

## Complying with Title IX while Protecting Shared Governance, Academic Freedom, and Due Process: A Model Sexual Misconduct Policy

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### Abstract

The promulgation by the US Department of Education's Office for Civil Rights of new and sometimes confusing Title IX guidance directing college and university efforts to combat sex discrimination in the form of sexual harassment, combined with institutional policy making in the absence of shared governance, has produced campus outcomes that threaten the academic freedom of faculty in teaching, scholarship, and extramural utterances. In cooperation with faculty, better policy can be crafted that will provide necessary protections for due process and tenure, which in turn will help restore a more robust level of academic freedom on campuses where it has been threatened. A model process and model policy demonstrate how to achieve these goals.

In June 2016 the AAUP national Council adopted a report prepared by a joint subcommittee of the Association's Committee A on Academic Freedom and Tenure and the Committee on Women in the

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Academic Profession.<sup>1</sup> This report, *The History, Uses, and Abuses of Title IX*, scrupulously highlights threats to shared governance, academic freedom, and due process that have emerged as a result of guidance promulgated since 2011 by the US Department of Education's Office for Civil Rights (OCR).

As documented in the report, the actions of academic administrators and the OCR have had a widespread negative impact on teaching, research, and extramural speech because faculty conduct is increasingly scrutinized by college and university Title IX coordinators and other compliance officers. Faculty are disciplined and even fired as a result of administrative policy and processes that use muddled definitions of hostile environment sexual harassment and because of inadequate due process protections for the accused. Substantial evidence has surfaced that in the rush to comply with new mandates from the federal government, colleges and universities have drafted Title IX policies without adequately consulting faculty, thus compromising shared governance.

### **New Title IX Regulations and Threats to Academic Freedom, Due Process, and Shared Governance**

Title IX of the Education Amendments of 1972 states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>2</sup>

The Title IX mandates that prohibit discrimination based on sex apply to all colleges and universities receiving federal financial assistance from the US Department of Education. Prohibitions on sex discrimination apply to a wide variety of activities conducted by postsecondary schools, including recruitment, admissions, financial aid, housing, athletics, discipline, treatment of pregnant and parenting students, employment, and sex-based harassment. The Office for Civil Rights is responsible for enforcing Title IX through evaluation, investigation, and resolution of complaints filed with the agency. The OCR also enforces Title IX proactively, conducting compliance reviews of schools that receive federal funding in order to discover if sources of information other than complaints point to systemic violations of Title IX.

Initial congressional debates prior to the passage of Title IX focused primarily on sex discrimination in faculty employment, student admissions, and financial aid.<sup>3</sup> The legal theory that sexual harassment of

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<sup>1</sup> Risa Lieberwitz, Rana Jaleel, Tina Kelleher, Joan Wallach Scott, Donna Young, Henry Reichman, Anne Sisson Runyan, and Anita Levy, “The History, Uses, and Abuses of Title IX,” *Bulletin of the American Association of University Professors* (special issue of *Academe*), July–August 2016, 69–99.

<sup>2</sup> US Department of Education, Office for Civil Rights, “Title IX and Sex Discrimination,” revised April 2015, [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

<sup>3</sup> Lieberwitz et al., “The History, Uses, and Abuses of Title IX.”

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students would constitute sex-based discrimination, prohibited by Title IX, first emerged and was accepted by a federal district court in 1977 in *Alexander v. Yale University*.<sup>4</sup> In this case, three female student plaintiffs, two female graduates, and a male faculty member charged that Yale University's "failure to combat sexual harassment of female students and its refusal to institute mechanisms and procedures to address complaints and make investigations of such harassment interferes with the educational process and denies equal opportunity in education."<sup>5</sup>

By 1980, when this case was being heard by the US Second Circuit Court of Appeals, the university had adopted a set of procedures for receiving and responding to student complaints of sexual harassment.<sup>6</sup> Consequently, while the Appeals Court did not rule in favor of the plaintiffs, two of their goals were achieved: (1) a district court and an appellate court recognized that sexual harassment was a form of sex discrimination prohibited under Title IX, and (2) Yale, along with many other colleges and universities across the United States, adopted policies for responding to student complaints of sexual harassment.

