

3-19-2020

Loose Lips Required . . . And Appreciated: In Support of Title IX's Mandatory Reporting Requirements for Professors in Undergraduate and Graduate Education

Stacy Scaldo

Follow this and additional works at: https://scholars.unh.edu/unh_lr



Part of the [Law Commons](#)

Repository Citation

Stacy Scaldo, *Loose Lips Required . . . And Appreciated: In Support of Title IX's Mandatory Reporting Requirements for Professors in Undergraduate and Graduate Education*, 18 U.N.H. L. Rev. 225 (2020).

This Article is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact sue.zago@law.unh.edu.



Stacy A. Scaldo

Loose Lips Required . . . And Appreciated: In Support of Title IX's Mandatory Reporting Requirements for Professors in Undergraduate and Graduate Education

18 U.N.H. L. REV. 225 (2020)

ABSTRACT. In an attempt to comply with the past decade's changing Title IX policies, a growing number of institutions have adopted policies requiring faculty members to report perceived sexual misconduct to designated administrators. These administrative decisions have come with mixed reviews. While Title IX scholars and trainers have by and large welcomed increased reporting requirements, faculty members have vocally criticized these mandates as destructive to the professor–student relationship and claimed unintended negative consequences of these policies. The “can I tell you something?” conversation is an all-too-common occurrence in the relationship between a student and his or her professor. While the nature of the conversation that follows this question could be centered on any number of topics, the common theme is relational. The student is approaching the professor because there is a level of trust that has been established. Consequently, the student feels comfortable sharing private, and sometimes what he or she would perceive as confidential, information with the professor. But, does the student's comfortability require the professor to be the keeper of those secrets? Or, is that role more properly exercised by personnel outside the faculty community?

This paper will explore the suggested conflict between Title IX reporting and the particular roles professors assume. While a professor's initial reaction may be based on a good faith interest in keeping the student's story confidential, sound reasoning demonstrates the role of the professor in higher education cannot be that of a parent, counselor, or confidant. While there have been a growing number of concerns with regard to potential overreaching in Title IX's application and how that may affect a professor's decision to discuss matters with students, these requirements have not placed an unnecessarily burdensome strain on the professor–student relationship or the professor's ability to effectively fulfill his or her obligations as a teacher and mentor.

AUTHOR. Stacy Scaldo joined Florida Coastal in 2004 after clerking in both the state and federal trial and appellate courts. She teaches Torts, Remedies, Professional Responsibility, Legal Writing, Lawyering Process, and Interviewing and Counseling (among various other courses). While at Florida Coastal she has served on various committees leading in areas such as professionalism, faculty appointments, curriculum, teaching, vision, and is very committed to

serving students and helping them succeed in law school and beyond. Professor Scaldo earned her B.S. in Journalism from Pennsylvania State University and her J.D. from Nova Southeastern University Shepard Broad Law Center where she graduated Summa Cum Laude. She serves on the Board of Directors at Jacksonville’s Women’s Help Center, on the Board at San Juan Del Rio Catholic School, and in the Catholic Lawyer’s Guild in nearby Saint Augustine. Professor Scaldo’s primary areas of scholarship are abortion jurisprudence and federal regulation.

INTRODUCTION.....	227
I. TITLE IX REGULATIONS AND THE RISE OF THE “RESPONSIBLE EMPLOYEE”	230
A. <i>1997 Guidance</i>	231
B. <i>2001 Revised Guidance</i>	234
C. <i>2011 Dear Colleague Letter</i>	237
D. <i>2014 Questions and Answers</i>	239
E. <i>2017 Dear Colleague Letter and 2017 Questions and Answers</i>	243
II. INSTITUTIONAL COMPLIANCE, GUIDANCE, AND CRITICISM OF THE “RESPONSIBLE EMPLOYEE” MANDATORY REPORTING REQUIREMENTS.....	244
III. THE “RESPONSIBLE EMPLOYEE” FACULTY MEMBERS ETHICAL OBLIGATION TO THEIR STUDENTS, INSTITUTION, AND PROFESSION.....	250
A. <i>The Confidential Professor–Student Relationship</i>	251
B. <i>In Loco Parentis for Adult Students</i>	252
C. <i>Professional-Based Confusion</i>	252
IV. INSTITUTIONAL RESPONSE TO TITLE IX IS WORKING.....	256
CONCLUSION.....	258

INTRODUCTION

On a rainy March afternoon, Professor Liu¹ sits at her desk entering data on her class's midterm performance. Her students have been trickling in throughout the day to pick up their graded scantrons and obtain the answer key for review, both of which Professor Liu has left outside her office door. On her way back from her faculty assistant's office, Professor Liu notices one of her students, Matt, rummaging through the stack of papers outside her door. The two exchange smiles and speak briefly about the exam and the upcoming spring break. As Matt turns to leave, he runs into another student, Claire. The awkward exchange of "hellos" between the two does not go unnoticed by Professor Liu. She realizes it is a little out of character for the two to be coming to get their exams separately—they are usually joined at the hip. They sit together in class, study together, and Professor Liu has even seen the pair riding to and from school together. Although trying not to listen in on their conversation, Professor Liu hears Matt ask Claire if she would like to get some coffee and talk things over. Claire declines and makes it clear that the conversation is over. Matt walks away, with shoulders slumped, obviously defeated. Professor Liu sees all of this but returns to her work while Claire shakily pours through the scantrons in an attempt to find her number. The documents fall to the floor in a disorganized pile. After cleaning up the mess and reorganizing the papers, Claire attempts to take an answer key out of the second file folder. The results are similar. She sinks to the ground, visibly upset. "Everything okay, Claire?" Professor Liu questions. Claire nods her head affirmatively but remains outside of Professor Liu's office as she reviews her work.

