.edu/equalopportunity/policies/ (last visited April 4, 2016).

[12] EEOC Notice No. 915.002, section V(C)(2), June 18, 1999 ("due care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti and not wait for an internal complaint.").

trigger a school's duty to respond.[13] Still, a university's duty to investigate cannot be greater than its ability to do so. A common scenario in cases involving student complaints about harassment concern a student who does not want to be identified to the accuser. If a student insists that his or her name not be revealed, the school's ability to investigate the alleged harasser is compromised because the school will not reasonably be able to discuss the allegations with the harasser without disclosing the complainant's identity. At least one state court has admonished a school for failing to investigate based on a complainant's non-cooperation.[14]

OCR takes the position that a school should notify a non-cooperative complainant that not disclosing his/her identity may compromise the school's ability to effectively respond.[15] In addition, the school should explain to the student that the school prohibits retaliation for any complaint of harassment and that the school will do its best to protect the student from retaliation. If the student continues to insist on anonymity, the school can proceed with other measures to try and correct the alleged harassment.[16] According to OCR, the school should consider the seriousness of the alleged harassment, the age of the complainant, whether other instances of harassment have been raised against the alleged harasser, and the rights of the accused to receive information during any disciplinary hearing (*e.g.*, particularly in the context of a public university subject to due process scrutiny).[17] In addition to considering what accommodations may be available to the complainant to make him/her feel more secure on campus, the school may proactively conduct harassment training at the site where the alleged incident occurred to ensure other potentially affected students are aware of their rights to file complaints and pursue investigations.[18] The school should also consider whether additional security measures are necessary around the area where the incident occurred, or whether a campus climate survey may help determine areas of vulnerability for would-be victims. The school may also consider whether there are any similar patterns in the non-cooperative complainant's story and other reports of harassment made on campus and how best to globally address that pattern of harassment to better protect the campus community at large.[19]

III. What kind of training and information should a school be providing to help members of its community understand their obligations?

Harassment training for both students and faculty is critical to reducing liability for harassment claims. In the Title VII context, employee training may help prove an affirmative defense to

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[13] *See Gebser v. Lago Vista Indpt. Sch. Dist.*, 524 U.S. 274 (1998); *see also Escue v. Northern Oklahoma College*, 450 F.3d 1146 (10th Cir. 2006); *Liu v. Striuli*, 36 F.Supp.2d 452 (D.R.I. 1999).

[14] *Brown v. State Personnel Board*, 166 Cal.App.3d 1151, 1162 (Cal. Ct. App. 1985)("It is founded on the right and duty of [the school] to deter misconduct with punishment, just as a criminal offense is a matter between the state and offender, independent of the wishes of the victim of the offense.").

[15] *See* "OCR Revised Sexual Harassment Guidance," pp. 17-18 (Jan. 2001).

[16] *See id. See also* OCR's "Questions and Answers on Title IX and Sexual Violence," pp. 18-22 (Apr. 29, 2014).

[17] *Id.*

[18] *Id.*

[19] *Id.*

alleged harassment by another employee by showing the employer took effective, prompt remedial action to resolve the complained-of conduct.[20] In the Title IX context, training may be relevant to establishing a school's commitment to informing students of their right to complain about harassment and the procedures used to do so, measures of confidentiality that may apply in making such a report, and providing information to would-be harassers about the potential consequences of any alleged harassment. If a school is sued for Title IX violations, the school can use its training program as at least one form of evidence to show the complainant had effective access to any complaint procedure. If the OCR opens an investigation of a school, having training programs already in place may help demonstrate a school's commitment to enforcing Title IX.

A. Faculty Training

To the extent they have not already done so, institutions receiving federal funding must designate a coordinator to receive Title IX complaints about alleged harassment and sexual assault.[21] The Title IX coordinator should be the designated point person to conduct (or monitor) any school investigation across university departments, to provide information about the institution's Title IX and equal opportunity policies, and to communicate equitably with both the accused and complainant about the investigation and any grievance process.[22] Any university designated faculty members responsible for addressing these issues should receive additional specialized training concerning how to conduct investigations (including interviewing witnesses and determining credibility), the types of remedial actions and accommodations available to complainants of sexual assault and harassment, and the need to respect confidentiality or retaliation concerns.