As the case law defining sexual harassment as a form of illegal sex discrimination has evolved, the OCR has continued to create and revise regulations and policy guidance for educational institutions subject to Title IX. In 2011, with the publication of a "Dear Colleague Letter," the OCR increased its focus on sexual violence as a form of prohibited sex discrimination under Title IX, as well as the actions that colleges and universities must take to eliminate sexual violence, prevent it from reoccurring, and remedy its effects.<sup>7</sup> Sexual violence includes rape, sexual assault, sexual battery, and sexual coercion.

According to the *Chronicle of Higher Education's* Title IX Tracker, since 2011 the OCR has begun Title IX compliance investigations of 362 colleges and universities, with 304 investigations still open.<sup>8</sup> The *Chronicle* reports that the average investigation lasts 1.6 years. An OCR investigation produces negative publicity for a college or university, the possibility of higher liability insurance rates for the institution, and the need to commit hundreds, if not thousands, of employee work hours to complying with and producing information for the OCR investigation. Given these costs, schools take a variety of actions aimed at risk management, some of which unnecessarily compromise shared governance.

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<sup>4</sup> *Alexander et al. v. Yale University*, 459 F. Supp. 1, US District Court for the District of Connecticut, 1977.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ronni Alexander, Ann Olivarius, Pamela Price, Margery Reifler, and Lisa Stone v. Yale University*, 631 F.2d 178, US Court of Appeals, 2d Cir.,1980.

<sup>7</sup> Russlynn Ali, Office of the Assistant Secretary of Education for Civil Rights, "Dear Colleague Letter," April 4, 2011, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>8</sup> *Chronicle of Higher Education*, "Title IX: Tracking Sexual Assault Investigations," <http://projects.chronicle.com/titleix/>; accessed January 29, 2017.

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As *The History, Uses, and Abuses of Title IX* illustrates, colleges and universities seeking to rapidly come into compliance with sometimes confusing OCR mandates have on many occasions adopted overly broad interpretations of what types of verbal, nonverbal, and physical conduct creates an impermissible hostile environment based on sex. While an analysis of the evolution of OCR mandates is beyond the scope of this study, the OCR currently defines sexual harassment as unwelcome conduct of a sexual nature, or conduct that is targeted at an individual or group because of sex, gender identity, or sexual orientation, or because of sex stereotyping. Hostile environment harassment violates federal prohibitions on sex discrimination when there is unwelcome conduct that is sufficiently severe or pervasive that it (1) interferes with or limits a student's ability to participate in or benefit from a school's programs or activities<sup>9</sup> or (2) explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.<sup>10</sup> The more severe the unwelcome conduct, the fewer the number of incidents are required to prove that the environment is hostile.

The National Association of College and University Attorneys (NACUA) has also reported on the problems schools face in both developing and implementing policies that comply with Title IX mandates, with one report calling sexual misconduct a "legal and political minefield."<sup>11</sup> A NACUA analysis of federal lawsuits filed by both accusers and accused in collegiate sexual harassment cases has found that alleged problems with policy implementation include unreasonable delays in beginning investigations or holding hearings, conspiracies and cover-ups, failure to take any action, institutions acting out of fear of OCR sanctions, a rush to judgment, and institutions failing to follow their own policies.

One key problem that should concern all stakeholders in higher education is that failures of policy development and implementation (such as those described above) threaten the academic freedom faculty need to advance the university's educational and scholarly missions, as well as the rights to extramural expression due to all private citizens.

Another problem is that one-size-fits-all policies, created expeditiously by attorneys and/or administrators unfamiliar with the concepts of academic freedom and tenure, are less likely to protect the due-process rights necessary to maintain both academic freedom and tenure. Following a shared governance model of formulating policy is not at odds with providing prompt policy adjustments in response to new

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<sup>9</sup> US Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students, by School Employees, Other Students, or Third Parties* (Washington, DC: 2001).

<sup>10</sup> Equal Employment Opportunity Commission, *Facts about Sexual Harassment*, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>; accessed January 30, 2017.

<sup>11</sup> Craig Wood, Josh Whitlock, Melissa Nelson, Tyler Laughinghouse, and Jillian Nyhof, "Between a Rock and a Hard Place: A Discussion of Issues That Frequently Arise in Sexual Misconduct-Related Litigation against Colleges and Universities," *NACUA Notes* 14, no. 4 (May 18, 2016).