A few minutes later, Claire taps on the door and asks Professor Liu if she can speak with her. Assuming the conversation is going to be about Claire's score, Professor Liu welcomes her in, shuts the door, and directs her to a chair opposite her desk. The following conversation ensues:

Professor Liu: *What can I help you with? Did you not do as well as you had hoped on the midterm?*

Claire: *Well, I certainly could have done better. I feel I knew the material better than my score reflects. But, it's just . . . it's just that last night after the midterm a bunch of us went out to blow off some steam. We all thought the test was pretty difficult and needed to just unwind. We had to prepare for our Moot Court competition coming up also, so we all decided to have a few drinks while we went over the cases for the*

¹ Professor Liu, and all other characters mentioned in this story, are completely fictional.

competition. I don't remember how many drinks I had but I remember waking up this morning in Matt's bed. And, I didn't have any clothes on. And neither did Matt. I left before he woke up and the first time I saw him since last night was a few minutes ago just outside your door. Matt and I are friends. He has a girlfriend. I don't think I would have gone to bed with him if I wasn't drunk. I didn't think he would do that either. He seems really happy with his girlfriend. I don't remember how many drinks I had. Every time I turned around; Matt had another drink for me. I don't even remember how we got back to his apartment. Everything is just such a blur. Matt wants to talk to me, but I just feel weird. I just don't know. I'm sorry I am bothering you with all of this but I guess I just needed to unload how I felt, and you were here. And you are such a good teacher and I know how much you care about your students. I'm so sorry. Please don't tell anyone I told you this. I am so happy you are a lawyer. I know my secret is safe with you. I'll figure it out.

Claire jumps up and lurches toward the door, desperate to leave.

Professor Liu: *Claire, wait . . .*

But Claire continues, running out of Professor Liu's office, disappearing down the hall. Professor Liu sits back in her chair, playing the conversation in her mind over and over again, and trying to figure out what to do.

* * *

In an attempt to comply with the past decade's changing Title IX policies, a growing number of institutions have adopted policies requiring faculty members to report perceived sexual misconduct to designated administrators.² These

² See, e.g., *Mandatory Reporting, AD85 Sexual And/or Gender-Based Harassment and Misconduct*, THE PENNSYLVANIA STATE UNIVERSITY, <https://policy.psu.edu/policies/ad85#mandatory%20reporting> [<https://perma.cc/DT5L-VCMT>]; *Responsible Employee, Faculty Senate*, VANDERBILT UNIVERSITY, <https://www.vanderbilt.edu/facultysenate/engage/responsibleemployee.php> [<https://perma.cc/BFA4-EH7K>]; *Responsible Employee, Report an Incident*, SPELMAN COLLEGE, <https://www.spelman.edu/title-ix/help-and-support/report-an-incident> [<https://perma.cc/R5XB-TH4T>]; *Responsible Employee, Sexual Misconduct and Response Prevention*, NORTHERN ILLINOIS UNIVERSITY, <https://www.niu.edu/sexual-misconduct/title-ix/responsible-employee.shtml> [<https://perma.cc/EJ94-MWGY>]; *Responsible Employee Statement, Title IX and Sexual Misconduct*,

administrative decisions have come with mixed reviews. While Title IX scholars and trainers have by and large welcomed increased reporting requirements, faculty members have vocally criticized these mandates as destructive to the professor–student relationship and claimed unintended negative consequences of these policies.³ The “can I tell you something?” conversation is an all-too-common occurrence in the relationship between a student and his or her professor.⁴ While the nature of the conversation that follows this question could be centered on any number of topics, the common theme is relational. The student is approaching the professor because there is a level of trust that has been established. Consequently, the student feels comfortable sharing private, and sometimes what he or she would perceive as confidential, information with the professor. But, does the student’s comfortability require the professor to be the keeper of those secrets? Or, is that role more properly exercised by personnel outside the faculty community?

This paper will explore the suggested conflict between Title IX reporting and the particular roles professors assume. While a professor’s initial reaction may be based on a good faith interest in keeping the student’s story confidential, sound reasoning demonstrates the role of the professor in higher education cannot be that of a parent, counselor, or confidant. While there have been a growing number of concerns with regard to potential overreaching in Title IX’s application and how that may affect a professor’s decision to discuss matters with students, these requirements have not placed an unnecessarily burdensome strain on the professor–student relationship or the professor’s ability to effectively fulfill his or her obligations as a teacher and mentor.

Part I of this article will focus specifically on the evolution of Title IX’s institutional reporting requirements and the resulting expansion in the circle of those required to report allegations of sexual violence. Part II will examine the arguments that claim that these requirements conflict with and override the traditional ethical duties of professors in undergraduate and graduate programs. Part III will respond to faculty concerns regarding mandatory reporting and demonstrate how the lines of who is a responsible employee must not just be clearly

COAST COMMUNITY COLLEGE DISTRICT, <https://www.cccd.edu/employees/hr/title9/Pages/default.aspx> [<https://perma.cc/UEU4-CV6T>]; *Sexual Misconduct – Required Reporting, Sexual Misconduct, Intimate Partner Abuse and Stalking*, UNIVERSITY OF COLORADO, <https://www.cu.edu/sexual-misconduct/sexual-misconduct-required-reporting> [<https://perma.cc/FLB7-AJPQ>].