Moreover, faculty and supervisors should be regularly trained to report instances of possible harassment or assault to their administrators and the Title IX coordinator, just as they would do in the Title VII context. As part of any training regimen, faculty should receive practical information about how to identify sexual harassment or assault, including behaviors that lead to and result in sexual violence and the attitudes of bystanders that may allow conduct to continue. Faculty should also be instructed how to respond to confidentiality and retaliation concerns, as a student is likely to raise these issues directly to the first faculty point of contact when making a complaint. To increase faculty participation in training programs, schools may consider whether training would be better received coming from other faculty members who volunteer to learn the material and provide the training, and whether calling the program a "forum" or "seminar" (as opposed to "training") may increase receptivity.[23]

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[20] *See Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

[21] *See* 34 C.F.R. § 106.8(a). *See also* OCR's "Dear Colleague Letter," p. 7 (Apr. 4, 2011).

[22] *See* OCR's "Dear Colleague Letter," pp. 7-8 (Apr. 4, 2011). *See also* OCR's "Questions and Answers on Title IX and Sexual Violence," pp.10-11 (Apr. 29, 2014).

[23] *See* "Sexual Harassment in the Academy: Some Suggestions for Faculty Policies & Procedures," Donna Euben, AAUP Counsel (Oct. 2002).

B. Student Training

Institutions should make students aware of their rights under Title IX. Training should take place as early as the first student orientation on campus to make sure students are aware of the pertinent campus offices that respond to Title IX complaints and available counseling resources (both on campus and in the community). During training, universities should provide information about what constitutes consent, how the school analyzes whether conduct is "unwelcome" under Title IX, any applicable grievance procedures for reports of sexual harassment or assault, reporting options (including requesting confidentiality), and protections against retaliation. Moreover, schools should provide accessible information both on the school's website or intranet, and in pamphlets on campus, to make it easy for students to look for information should they need it in the future.

IV. How does a school assess whether sex was consensual in light of the unequal power dynamic between professors and students?

As noted by the AAUP, "[e]ven when both parties initially have consented, the development of a sexual relationship renders both the faculty member and the institution vulnerable to possible later allegations of sexual harassment in light of the ***significant power differential*** that exists between faculty members and students."[24] OCR takes the position that "[i]n cases involving a student who meets the legal age of consent in his or her state, there will be a strong presumption that ***sexual activity between an adult school employee and a student is unwelcome and nonconsensual***."[25] Accordingly, while OCR takes a more aggressive approach to delineating what is nonconsensual, AAUP and OCR seem to agree, at a minimum, that there is some risk of unequal power between faculty and students that renders "consent" difficult to establish. This is especially so in the context of harassment allegations that entail rape or sexual assault, where consent may be litigated in a courtroom between experts retained by the state and the defense, far beyond the confines of the university investigative and disciplinary process.

V. Does it matter if the student is also an employee (e.g. work-study or teaching assistant)?

When a student is also an employee of an educational institution, a university's potential liability increases because Title IX and common law are no longer the limits of exposure. Universities must also consider possible implications of Title VII, ADEA, ADA and parallel state and local anti-discrimination employment statutes that protect against harassment, discrimination and

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[24] *See* AAUP's "Statement on Consensual Relations Between Faculty and Students" (1995) (emphasis added).

[25] *See supra* fn. 6-7 (emphasis added). *See also Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 529 (10th Cir. 1998)(professor's disagreement with university's assessment of whether "sexual contact between participants in an unequal power relationship [became] exploitative" was not grounds for professor's substantive due process claim); *Schneider v. Plymouth State College*, 144 N.H. 458, 463 (N.H. 1999)("The relationship between students and those that teach them is built on a professional relationship of trust and deference, rarely seen outside the academic community," giving rise to a fiduciary duty "to create an environment in which the plaintiff could pursue her education free from sexual harassment by faculty members.").

retaliation. Moreover, because these statutes cover protected categories beyond gender, the number of possible theories of liability may expand.