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federal mandates. Moreover, when faculty work with students, administrators, and attorneys, stakeholders can identify the intersection of policy options that eliminate, prevent, and remedy the effects of sex discrimination in the form of sexual harassment—while simultaneously protecting academic freedom, due process, and tenure.

The sections below explain the process used at Hampden-Sydney College to revise the school’s sexual harassment and discrimination policy to achieve the three objectives specified in OCR’s guidance documents and to develop a model policy that could be adopted by other colleges and universities facing the same challenges.

### **Shared Governance: The Process of Crafting a Title IX Sexual Misconduct Policy**

In 2014 an ad hoc committee was created to draft a revision of the college’s sexual harassment and discrimination policy. The committee was led by the vice president for administration, strategy, and board affairs, who was also serving as the college’s Title IX coordinator. Committee members included the dean of students, the provost and dean of faculty, the chief of police and director of public safety, the director of the Wellness Center, a faculty representative (this author), and an outside expert from a firm specializing in Title IX consulting. The four deputy Title IX coordinators also served on the ad hoc committee, each representing different campus stakeholders, including the associate athletic director, the associate dean of students, the associate dean of faculty, and the director of human resources.

Shared governance was assured through the process by which the final policy was drafted and the procedures specified for its approval. To become operational, the final draft of the policy would have to be approved by two-thirds of the voting faculty present for a regularly scheduled faculty meeting (quorum equal to 50 percent of the voting faculty) and by a majority of the members of the college’s board of trustees.

Drafting a policy as a committee was an unproductive exercise. The emerging document was disjointed and in some places conflicting. Ultimately, members of the committee agreed to delegate the drafting of the document to one primary author (a tenured faculty member) and one secondary author (the college’s Title IX coordinator), both of whom were well-versed in sexual harassment law under Title IX, Title VII of the 1964 Civil Rights Act (which prohibits sexual harassment of employees), and the 1990 Clery Act (which requires collection and reporting of crime data, including sex crimes).<sup>12</sup> The authors would combine their knowledge

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<sup>12</sup> The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act is a federal law codified at 20 U.S.C., § 1092(f). The Clery Act requires that all colleges that participate in federal financial aid programs must collect and report information about specified crimes (murder, sex offenses, robbery, arson, etc.) committed on or near their campuses. Institutions must also provide timely warnings to the campus community when reported crimes represent a threat to students or employees. Amendments to the Clery Act in 2014 also required schools to collect and report data on domestic violence, dating violence, and stalking.

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with published federal guidance and information gathered from interviews of committee members to produce a first draft of a policy guided by a series of binding constraints and subject to review by all members of the committee and the college's attorney.

At the macro level the policy would have to be consistent with achieving OCR's specified goals of (1) eliminating sexual harassment, (2) preventing reoccurrences, and (3) remedying its effects.<sup>13</sup> More specifically, the policy would also

- Protect academic freedom in teaching, research, and extramural utterances;
- Protect all students' rights and employees' rights to due process, including the rights of tenure;
- Reduce the incidence of sexual misconduct by clarifying the definition of "consent";
- Reduce confusion regarding the broad spectrum of behavior that constitutes unlawful sexual harassment by providing clear definitions and examples of prohibited behavior, including verbal, nonverbal, and physical conduct;
- Empower the target of sexual misconduct by providing a complete explanation of reporting options (for example, medical, administrative, law enforcement, OCR), while also including the options to report confidentially, or not to report at all;
- Make help easily available to an employee, student, or guest who has been through a traumatic sexual experience;
- Provide support for both the "complainant" and the "respondent" during the investigation and resolution of a complaint;
- Provide for informal resolution of complaints that do not involve a person under the age of eighteen or an act of sexual violence, domestic violence, dating violence, or stalking;
- Prevent retaliation against all parties in a sexual misconduct case, including the complainant, the respondent, and any witnesses;
- Mitigate against possible conflicts of interest in the investigation and resolution of a sexual misconduct complaint by allowing both the complainant and the respondent to petition for a substitution of the assigned hearing panel members, the assigned investigators, and the assigned Title IX, or deputy Title IX coordinator;
- Provide a thorough, impartial, and prompt investigation of all sexual misconduct complaints received by the college; and
- Comply with Virginia commonwealth statutes regarding sexual violence on college campuses.