³ Colleen Flaherty, *Endangering a Trust*, INSIDE HIGHER ED (Feb. 4, 2015), <https://www.insidehighered.com/print/news/2015/02/04/faculty-members-object-to-new-policies-making-all-professors-mandatory-reporters-of-sexual-assault> [<https://perma.cc/U76Q-VPYB>].

⁴ *Id.* at 2–3.

delineated but should always include faculty members in the group of personnel required to report incidents of alleged sexual misconduct. Part IV will explain why the new mandatory reporting requirements create clear lines of responsibility for faculty that are effective in both scope and sequence. The article concludes with a solution for Professor Liu and suggestions for professors working toward complying with the Title IX mandatory reporting requirements.

I. TITLE IX REGULATIONS AND THE RISE OF THE “RESPONSIBLE EMPLOYEE”

Signed into law by President Richard M. Nixon on June 23, 1972, Title IX states that “[n]o 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”⁵ Title IX protections extend to sexual harassment, which includes, among other acts, sexual violence.⁶ Colleges and universities are, for the most part, subject to the mandates of Title IX as educational institutions that receive federal funding.⁷ In addition to the cross-statutory reporting requirements that exist within the realm of sexual harassment at educational institutions, the colleges and universities must not only comply with the Title IX requirements, but must also adhere to policy guidance directives and “Dear Colleague Letter” documents.⁸ These additional Department of Education Office for Civil Rights (OCR) guiding documents, letters, and regulations are chronologically pertinent. The revisions and additions to Title IX policy demonstrate both the changing emphasis placed upon certain policy

⁵ 20 U.S.C. § 1681(a) (2019).

⁶ See Diane Heckman, *The Role of Title IX in Combatting Sexual Violence on College Campuses*, 325 ED. LAW REP. 1, 5–6 (2016). Heckman explains that Title IX has been interpreted by the courts to extend to sexual harassment utilizing a legal concept derived from Title VII of the Civil Rights Act. *Id.* Furthermore, Heckman notes “[s]exual harassment deals with unwelcomed or unconsented actions. Sexual harassment can cover an amalgam of transgressions based on the sex of the individual including: (1) bodily transgressions, (2) visual transgressions, and (3) audio transgressions.” *Id.* at 6 (citing Diane Heckman, *Title IX and Sexual Harassment Claims Involving Educational Athlete Department Employees and Student-Athletes in the Twenty-First Century*, 8 VA. SPORTS & ENT. L.J. 223 (2009)).

⁷ 20 U.S.C. § 1681(c) (2019). For purposes of Title IX, “educational institution” means “any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.” *Id.*

⁸ Heckman, *supra* note 6, at 5.

requirements and processes, and also the ways in which institutions have been afforded the ability to adapt in order to comply with the statutory requirements.⁹

A. 1997 Guidance

In 1997, the *Report Card on Gender Equity* from the National Coalition for Women and Girls in Education concluded that “sexual harassment remains a significant impediment to gender equity for girls and women across the board.”¹⁰ It cited the following statistics in support of this statement: (1) eighty-one percent of eighth through eleventh graders surveyed had experienced sexual harassment; (2) seventy-nine percent of eighth through eleventh graders who reported having been harassed said they were targeted by another student; (3) approximately thirty percent of undergraduate students and forty percent of graduate students who were surveyed had experienced sexual harassment; and (4) approximately ninety percent of post-secondary students who reported having been harassed said they were harassed by another student.¹¹

Soon thereafter, OCR released its *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (1997 Guidance) in order to clarify a school’s responsibilities in preventing and resolving allegations of sexual harassment.¹² In the Preamble, it was made clear that “[t]he elimination of sexual harassment of students in federally assisted educational programs is a high priority

⁹ See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997), [hereinafter 1997 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> [https://perma.cc/7BGH-JMV3]; U.S. DEP’T OF EDUC., OFFICE FOR C.R., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), [hereinafter 2001 Revised Guidance], <http://www.ed.gov/ocr/docs/shguide.html> [https://perma.cc/SB4R-8KLN]; U.S. DEP’T OF EDUC., OFFICE FOR C.R., OFFICE OF THE ASSISTANT SEC’Y, DEAR COLLEAGUE LETTER (Apr. 4, 2011), [hereinafter 2011 DCL], <http://www.ed.gov/ocr/letters/colleague-201104.html> [https://perma.cc/4VQD-K2XV]; U.S. DEP’T OF EDUC., OFFICE FOR C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), [hereinafter 2014 Q&A], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [https://perma.cc/Y4QW-KDTT]; Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2012).

¹⁰ NAT’L COALITION FOR WOMEN AND GIRLS IN EDUC., TITLE IX AT 25: REPORT CARD ON GENDER Equity 31 (Nat’l Women’s Law Ctr., 1997).

¹¹ *Id.* at 32.