For example, in *Urie v. Yale Univ.*, the District of Connecticut granted Yale University's motion to dismiss Title IX claims brought by a teaching fellow concerning sexual harassment by a professor following the fellow's graduation.[26] The District Court found the rights the teaching fellow sought to be vindicated were actually *covered by Title VII*, not Title IX. The court rejected the teaching fellow's claim that her Title IX claim arose from her time as a student because the allegations did not support a theory that she was subjected to any harassment prior to graduation. Thus, the motion to dismiss was granted in favor of the university. In *Urie*, the court easily differentiated between the dates the plaintiff was a student prior to graduation and the dates she was an employee following graduation, but in many instances this will not be a "bright-line" rule that can easily be applied to dismiss harassment allegations involving a student who wears both hats prior to graduation.

At least one other district court has addressed the distinction between a student and an employee. In *Liu v. Striuli*, a professor had a relationship with an international PhD student on a student visa, who also worked as a graduate assistant.[27] The graduate assistant alleged the professor raped her multiple times while threatening her visa status. The graduate assistant told her supervisor about the harassment and he had her meet with the college's sexual harassment officer, who launched an investigation. The college investigator concluded the graduate assistant's complaint had some merit, and the college sanctioned the professor with a letter of reprimand for failing to exercise appropriate professional judgment by entering a romantic relationship with a student. The District Court found the college did not have knowledge of the harassment until the investigator was alerted to the conduct. The plaintiff's theory that two other professors had knowledge of the relationship, which they believed was consensual, was inadequate to support a constructive knowledge theory under *Gebser*, which requires "actual" knowledge of the harassment.[28] Thus, the court granted the college's motion for summary judgment on Title IX and related negligence claims. The court also addressed the employment relationship in connection with the plaintiff's negligent supervision and Rhode Island Civil Rights Act claims, both of which were dismissed on summary judgment. The court found the accused professor was neither plaintiff's professor nor her supervisor, and there was no evidence that the college had breached a duty to her as an employee to support a negligence claim. Moreover, the court concluded that the college could not be vicariously liable for any intentional conduct of the professor under the state anti-discrimination law (absent evidence of negligence), so the court granted summary judgment on all remaining claims against the college.

Thus, while in some ways a student employee has more rights to vindicate under various employment law theories than a student does under Title IX, it may be more difficult for a

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[26] 331 F. Supp. 2d 94 (D. Conn. 2004).

[27] 36 F. Supp. 2d 452 (D.R.I. 1999).

[28] *See Gebser*, 524 U.S. 274. *See also Escue v. Northern Oklahoma College*, 450 F.3d 1146 (10th Cir. 2006) (instances of consensually dating "two non-traditional students nearly his own age" and complaints regarding "inappropriate touching" and "inappropriate name-calling" did not give school actual knowledge that professor was a substantial risk to students, where inappropriate incidents took place ten years prior).

student employee to establish those theories based on whether the conduct occurred in the student's capacity as a student versus an employee. Moreover, the perception of any power differential between students and faculty may be less apparent in the context of an employment relationship between consenting university employees.

VI. Does it matter if the student has never been in the professor's class?

When a student is enrolled in a professor's class and engages in a relationship with the professor, it becomes apparent to most that a potential for conflict exists if the professor gives the student inflated or deflated grades based on the relationship. Other students may negatively react to the perception of any romantic relationship, whether or not consensual, in terms of whether they are being graded fairly. However, if a professor is accused of harassment by a student who was never enrolled in the professor's class, the perception of impropriety may be reduced because the professor is not responsible for grading the student's academic performance. According to the OCR, this distinction is not dispositive.[29]

At least the Eighth Circuit has taken a different approach in considering whether a student not enrolled in a class with a professor may be in a position to have a consensual relationship with the professor. In *Waters v. Metro. State Univ.*, a student had previously taken classes with a professor, but was no longer enrolled in any of his classes when she consented to a sexual relationship with him over one year later.[30] The District Court dismissed her Title IX claims against the university, finding there was no evidence of "deliberate indifference." The student appealed the dismissal of her Section 1983 claim against the professor in his individual capacity. The District Court dismissed the 1983 claim because it found the conduct was not unwelcome, thus, there could not have been a deprivation of liberty. Moreover, although plaintiff was enrolled as a student at the time she had the relationship with the professor, *she had withdrawn or failed all of her classes already*. The Eighth Circuit affirmed the dismissal, finding that there was no evidence of any unwelcome relationship with the professor.