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<sup>13</sup> US Department of Education, Office for Civil Rights, *Dear Colleague Letter*, 2011.

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The primary and secondary authors met at the end of December 2014 to draft an outline of the policy document and make some decisions regarding the terminology to be used in the policy. While sexual harassment embodies a broad spectrum of behaviors, from repeated use of sexual slurs to acts of extreme sexual violence, a decision was made to use the term “sexual misconduct” to define prohibited behavior. The authors decided to use the term “complainant” to refer to a person who was the target of an act of sexual misconduct while recognizing that some individuals targeted by sexual misconduct will choose not to make a formal complaint and that in some cases knowledge of an act of prohibited conduct might come from a third party, such as a friend or witness. The authors chose the term “respondent” to refer to the person alleged to have engaged in the prohibited conduct, while understanding that in some cases no formal complaint would be filed. Additionally, the term “respondent” was preferred to alternatives (e.g., “perpetrator”) in order to stress that there will not be a presumption of guilt based solely on the filing of a complaint.

Another rhetorical choice made by the authors was to describe each step in the process of reporting, intake, investigation, resolution, and appeal. Although this choice increased the length of the policy document and might make stakeholders less likely to read it from start to finish, the authors determined that detailing each step in the process (as in a recipe book) would reduce potential confusion among those who have to implement the policy. The authors concluded that a policy that skips steps, or only provides guidance in broad brushstrokes, promotes ad hoc decision making, increasing the risk of outcomes that are unjust and not in compliance with federal mandates.

Over five months the authors completed five drafts of the policy before they were ready to share their work with the ad hoc committee. The draft policy was sent by e-mail to committee members with a request that comments be submitted within two weeks. Given the difficulty of finding convenient meeting times for a large committee during the summer, the authors met with members of the ad hoc committee individually or in small groups before producing a sixth draft of the policy. This version was shared with the college’s attorney, who provided many helpful clarifications of policy language.

One substantive issue, providing due process protections for staff employees named as respondents in sexual misconduct complaints, required several subsequent meetings and negotiations. College counsel recommended that staff, most of whom are at-will employees,<sup>14</sup> not be granted the right to a hearing when named as respondents in sexual misconduct complaints. However, several employees of the college (including the authors of the draft policy, the director of human resources, and the vice president for business) argued that due process rights should be granted to all employees, not just faculty.

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<sup>14</sup> An at-will employee can be fired at any time for any reason, or no reason at all—except for an illegal reason (for example, because of race, color, religion, national origin, or sex).

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In August 2015, after the ad hoc committee decided to retain due process rights for staff employees, the sixth draft of the policy was shared with the members of the Faculty Affairs Committee. Fortunately for the faculty, when the college had adopted its first sexual harassment policy in the 1990s, it added the policy to the faculty handbook, which is designated by the college as an employment contract. The faculty handbook can only be amended by a two-thirds vote of the faculty and a majority vote of the board of trustees. Consequently, the faculty have insisted that the sexual harassment policy remain in the faculty handbook so they can exercise shared governance every time it is revised. Having been briefed and consulted on policy developments during the early drafting phases, the members of the Faculty Affairs Committee voted unanimously to bring the policy to the whole faculty for a vote.

The sexual misconduct policy was e-mailed to all members of the faculty in the third week of September 2015, and two town hall meetings were scheduled to enable faculty to ask questions or suggest amendments. The policy was approved by the faculty on October 5, 2015, and by the board of trustees on October 12.

The *Hampden-Sydney College Sexual Misconduct Policy* is organized into seven “articles.”<sup>15</sup> The first part of the policy describes prohibited conduct, while the remainder of the document details the Title IX resolution procedures. The authors decided to order Articles III through VII chronologically with respect to the procedures of reporting, intake, investigation, and complaint resolution.