¹² See 1997 Guidance, *supra* note 9.

for OCR.”¹³ The Preamble further explained that the 1997 Guidance’s purpose was to “provide[] information intended to enable school employees and officials to identify sexual harassment and to take steps to prevent its occurrence.”¹⁴ Importantly, it was noted that “the Guidance illustrates that in addressing allegations of sexual harassment, the judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.”¹⁵ The Preamble continued its explanation of common sense and judgment:

Consistent with the Guidance’s reliance on school employees and officials to use their judgment and common sense, the Guidance offers school personnel flexibility in how to respond to sexual harassment. Commenters who read the Guidance as always requiring schools to punish alleged harassment under an explicit sexual harassment policy rather than by use of a general disciplinary or behavior code, even if the latter may provide more age-appropriate ways to handle those incidents, are incorrect. First, if inappropriate conduct does not rise to the level of harassment prohibited by Title IX, school employees or officials may rely entirely on their own judgment regarding how best to handle the situation.

Even if a school determines that a student’s conduct is sexual harassment, the Guidance explicitly states that Title IX permits the use of a general student disciplinary procedure. The critical issue under Title IX is whether responsive action that a school could reasonably be expected to take is effective in ending the sexual harassment and in preventing its recurrence. If treating sexual harassment merely as inappropriate behavior is not effective in ending the harassment or in preventing it from escalating, schools must take additional steps to ensure that students know that the conduct is prohibited sex discrimination.¹⁶

The 1997 Guidance itself noted that a school’s official grievance procedure cannot only help students complain of alleged sex discrimination, but can also provide the school with the ability to prevent sexual harassment before it occurs.¹⁷

¹³ See U.S. DEPT OF EDUC., OFFICE FOR C.R., SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES: PREAMBLE (1997), <http://www2.ed.gov/about/offices/list/ocr/docs/sexharoo.html> [<https://perma.cc/5SYY-S97Y>].

¹⁴ *Id.* The Preamble continued:

In addition, the Guidance is intended to inform educational institutions about the standards that should be followed when investigating and resolving claims of sexual harassment of students. The Guidance is important because school personnel who understand their obligations under Title IX are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs.

Id.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 1997 Guidance, *supra* note 9.

An underlying principle of Title IX documentation appears to be focused on preventive justice measures as much as corrective ones. Specifically, regarding liability of institutions for peer harassment, the 1997 Guidance stated three conditions must be met: (1) a hostile environment must exist within the school's programs or activities; (2) the school knows or should have known of the harassment; and (3) the school fails to take immediate and appropriate action to correct the problem.¹⁸ In other words, a violation occurs if the school has notice of a hostile environment and fails to take immediate corrective action.¹⁹ Notice is present if the school "actually knew, or in the exercise of reasonable care, should have known about the harassment."²⁰ Under the 1997 Guidance, the institution would have notice "as long as an agent or responsible employee of the school received notice."²¹

While the 1997 Guidance relied on the actions of the "responsible employee" and mentioned the term three times throughout the document, it did not officially define what and who is a "responsible employee" for purposes of Title IX reporting.²² It did note that in addition to those designated by the school, a responsible employee could also include employees that a student may reasonably believe is "an agent or responsible employee" based upon "the age of the student."²³ Examples of such responsible employees include "a principal, campus security, bus driver, teacher, an affirmative action officer, or staff in the office of student

¹⁸ *Id.*

¹⁹ *Id.* According to the 1997 Guidance, "Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice." *Id.* Along with the indicators of institutional noncompliance, the 1997 Guidance sets forth its requirements for adopting and publishing grievance procedures in order to promptly and effectively resolve complaints of sex discrimination and suggests that "[b]y having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences." *Id.*

²⁰ *Id.*

²¹ *Id.* OCR explained the different ways a school could have received notice. They could include a student filing a grievance, complaining to a teacher, contacting appropriate personnel, an agent or responsible employee witnessing an event, or media reports. *Id.* OCR included examples of constructive notice as well—knowledge of some incidents of sexual harassment would be sufficient to provide notice to others, or the pervasive nature of harassment as sufficient to impart knowledge. *Id.*

²² *See id.*

²³ *Id.*

affairs.”²⁴ Despite these examples, institutions were largely left to determine what type of employee would be considered to have received notice, and consequently, who they would consider a responsible employee.

B. 2001 Revised Guidance

Shortly after the 1997 Guidance was released, the Supreme Court decided two important Title IX cases: *Gebser v. Lago Vista Independent School District*²⁵ and *Davis v. Monroe County Board of Education*²⁶. In *Gebser*, the Court held school districts are liable for money damages under Title IX if an “appropriate person” with authority to take corrective action has “actual knowledge” of sexual harassment and acts with “deliberate indifference.”²⁷ The Court defined an appropriate person as “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf.”²⁸ In *Davis*, the Court found it was “constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can . . . rise to the level of discrimination” under Title IX.²⁹ It continued that it would not be “necessary to show an overt, physical deprivation of access to school resources” but that the harassment is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”³⁰

In light of these important holdings, OCR issued a Revised Sexual Harassment Guidance: *Harassment of Students by School Employees, Other Students, or Third Parties* (2001 Revised Guidance).³¹ OCR clarified and affirmed the Department of Education’s authority to enforce Title IX administratively and its mandate to enforce the requirements of the statute.³² Importantly, it expanded the definition of sex discrimination to include sexual harassment, which it defined to include

²⁴ *Id.*

²⁵ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 274 (1998).

²⁶ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 629 (1999).

²⁷ *Gebser*, 524 U.S. at 290.

²⁸ *Id.*

²⁹ *Davis*, 526 U.S. at 650.