However, even when a student is not in a professor's class, a professor (and university) should still consider the possible consequences to a student, particularly based on the student's age and level of education. For example, once other faculty learn of a relationship, those faculty/mentors may avoid the student and give him/her less opportunity for fear of being pulled into a "sticky" situation. The fact that other members of the department may feel less inclined to extend additional offers to the student to participate in important academic research or mentorship may hurt the student's future career prospects. As noted by one author in *The New Republic*, professors are now seen as "professional gatekeepers" to employment, so they typically have a greater sphere of influence over a student's experience that is more akin to an employer than a teacher.[31]

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[29] *See supra* fn. 6-7.
[30] 52 Fed. Appx. 1 (8th Cir. 2002).
[31] *See* "The Hostile Renegotiation of the Professor-Student Relationship" by Phoebe Maltz Bovy, *The New Republic*, June 5, 2015.

VII. What can an institution do if the faculty member is tenured?

When a tenured faculty member is accused of harassment, a university must follow its established tenure protocols for investigating and, if necessary, disciplining, the faculty member. Especially in the public university context, courts are often confronted with the issue of whether or not a professor has had due process in connection with any investigation/hearing concerning a tenured professor accused of harassment, and whether or not any disciplinary action was warranted.[32] The case summaries that follow concern tenured faculty raising due process concerns about disciplinary actions taken in response to harassment claims by students:

- In *Brown v. State Personnel Board*, a state appellate court reversed a trial court and ordered a professor to be reinstated because the professor's termination was based on one incident of a sexual advance on a student "made without threat or retaliation."[33] The appellate court found because the school never had a rule, regulation or policy prohibiting faculty and students from dating, living together or getting married, termination was inappropriate. Thus, at least in *Brown*, the court found it important that the sexual advance was not conditioned on a threat, and that the university had no rule notifying the professor that a sexual advance would be subject to sanction.

- In *Corstvet v. Boger*, a tenured professor sued a university under Section 1983 for the termination of his employment based on solicitation of sexual activities in a student union restroom.[34] The hearing committee found that although the professor engaged in homosexual acts in the restroom, he deserved a second chance. Although the university president accepted the findings of the committee, he disagreed with the second-chance warning and decided the conduct was grounds for immediate termination. The Tenth Circuit upheld a jury's verdict finding the professor received due process prior to termination. The Tenth Circuit found no evidence of any bias based on homosexual conduct.

- In *Tonkovich v. Kansas Bd. of Regents*, a tenured professor brought a Section 1983 claim against a university for the termination of his employment.[35] The professor alleged the school's hearing concerning his termination violated due process procedural safeguards. The Tenth Circuit found that the professor had ample time to prepare his defense for the hearing and, even though he initially did not know the name of the student accuser, he learned of the student's identity well before the hearing to effectively cross-examine the student. Further, the court found that the school's attempt to pass a retroactive faculty

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[32] Of course, if a faculty member is up for tenure at the same time as being accused of harassment, it would be prudent for a university to consider first a path for resolution of the harassment allegation prior to finalizing any tenure decision to give the university adequate grounds for denying tenure, if necessary. Either way, universities should exercise caution because a faculty member who does not receive tenure in connection with a harassment investigation (whether during the investigation or after the investigation is completed) may allege retaliation for participation in the school's investigative proceeding.

[33] 166 Cal.App.3d 1151 (Cal. Ct. App. 1985).

[34] 757 F.2d 223 (10th Cir. 1985).

[35] 159 F.3d 504 (10th Cir. 1998).

rule prohibiting faculty-student relationships was not a due process violation because the professor's conduct remained in violation of existing university policy, prohibiting a professor from "exploit[ing] a student for his own private advantage." Thus, denial of the professor's Section 1983 claim was affirmed.