The articles are as follows:

- Article I. Introduction: Includes the college statement of nondiscrimination, contact information for the Title IX coordinator, the scope of the policy, and notice that there is no time limit for filing a formal complaint.
- Article II. Statement of Policy: Includes descriptions of prohibited conduct with examples, *a stipulation that determinations regarding the creation of a hostile environment must consider whether the conduct in question is entitled to the protections of academic freedom*, explanations of consent, prohibition against retaliation, prohibition against providing false information, descriptions of options for confidential reporting, complainant requests not to investigate, complainant options not to participate in an investigation or resolution process, limited immunity from the college’s alcohol and drug policies, and accommodations for individuals with disabilities.
- Article III. Reporting Sexual Misconduct: Includes a description of all reporting options along with relevant contact information, such as reporting to medical professionals, reporting to psychological or faith counselors, reporting to the police, reporting to the college through a

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<sup>15</sup> Hampden-Sydney College Sexual Misconduct Policy, 2015, <http://www.hsc.edu/Sexual-Misconduct/Sexual-Misconduct-Policy.html>; accessed January 30, 2017.



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- responsible employee, reporting to the Office for Civil Rights at the US Department of Education, as well as the right not to report.
- Article IV. Intake of Sexual Misconduct Complaints and Procedures for Investigation: Includes a description of the respective intake meetings for the complainant and the respondent with the Title IX coordinator or a deputy title IX coordinator; options to petition for a different coordinator or different investigators in the case of actual or perceived conflicts of interest; the availability and role of an individual adviser (who may be an attorney) for both the complainant and the respondent; the timetable for resolving complaints; the availability of interim measures for both the complainant and the respondent; the availability and appropriateness of informal resolution options prior to the investigation; the assignment of investigators; investigative procedures to be utilized; notice of considerations that investigators must give to conduct protected by academic freedom, as defined by the AAUP; preparation of the investigative report; and investigation review by the Title IX coordinator or deputy Title IX coordinator.
  - Article V. The Informal Resolution Process—Mediation Procedures: Includes an overview of the mediation process by a trained mediator; the availability and role of an individual adviser (who may be an attorney) for the complainant and the respondent, respectively; the rights of either party to end the mediation process and proceed to a formal resolution; and a notice that mediation is not an option in complaints that involve a person under the age of eighteen or in complaints that involve sexual violence, domestic violence, dating violence, or stalking.
  - Article VI. The Formal Resolution Process: Includes a description of the differences in the composition of the hearing panel depending on whether the respondent is a student, faculty member, other employee, or third party (for example, a visitor to the campus); description of the “Hearing Panel,” its membership (for example, three tenured faculty members selected from a nine-member, elected faculty grievance committee when a faculty member is the respondent), and options for either the complainant or respondent to petition in opposition to hearing panel members for an actual or perceived conflict of interest; hearing policies and procedures, including the rights of the complainant and respondent to call witnesses and ask questions of the other party and the other party’s witnesses (through the chair of the hearing panel); options for special arrangements (for example, provision of a screen between the two parties); the availability and role of an individual adviser (who may be an attorney) for the complainant and the respondent, respectively; deliberations of the hearing panel; the preponderance-of-the-evidence standard; hearing panel recommendations regarding sanctions; measures for preventing retaliation; and the process for appeal.

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- Article VII. The Formal Resolution Process in Cases Involving Faculty as Respondents – Where Suspension or Termination Is a Potential Sanction: Includes a description of the post-investigative assessment made by the dean of faculty and Title IX coordinator regarding potential sanctions if the charges in the complaint are supported by a preponderance of the evidence; an explanation that if the charges are supported and might result in suspension or termination of a faculty member (regardless of tenure status) the dean of faculty and Title IX coordinator must meet with the president of the college before proceeding to a hearing; a description of the hearing process (which is the same as presented in Article VI); the process for the first appeal to the president of the college regarding the finding of the hearing panel and/or an appeal of the recommended sanction(s); and the process for the second appeal to the executive committee of the board of trustees regarding the finding of the hearing panel and/or an appeal of the recommended sanction(s).

### Elements of the Sexual Misconduct Policy That Assure Protections for Academic Freedom

Sometimes verbal conduct, nonverbal conduct, or physical conduct may create an environment that students, or employees perceive as hostile based on sex. A classics professor may give a lecture on the role of incest in the writings of Ovid. An English professor teaching a class on the depiction of criminal law in film might show the 1988 movie *The Accused*. A theater professor may touch students in the process of fitting a costume for a student production. Faculty research, scholarly writing, and opinion articles may focus on subject matter related to sexual behavior and express views that make students, employees, or others perceive that there is a hostile environment based on sex. If all of a university's education, research, and public service must be carried out in a way that no one could perceive an offense, the work of the university will suffer, to the detriment of students, faculty, and the public.