³⁰ *Id.*

³¹ 2001 Revised Guidance, *supra* note 9. By its own admission, the 2001 Revised Guidance was in many ways identical to the 1997 Guidance. *Id.* at i. The 2001 Revised Guidance was created in part to distinguish the Title IX standards from “the standards applicable to private litigation for money damages.” *Id.*

³² 2001 Revised Guidance, *supra* note 9 at iii.

“unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature,” as conduct prohibited by Title IX.³³ It reminded those affected by the regulations that:

A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct.³⁴

Along the lines of creating an environment of action, one significant change between the 1997 Guidance and the 2001 Revised Guidance is the emphasis on the responsible employee. In the 2001 Revised Guidance, the term “responsible employee” was mentioned more than ten times³⁵ and was defined as either (1) any employee with the authority to redress the harassment; (2) any employee with a duty to report sexual harassment or other misconduct to appropriate school officials; or (3) any individual who a student would reasonably believe has the authority to make these reports.³⁶ Admittedly, on the heels of the aforementioned Supreme Court decisions, the definition of responsible employee within the OCR guidance documents was to be interpreted far more broadly than in the noted relevant case law.³⁷ In fact, OCR explained in a particularly detailed footnote just what that meant:

Whether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and school practices and procedures, both formal and informal.

The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. [citations omitted]. The concept of a “responsible employee” under our guidance is broader. That is, even if a responsible employee does not have the authority to address the discrimination and take corrective action, he or she does have the obligation to report it to appropriate school officials.³⁸

³³ *Id.* at 2.

³⁴ *Id.* at iii.

³⁵ *Id.* at iv, 13, 15, 33, 34.

³⁶ *Id.* at 13.

³⁷ *See id.*

³⁸ *Id.* at 33–34, n.74.

As this broader definition of a responsible employee suggested the three categories could potentially include a large range of institutional employees. The OCR explained that “schools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials.”³⁹

Notice appears to be an overriding theme of the 2001 Revised Guidance. In addition to a specific subsection of the document dedicated to this requirement,⁴⁰ the importance of recognizing and following through with student complaints is repeated throughout.⁴¹ Furthermore, in the section on peer and third party harassment, the 2001 Revised Guidance places great emphasis on the notice requirement and compiles the 1997 Guidance’s previously scattered statements into a concise, prominent declaration.⁴² It concludes that once a school receives notice of sexual harassment, its failure to take prompt and effective corrective action is, in and of itself, a violation of Title IX.⁴³

The 2001 Guidance also sought to clarify that notice could occur through channels or personnel previously not contemplated:

A school can receive notice of harassment in many different ways. A student may have filed a grievance with the Title IX coordinator or complained to a teacher or other responsible employee about fellow students harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, affirmative action officer, or staff in the office of student affairs. A teacher or other responsible employee of the school may have

³⁹ *Id.* at 13.

⁴⁰ *See id.*

⁴¹ *Id.*

⁴² *Id.* at 12. The opening paragraph of the section title “Harassment by Other Students or Third Parties” states:

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school’s own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student’s ability to participate in or benefit from the school’s program on the basis of sex. In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

Id.

⁴³ *Id.* at 12–13.

witnessed the harassment. The school may receive notice about harassment in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The school also may have learned about the harassment from flyers about the incident distributed at the school or posted around the school. For the purposes of compliance with the Title IX regulations, a school has a duty to respond to harassment about which it reasonably should have known, i.e. – if it would have learned of the harassment if it had exercised reasonable care or made a “reasonably diligent inquiry.”⁴⁴

As such, both the letter and the spirit of the 2001 Revised Guidance served to increase the responsibility of the institution with regard to rooting out Title IX violations and appropriately handling complaints. While OCR did not provide an exhaustive list, teachers were again included in the short list of employees who had a duty to report allegations of sexual misconduct.

C. 2011 Dear Colleague Letter

On April 4, 2011, the Obama Administration attempted an overhaul of the requirements placed on schools by Title IX. Former Secretary of Education, Arne Duncan, explained the Administration’s “first goal is prevention through education” as “information is always the best way to combat sexual violence.”⁴⁵ He continued that the second goal was to “raise awareness to an issue that should have no place in society and especially in our schools.”⁴⁶ The goal of the accompanying Dear Colleague Letter (2011 DCL) was to explain that the requirements of Title IX cover sexual violence and to remind schools that they have a responsibility to take immediate and effective steps to respond to sexual violence in accordance with the requirements of Title IX.⁴⁷ The 2011 DCL was designed to clarify and provide guidance on issues surrounding sexual violence cases involving students.⁴⁸ The

⁴⁴ *Id.* at 13.

⁴⁵ Press Release, U.S. Dep’t of Educ. Vice President Biden Announces New Administration Effort to Help Nation’s Schools Address Sexual Violence (Apr. 4, 2011), <https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad> [<https://perma.cc/NCS7-CS3L>].

⁴⁶ *Id.*

⁴⁷ 2011 DCL, *supra* note 9.