- In *Board of Trustees of Compton Junior College v. Stubblefield*, a professor was caught by a policeman in his car partially naked with a student.[36] The professor reversed the car, injuring the police officer, and led the police on a chase. The Junior College District suspended the professor and notified him of intent to dismiss within 30 days. He requested a hearing, which was provided. The College District asked the court to hold a fact finding hearing under the California Education Code, where the court upheld the grounds for dismissal of the professor ("immoral conduct and evident unfitness for service"). The appellate court upheld the court's decision. Of note, the appellate court found: "It would seem that, as a minimum, responsible conduct upon the part of a teacher, even at the college level, excludes meretricious relationships with his students and physical and verbal assaults on duly constituted authorities in the presence of his students."[37]

Even non-tenured faculty may assert due process (or First Amendment) claims for disciplinary actions based on student complaints of harassment. In a Section 1983 case involving a non-tenured faculty, *Trejo v. Shoben*, the Seventh Circuit found the faculty member received due process because the school's termination decision was reviewed by two separate, independent faculty committees which conducted their own investigations of the charges and came to the conclusion that the professor's harassing comments to students warranted removal.[38]

As a best practice to defend against Title IX (or Title VII) claims, universities should keep records of complaints brought against faculty to preserve the institution's ability to show that complaints were resolved promptly and effectively such that the school was unaware that the faculty member presented any continuing threat to students.[39]

VIII. How should a school handle a student's complaint against a faculty member when the faculty member then files a cross-complaint against the student?

If a student complains about a faculty member, and the faculty member files an internal "cross-complaint" or a lawsuit against the student, the university needs to be mindful not only of due

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[36] 16 Cal.App.3d 820 (Cal. Ct. App.1971).
[37] *Id.* at 825.
[38] 319 F.3d 878 (7th Cir. 2003). The *Trejo* decision raises an important question concerning due process protections afforded to non-tenured faculty: is it best practice for schools to require non-tenured faculty termination be reviewed by faculty committees? That proposition seems overreaching and at odds with the at-will employment doctrine adopted by most states, but it may be worth considering whether additional measures should be taken prior to termination to make litigation defensible.
[39] *See* "Sexual Harassment of University or College Students by Faculty Members," by Walter B. Connolly, Jr. and Alison B. Marshall, 15 J.C. & U.L. 381, 401 (Spring 1989).

process concerns for both the student and the faculty member, but of the possibility that one or both parties may allege some form of retaliation in connection with the hearing/review process.

How an institution should respond to such a situation will vary significantly based on the school's existing policies and procedures. However, advance planning can be helpful to ensure a school has procedural flexibility in the event of parallel complaints and cross-complaints. The obvious danger for the institution is inconsistent results from different decision-makers. Thus, to the extent possible, schools should consider revising their policies to build in procedural flexibility to (i) join complaints, cross-complaints and/or investigations when it makes sense to do so in the school's sole discretion, and (ii) to prioritize the order of investigations/hearings to reduce the risk of inconsistent decisions. Under all circumstances, students and faculty alike should be assured verbally and in writing that the school is committed to protecting them from retaliation.

IX. How does a school deal with faculty resistance to an institution's policy banning or imposing restrictions on professor-student relationships?

Universities have limited options for responding to faculty resistance against policies banning or restricting faculty-student relationships. First, the university may carve-out some provision in any written relationship policy that requires faculty and students to disclose consensual relationships and permit the university to reassign the student (or professor).[40] Such a carve-out puts both parties on record that the relationship is reported as consensual and does not affect the student's academic work going forward, *i.e.*, the student cannot later claim that the university had knowledge of a nonconsensual relationship in violation of Title IX. The obvious setback of a carve-out is that students may be coerced into making such disclosures under duress from faculty, even if the relationship is nonconsensual.[41]

If a university reasonably believes a substantial number of faculty support the policy, and only a few members are actually "resistant," the university can hold an open forum for faculty to air any grievances regarding the policy, and permit other faculty to respond. This way, faculty are engaged in a discussion about the policy and can vocalize their concerns in an organized fashion, while also confronting the reality that other faculty favor the policy. If the "resistance" is limited to a few faculty members in comparison to the greater faculty population, such a forum may weaken those resisting the policy because they understand most other faculty are comfortable with its existence in practice.[42]

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[40] *See supra* fn. 5.