For the drafters of the revised Hampden-Sydney policy, the first step in ensuring robust protections for academic freedom was to use the AAUP's language to define it. The policy glossary states that "academic freedom is defined by the American Association of University Professors' 1940 *Statement of Principles of Academic Freedom and Tenure*. 'Faculty are entitled to full freedom in research and the publication of the results. . . . Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.'"<sup>16</sup>

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<sup>16</sup> Hampden-Sydney College Sexual Misconduct Policy, [http://www.hsc.edu/Documents/TitleIX/FacultyApprovedSexualMisconductPolicy12\\_7\\_15.pdf](http://www.hsc.edu/Documents/TitleIX/FacultyApprovedSexualMisconductPolicy12_7_15.pdf).

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The second step was to carefully and clearly define the concept of hostile environment sexual harassment in Article II.2.a.(1) of the policy and state that conduct of a sexual nature, or conduct that occurs because of sex, sometimes deserves the protections of academic freedom.

Article IV.5 describes investigative procedures. While the Title IX coordinator oversees the investigation and resolution processes, in all cases where a faculty member is a respondent the two investigators are chosen from a grievance committee of nine tenured, elected faculty members who serve staggered three-year terms. All faculty members who agree to serve on this committee also agree to complete twenty-five to thirty hours of on-campus, seminar-style training in how to investigate and adjudicate a civil rights complaint. The faculty elect tenured faculty to the grievance committee on the specific assumption that the protections of tenure will mitigate against any outside pressure on the investigative teams.

Faculty respondents thus are investigated by other (trained) faculty who presumably have a more nuanced understanding of the concept of academic freedom than a person from a wholly administrative background, or an outside investigator, or an arbiter who doesn't have faculty experience (such as a retired judge or a Title IX consultant). While the Title IX coordinator makes investigator assignments, the policy recognizes that conflicts of interest may arise, especially at a small college. Consequently, the policy allows the respondent (and the complainant) to petition the Title IX coordinator for alternative assignments and may permit the use of an outside investigator if all nine members of the faculty grievance committee are conflicted.

The instructions given to the investigators in Article IV.5 state that “in the case of a Complaint against a faculty member, the investigators will consider whether the charges in the Complaint arise from conduct that is protected under the faculty member’s rights to Academic Freedom, as stated by the American Association of University Professors in the 1940 *Statement of Principles on Academic Freedom and Tenure*. Academic Freedom never provides protection for acts of sexual violence.”

Not all complaints against faculty, students, employees, or guests require a hearing panel for adjudication. Some circumstances allow for an informal resolution, mediation, or the dismissal of a complaint following an investigation, and these circumstances are defined in the policy. When a hearing panel is necessary to make a finding regarding complaint against a faculty member and to recommend sanctions (if the complaint is found to be supported by a preponderance of the evidence), three hearing panel members are selected from the faculty grievance committee. During the hearing a faculty respondent can introduce evidence to support a claim that the conduct in question is supported by the protections of academic freedom. The hearing panel members must consider the matter before making a finding regarding the complaint.

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## Elements of the Sexual Misconduct Policy That Assure Protections for Due Process

The AAUP, NACUA, the Foundation for Individual Rights in Education (FIRE), and higher education media outlets have reported on multiple cases where sexual misconduct respondents were denied due process rights owed to them by their own institution's policies and/or by the OCR's requirements for equitable grievance procedures.<sup>17</sup> Many in higher education are familiar with the Title IX investigation of Professor Laura Kipnis of Northwestern University, which was prompted by student complaints over an essay she wrote and became a McCarthy-like inquisition. Hampden-Sydney's sexual misconduct policy includes numerous protections to protect a respondent's rights to due process.