⁴⁸ *Id.* This included: (1) providing guidance on the unique concerns that arise in sexual violence cases, such as the role of criminal investigations and a school’s independent responsibility to investigate and address sexual violence; (2) providing guidance on a school’s requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures; (3) discussing proactive measures a school can take to prevent sexual violence; (4) discussing the interplay between Title IX, FERPA and the Clery Act; and (5)

OCR very clearly reiterated that “[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”⁴⁹ It stressed the importance of employee training, “so that [employees] know to report harassment to appropriate school officials, and so that employees with authority to address harassment know how to respond properly.”⁵⁰ The OCR explained such training would be required for those employees who were “likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.”⁵¹

While the 2011 DCL addressed the requirements and responsibilities of the Title IX Coordinator,⁵² it did not expand on the role of the responsible employee beyond what was set forth by the 2001 Guidance. Despite this, OCR emphasized the need to conduct investigations with respect for the victim’s interests as a top priority.⁵³ It suggested that before beginning an investigation, schools “should inform and obtain consent” from the complaining party, and “[i]f a complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue the investigation.”⁵⁴ It noted, however, that the school should inform the complainant that it may be limited in its ability to maintain his or her anonymity.⁵⁵

providing examples of remedies and enforcement strategies schools can use to response to sexual violence. *Id.*

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* The 2011 DCL elaborated further on the need for training as follows:

Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

Id.

⁵¹ *Id.* at 4.

⁵² *Id.* at 7.

⁵³ *Id.*

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* The OCR explained, in line with the 2001 Guidance that:

If the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for

D. 2014 Questions and Answers

In an attempt to clarify and provide further guidance regarding an institution's obligations under Title IX to address sexual violence, the OCR released a *Questions and Answers on Title IX and Sexual Violence* guidance document on April 29, 2014 (2014 Q&A).⁵⁶ The document provided "examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects."⁵⁷ The 2014 Q&A was designed to answer critical inquiries such as how to deal with a student's request for confidentiality, protection of students complaining about sexual violence, how to determine whether sexual violence occurred, and how to determine appropriate remedies.⁵⁸

First and foremost, the OCR explained that Title IX requires schools to respond to sexual violence and defined such behavior as:

[P]hysical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the students from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.⁵⁹

The 2014 Q&A continued that an institution violates a student's rights under Title IX regarding student-on-student sexual violence when a two-part test is met.⁶⁰

confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

Id. It noted "[t]he school should inform the complainant if it cannot ensure confidentiality." *Id.*

⁵⁶ 2014 Q&A, *supra* note 9.

⁵⁷ *Id.* at ii.

⁵⁸ Press Release, U.S. Dep't of Educ. Office for C.R., Guidance Issued on Responsibilities of Schools to Address Sexual Violence, Other Forms of Sex Discrimination (Apr. 29, 2014), <https://www.ed.gov/news/press-releases/guidance-issued-responsibilities-schools-address-sexual-violence-other-forms-sex-discrimination> [<https://perma.cc/9S64-CP8Z>]. The Press Release highlighted then Secretary of Education Arne Duncan's statement that "[f]or far too long, the incentives to prevent and respond to sexual violence have gone in the wrong direction at schools and on college campuses." *Id.* at 1. The 2014 Q&A was a continued attempt to change "these incentives to put an end to rape-permissive cultures and campus cultures that tolerate sexual assault." *Id.*

⁵⁹ 2014 Q&A, *supra* note 9, at 1.

⁶⁰ *Id.*

First, the alleged conduct must be sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program.⁶¹ In other words, the student is subject via the situation to a hostile environment.⁶² Second, the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.⁶³ As to hostile environment, the OCR required that the conduct in question "be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances."⁶⁴

In accordance with the 2001 Guidance and 2011 DCL, in order for a school to find itself in violation of Title IX, it must have had notice of the incident(s).⁶⁵ OCR affirmed a school is deemed to have notice of such events if a "responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence."⁶⁶ Once an institution has knowledge, its responsibilities are weighty. According to the OCR:

When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. . . . If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.⁶⁷

Further, the 2014 Q&A reiterated that inaction is unacceptable. In the event a school delays responding to an allegation of sexual violence or if it responds inappropriately to an allegation, the school's inaction may, in and of itself,

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 2. OCR's document provides examples of notice, including:

[A] student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence. The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media.

Id.

⁶⁷ *Id.* at 2-3.

constitute a hostile environment to the student.⁶⁸

The 2014 Q&A provided the most comprehensive explanation of the responsible employee to date and reiterated the importance of effective responses to notice of sexual violence.⁶⁹ It stated that if an institution is responsible because it knows or reasonably should know of possible sexual violence, and notice is imputed through the knowledge of responsible employees, then both the institution and those who work for it must be clear on who qualifies as a responsible employee.⁷⁰ It acknowledged that although the Title IX coordinator is responsible for overseeing all matters related to Title IX mandates and potential violations, the coordinator will often times not be the first person with a reporting requirement who is privy to potential sexual violence information.⁷¹ Therefore, the coordinator must rely upon the reporting of such incidents by responsible employees. A responsible employee is required to report incidents of sexual violence to the Title IX coordinator or other appropriate school designees.⁷² Essentially restating the definitions first found in the 2001 Revised Guidance, the 2014 Q&A clarified the definition of “responsible employee” as any employee:

Who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.⁷³

It continued that because of the grave responsibility placed upon school employees who are considered responsible employees, “[a] school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees.”⁷⁴ The OCR noted that “[w]hether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of

⁶⁸ *Id.* at 3.

⁶⁹ *Id.* at 14–15.

⁷⁰ *Id.* at 14.

⁷¹ *Id.*

⁷² *Id.* at 14–15. (“[T]he Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.”).

⁷³ *Id.* at 15.