[41] *See supra* fn. 6-7.

[42] Notwithstanding, if two or more professors disagree with the policy and express their concerns in this forum, they may be engaging in protected, concerted activity under the National Labor Relations Act, and any further adverse action against those faculty members may be grounds for an Unfair Labor Practice charge.

X. How should an institution respond to a professor's retort that other faculty members engaged in similar behavior but were treated differently?

If a professor is accused of having an improper relationship with a student, s/he may look to examples of other professors who have not been reprimanded for similar dalliances and claim they are being treated differently based on a protected category under Title VII, ADA, ADEA and applicable state and local anti-discrimination laws. Professors may also bring Equal Protection, Section 1983 or First Amendment claims. The following case summaries illustrate discrimination theories brought by faculty:

- In *Naragon v. Wharton*, a graduate student, who was also a full-time instructor, engaged in a relationship with an undergraduate freshman.[43] When the undergraduate's parents learned of the relationship, they complained to the school. The instructor was permitted to continue teaching full-time without a change in compensation, but she was no longer able to teach undergraduates. The instructor sought declaratory relief that the decision to remove her undergraduate duties was based on her sexual orientation, which violated her Equal Protection and First Amendment rights. The Fifth Circuit found the reassignment decision was prompted by a concern about an improper romantic relationship between a teacher and a student, and not the instructor's sexual orientation. Thus, the Fifth Circuit upheld the decision to deny declaratory relief. However, a dissenting judge noted that evidence in the record showed another instructor who had a heterosexual live-in relationship with a student had not been charged with any sanctions. Thus, the dissent found some evidence of sexual orientation bias to support the instructor's Equal Protection claim.

- In *Korf v. Ball State Univ.*, a tenured professor brought a Section 1983 claim against a public university for violation of his constitutional rights.[44] He was accused of "exploiting students for his private advantage" pursuant to the AAUP Statement on Professional Ethics. The professor argued the relationships were "private and consensual." He disagreed that the AAUP Statement on Professional Ethics could not be "reasonably interpreted" to include "consensual sexual relationships with students," which the Hearing Committee found unethical. He alleged that other faculty-student relationships were occurring on campus, and nothing had been done to those professors, in part because those professors were involved with members of the opposite sex, while he was being accused of coming on to individuals of the same sex. The district court granted summary judgment to the university, which was affirmed on appeal. The professor also made an equal protection argument that he was terminated for "untraditional sexual preferences" because of his interest in the same sex, which was rejected by the Seventh Circuit.

- In *Tonkovich*, which concerned a professor's equal protection claim, the Tenth Circuit rejected a professor's argument that he was treated differently from other "similarly situated" faculty who dated students.[45] Significantly, the Tenth Circuit found the

[43] 737 F.2d 1403 (5th Cir. 1984).
[44] 726 F.2d 1222 (7th Cir. 1984).
[45] *Tonkovich*, 159 F.3d 504.

> professor was not charged with "dating" a student; he was accused of exploiting the student for his own private advantage by engaging her in a discussion of grades and then having sex with her. Because there was no evidence of any similarly-situated professor who exploited a student for his own private advantage, the equal protection claim failed.

Accordingly, as with all employees, universities need to be mindful of enforcing policies uniformly and treating similarly-situated professors equally. When considering everything from the type of evidence presented at a disciplinary hearing, to the level of discipline given to a professor, it is important for universities to look at their own institution's past precedent to stave off claims of discrimination and other constitutional violations.

Due to the importance of precedent, when a school is presented with a unique situation, particularly one in which they are inclined to respond more leniently due to mitigating factors, it is important to document at that time why the decision was made. This documentation can be particularly helpful when a similar, but still materially different scenario occurs later which seems to mandate a different decision or result.