Generally, due process requires that proceedings (including intake and investigation interviews, as well as hearings) be fair, that respondents be given reasonable notice of the proceedings, and that respondents have an opportunity to address the charges against them and present evidence on their own behalf. Title IX administrative proceedings are not formal legal proceedings, so the same level of due process protections that would apply in a criminal or civil case are not mandated for the resolution of a sexual misconduct complaint. While a college cannot incarcerate an individual, potential sanctions can be substantial. An employee may lose his or her source of income and a student suspended or expelled in the middle of a semester might lose tens of thousands of dollars in tuition and fees. While it is important to arrive at a correct finding and apply appropriate sanctions when an individual has committed an act of sexual misconduct, it is equally important not to falsely find a person responsible for an act of sexual misconduct that he or she did not commit.

Because the preponderance-of-the-evidence standard sets a lower burden of proof than "beyond a reasonable doubt," or "clear and convincing evidence," the college's ad hoc policy-writing committee determined that to promote just outcomes greater due process protections should be guaranteed than those required by OCR mandates.

Specifically, Article II.4 states that a person who knowingly files a false complaint, or who knowingly provides false information to college officials, or who intentionally misleads college personnel attempting to resolve a complaint will be subject to disciplinary sanctions.

Article IV focuses on complaint intake and specifies that a meeting between the Title IX coordinator and the respondent should be scheduled as soon as "practicable" after the meeting with the complainant. College policy also mandates that the respondent be notified in advance regarding the subject of the meeting and also clearly informed of the right to bring an adviser, who can be a friend, a relative, a mentor, or an attorney. Both the complainant and respondent are permitted to have an adviser with them at every subsequent meeting that is part of the complaint resolution process. During the intake meeting, the Title IX coordinator

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<sup>17</sup> US Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance*.

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provides a copy of the complaint and a copy of the college's sexual misconduct policy, and both explains and answers questions about the policy and the process. The respondent is notified that he or she has the option to provide a written statement in response to the complaint within seven days. Once investigators are appointed, the Title IX coordinator informs the complainant and respondent of the investigators' names and contact information. Both the complainant and respondent are given the right to petition in writing, within two days, if they believe there is a conflict of interest, with the default decision being to honor requests for appointment of an alternative investigator.

Investigators interview the complainant, the respondent, and the witnesses named by each party, as well as other potential witnesses discovered during the investigation process. Once the investigation is complete, the investigative report is submitted to the Title IX coordinator. The investigative report does not include a finding regarding the charges; it is a factual document describing information uncovered during the investigative process. The Title IX coordinator meets separately with the complainant and the respondent. Both parties have an opportunity to review the investigative report, take notes, correct information in the report, and identify any omitted information.

If the sexual misconduct that has been charged is minor and not pervasive, at this point in the process the Title IX coordinator meets with a college vice president who has supervisory authority over the respondent. If the respondent is a faculty member, the meeting is with the dean of faculty (that is, vice president for academic affairs). Without making a finding regarding the veracity of the charges, the Title IX coordinator and the dean of faculty attempt to determine if there is a resolution that is consistent with Title IX goals. If there is no resolution agreeable to both the complainant and the respondent, the complaint proceeds to a hearing panel.

If the complaint alleges sexual misconduct that is severe or pervasive, the complaint proceeds to a hearing panel. Article VI describes the procedures to be followed if a faculty member is the respondent in a sexual misconduct complaint that would not result in suspension or termination if the charges were supported by a preponderance of the evidence. When a faculty member is the respondent, the hearing panel will include three tenured professors from the elected faculty grievance committee. Once the hearing panel members have been appointed by the Title IX coordinator, the complainant and respondent are notified of the membership of the hearing panel and both the complainant and respondent have the option to petition for alternates in case of a conflict of interest. The petition should be in writing and explain the source of the conflict. The default option is to replace hearing panel members in case of a named conflict.

The hearing panel elects its own chair. In addition to the original complaint, the respondent's answer to the complaint, and the investigative report, the hearing panel receives a list of witnesses (if any) from both the

complainant and the respondent. Both the complainant and respondent are permitted to submit written statements to the hearing panel.

The hearing is recorded. Both parties are given the option to submit questions to the hearing panel to be asked of their own witnesses and of the witnesses for the other party. The hearing panel chair poses the questions and may edit them for clarity. While the complainant and the respondent are both given equal opportunities to introduce evidence into the hearing record, they do not cross-examine each other.