⁷⁴ *Id.* The OCR notes that the school must also inform all employees both of their own reporting responsibilities in addition to the importance of informing complaining parties of their reporting responsibilities. *Id.*

both formal and informal school practices and procedures.”⁷⁵

OCR provided a more descript explanation of the responsible employee’s duties. There are two important responsibilities of note to the responsible employee: what information he or she is required to report and what he or she should tell a student who discloses an incident of sexual violence.⁷⁶ With regard to what a responsible employee is required to tell the Title IX coordinator, the answer is, quite simply, *everything*.⁷⁷ The OCR explained that required reporting includes (1) the name of the student who alleged sexual violence; (2) the name of the alleged perpetrator; (3) the names of any other students involved in the alleged sexual violence; (4) date; (5) time; (6) location; and (7) any other relevant information the responsible employee receives.⁷⁸ The requirements placed on the responsible employee when responding to a student who discloses an incident of sexual violence is equally clear:

Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee’s obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student’s option to request that the school maintain his or her confidentiality, which the school (*e.g.*, Title IX coordinator) will consider, and (iii) the student’s ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (*e.g.*, sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers).⁷⁹

⁷⁵ *Id.* As an example, the 2014 Guidance stated “while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.” *Id.*

⁷⁶ *Id.* at 16.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* Repeating language from the 2001 Guidance and the 2011 DCL, OCR explained that even if a student requests that her name be kept confidential, there are situations where the school, in order to comply with Title IX regulations, must override that student’s request. It is important to note that the request for confidentiality under the statutes is a plea to the Title IX coordinator—the responsible employee has no authority under Title IX to choose not to report in order to keep the student’s name or incident confidential. In the event that the student requests her name not be revealed to the alleged perpetrator, the school should inform the student that keeping that information confidential could impeded the investigatory process. Under those circumstances,

It appears OCR realized both the heightened burden placed on a responsible employee and the potential increase in number of those who would fall under that classification. As such, the 2014 Guidance exempted from the category of responsible employee “campus mental-health counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person.”⁸⁰ It also strongly encouraged schools to designate “all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers” as confidential sources.⁸¹ OCR acknowledged that “[t]hese non-professional counselors or advocates are valuable sources of support for students,” and, wanting “students to feel free to seek their assistance,” desired to “give schools the latitude not to require these individuals to report incidents of sexual violence in way that identifies the student without the student’s consent.”⁸² As such, while the 2014 Q&A effectually expanded the number of personnel who would be considered responsible employees, it also increased the number of resources available to students to seek help and maintain confidentiality.

E. 2017 Dear Colleague Letter and 2017 Questions and Answers

On September 22, 2017, the Trump Administration released a Dear Colleague Letter (2017 DCL) and a Questions and Answers/ on Campus Sexual Misconduct (2017 Q&A),⁸³ withdrawing the 2011 DCL and 2014 Q&A.⁸⁴ OCR noted that as a result of the two previously relied upon documents, “many schools have established procedures for resolving allegations that ‘lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way

the school will need to determine whether it would be able to honor such a request while, at the same time, provide a safe and nondiscriminatory environment for all students. *See id.* at 20.

⁸⁰ *Id.* at 22. The OCR acknowledged “the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.” *Id.*

⁸¹ *Id.* at 23.

⁸² *Id.*

⁸³ *See* Candice Jackson, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Office for C. R., Dear Colleague Letter: Withdraw Notice (Sept. 22, 2017), [hereinafter 2017 DCL], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/X4B5-WWGR>]; *see also* U.S. Dep’t of Educ., Office for C. R., Questions and Answers on Campus Sexual Misconduct (2017), [hereinafter 2017 Q&A], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/Z3HC-8YYM>].

⁸⁴ 2017 DCL, *supra* note 84, at 1.

required by Title IX law or regulation.”⁸⁵ It further explained those “documents have led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints.”⁸⁶ In the accompanying 2017 Q&A, OCR reminded schools that they must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities.⁸⁷ Referring back to the 2001 Guidance, it stated that “[o]ther employees may be considered ‘responsible employees’ and will help the student to connect to the Title IX Coordinator.”⁸⁸ With the 2011 DCL and 2014 Q&A withdrawn, the mandates placed upon the responsible employee by those documents were also removed, reverting back to the requirement only that schools have a “reasonable response” to information received regarding sexual harassment.⁸⁹

The guidelines provided in the 2017 DCL and 2017 Q&A neither removed the definition of responsible employee dating back to the 2001 Revised Guidance nor altered the non-exhaustive list of personnel considered responsible employees. As such, institutions were free to retain their internal policies and procedures regarding the identification, training, and duties of mandatory reporters.

II. INSTITUTIONAL COMPLIANCE, GUIDANCE, AND CRITICISM OF THE “RESPONSIBLE EMPLOYEE” MANDATORY REPORTING REQUIREMENTS

In response to OCR’s evolving explanation of sexual harassment reporting requirements, and in an effort to avoid Title IX investigation and punishment, many educational institutions overhauled their conduct codes, policies, and student and employee handbooks.⁹⁰ These efforts have included, among other things, hiring a Title IX coordinator, training their work force with regard to their duties as “responsible employees,” and informing students about the school’s Title IX compliance requirements. These requirements include who is considered a responsible employee and what that person’s responsibilities are, and suggesting or mandating that professors include language in their syllabi reminding students of

⁸⁵ *Id.*

⁸⁶ *Id.* at 1–2 (“[S]chools face a confusing and counterproductive set of regulatory mandates, and the objective of regulatory compliance has displaced Title IX’s goal of educational equity.”).