At the conclusion of the hearing, the audio recording is halted and the panel deliberates. The goal of the deliberation is to determine if a preponderance of the evidence (greater than 50 percent) supports a finding that the charged acts of sexual misconduct occurred. At least two of the three members of the hearing panel must agree in order to yield a finding. If the finding of the hearing panel supports the complaint, then the hearing panel may confer to recommend sanctions. Recommended sanctions, if any, are provided to the Title IX coordinator and to the dean of faculty. The dean of faculty makes the decision regarding sanctions to be applied to a faculty member.

Both the complainant and the respondent retain the right to appeal in writing within seven days of being notified of the finding and sanctions. If a faculty member is the respondent, the appeal is to the president of the college. The only grounds for appeal are (1) the availability of new germane evidence that was unavailable at the time of the hearing, (2) substantial and material procedural errors during the hearing that may have had an impact on the outcome, or (3) substantial and material abuse by the panel of its discretion in weighing the available evidence or in reaching its conclusion. After reviewing the record, the president may (1) overturn the finding of the hearing panel and/or the sanctions recommended by the dean of faculty, (2) uphold the finding of the hearing panel and/or sanctions recommended by the dean of faculty, or (3) order the collection of additional evidence.

The procedure described in this section provides a multitude of due process protections for respondents. The procedure does not allow for ambushing the respondent at the intake meetings, and the respondent may have an adviser (including an attorney) present at every meeting. The complaint resolution process was intentionally designed to be labor intensive, with one Title IX coordinator, two investigators, three hearing panel members, the dean of faculty, and the college president involved in a complaint that continues through to an appeal. Spreading the decision making across multiple individuals provides checks and balances that reduce the probability that one person's malfeasance will produce an unjust outcome. Respondents also have due process protections in the form of opportunities to introduce evidence during the investigation and during the hearing, including in some cases the opportunity to provide written expert-witness testimony.

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Finally, if due process errors occur during the complaint-resolution process, there is an appeal to the college president.

### Elements of the Sexual Misconduct Policy That Assure Protections for Tenure

As noted in the AAUP's 1940 *Statement of Principles of Academic Freedom and Tenure*, "Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society."

According to the AAUP's *Statement on Procedural Standards in Faculty Dismissal Proceedings*, protection of academic freedom and tenure require that "academic due process" be observed in cases where faculty conduct may warrant dismissal.<sup>18</sup> The final section of Hampden-Sydney College's sexual misconduct policy was written specifically to provide an academic due process in cases where any faculty member is a respondent in a sexual misconduct complaint and where the charges are so severe in nature that suspension or termination is a potential sanction. The same academic due process protections available to tenure-line faculty are extended to faculty who are off the tenure line.

The conclusion of the AAUP's 1940 *Statement of Principles of Academic Freedom and Tenure* addresses termination for cause. Tenure protections are substantially weakened if there is not a robust procedure to prohibit random and capricious termination of faculty members. The 1940 *Statement* recommends that "termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompanied by an adviser of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned."

The process described in Article VII of the college's sexual misconduct policy follows the same process for intake and investigation that is described in the preceding section. Following the completion of the investigative report, if the dean of faculty and the Title IX coordinator determine that the conduct charged in the complaint would warrant suspension or termination if supported by the evidence, they will confer with

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<sup>18</sup> AAUP, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, 1958, <https://www.aaup.org/report/statement-procedural-standards-faculty-dismissal-proceedings>.

the president of the college. Afterward the president meets with the respondent, who has the option to accept responsibility for the charges and also accept sanctions proposed by the president.

Alternatively, a faculty respondent has the option to proceed with a hearing on the complaint. Hearing procedures are exactly the same as described in the preceding section. The difference in cases that involve potential suspension or termination is that there are two levels of appeal for both the finding of the hearing panel and for the sanctions recommended by the dean of faculty. The first appeal is to the president of the college and must be based on one of the three criteria for appeal described in the preceding section. The president of the college does not confer with either the dean of faculty or the Title IX coordinator regarding the appeal.

The second level of appeal, as recommended in the AAUP 1940 *Statement*, is to the executive committee of the college's governing board. The grounds for appeal remain the same, and the governing board has the option to (1) overturn the hearing panel's findings regarding responsibility for the charges and/or the recommended sanctions, (2) uphold the hearing panel's findings and/or the recommended sanctions, or (3) request collection of more evidence before making their decision. The verdict of the governing board is final.

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