⁸⁷ 2017 Q&A, *supra* note 84, at 2.

⁸⁸ *Id.*

⁸⁹ 2001 Revised Guidance, *supra* note 9, at 17.

⁹⁰ *See generally, supra* note 2.

Title IX's effect on their conversations.⁹¹ Despite these sweeping changes, schools were not left in the dark to create their new policies and notice documents. In an effort to aid schools in crafting policies to help students understand an institution's Title IX responsibilities, the Association of Title IX Administrators (ATIXA), a professional association providing guidance and support for school and college Title IX coordinators, investigators, and administrators,⁹² promulgated a Sex/Gender-Based Harassment, Discrimination, and Sexual Misconduct Model Policy & Procedures in 2015 (Model Policy).⁹³ The Model Policy provides specific guidance with regard to confidentiality and reporting of offenses:

All university employees (faculty, staff, administrators) are expected to immediately report actual or suspected discrimination or harassment to appropriate officials, though there are some limited exceptions. In order to make informed choices, it is important to be aware of confidentiality and mandatory reporting requirements when consulting campus resources. On campus, some resources may maintain confidentiality—meaning they are not required to report actual or suspected discrimination or harassment to appropriate university officials—thereby offering

⁹¹ *Id.* For example, in addition to informing students as to the professor's role as "responsible employee", the professor may be required to include language in his syllabus stating something similar to the following:

It is important for students to know that all faculty members are mandated reporters of any incidents of sexual misconduct/violence (e.g., sexual assault, sexual exploitation and partner or relationship violence). This means that faculty cannot keep information about sexual misconduct/violence confidential. If you share that information with them they must report this information immediately to the Title IX Coordinator. In addition, deans, and other unit administrators are required to report incidents of sex or gender-based discrimination to the school's Title IX Coordinator.

Syllabus of Stacy Scaldo, Florida Coastal School of Law (on file with author).

⁹² ATIXA's mission statement reads as follows:

ATIXA provides a professional association for school and college Title IX Coordinators, investigators, and administrators who are interested in serving their districts and campuses more effectively. Since 1972, Title IX has proved to be an increasingly powerful levelling tool, helping to advance gender equity in schools and colleges. Title IX's benefits can be found in promoting equity in academic and athletics programs, preventing hostile environments on the basis of sex, prohibiting sexual harassment and sexual violence, protecting from retaliation and remedying the effects of other gender-based forms of discrimination. Every school district and college in the United States is required to have a Title IX Coordinator who oversees implementation, training, and compliance with Title IX. ATIXA brings campus and district Title IX coordinators, investigators, and administrators into professional collaboration to explore best practices, establish industry standards, share resources, empower the profession, and advance the worthy goal of gender equity in education.

About ATIXA and Title IX, ASS'N OF TITLE IX ADMINISTRATORS, <https://atixa.org/about/> [<https://perma.cc/CTY8-VLQS>] (last visited Feb. 24, 2020).

⁹³ *Sex/Gender-Based Harassment, Discrimination, and Sexual Misconduct Model Policy & Procedures*, ASS'N OF TITLE IX ADMINISTRATORS, [hereinafter Model Policy], https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18122345/ATIXA-Model-Policy_07-02-15_Final.pdf [[https://perma.cc/FQ3\]-AKVH](https://perma.cc/FQ3]-AKVH)].

options and advice without any obligation to inform an outside agency or individual unless a victim has requested information to be shared. Other resources exist for a victim to report crimes and policy violations and these resources will take action when an incident is reported to them.⁹⁴

The Model Policy suggests two separate reporting options: confidential reporting and formal reporting.⁹⁵ On-campus confidential reporting sources include: (1) on-campus licensed professional counselors and staff; (2) on-campus health service providers and staff; (3) on-campus Victim Advocates; (4) on-campus members of the clergy–chaplains working within the scope of their licensure or ordination; and (5) athletic trainers licensed and privileged under state statute and/or working under the supervision of a health professional.⁹⁶ Off-campus confidential reporting sources include: (1) licensed professional counselors; (2) local rape crisis counselors; (3) domestic violence resources; (4) local or state assistance agencies; and (5) clergy–chaplains.⁹⁷ Under the Model Policy, all other employees not specifically identified as confidential reporting recipients are required to report:

All university employees have a duty to report, unless they fall under the “Confidential Reporting” section above. Reporting parties may want to consider carefully whether they share personally identifiable details with non-confidential employees, as those details must be shared by the employee with the Title IX Coordinator and/or Deputy Coordinators. Employees must share all details of the reports they receive. Generally, climate surveys, classroom writing assignments, human subjects research, or events such as Take Back the Night marches or speak-outs do not provide notice that must be reported to the Coordinator by employees. Remedial actions may result without formal

⁹⁴ *Id.* at 19.

⁹⁵ *Id.* at 19–20.

⁹⁶ *Id.* ATIXA’s Mandatory Reporters: A Policy for Faculty, Trustees and Professional Staff, repeats this language and also notes “the definition of ‘responsible employee’ under Title IX would allow the College to treat only some faculty and staff as mandated reporters but with the same possibility of confusion and risk of institutional exposure.” *Mandatory Reporters: A Policy for Faculty, Trustees and Professional Staff*, ASS’N OF TITLE IX ADMINISTRATORS (2015), https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18122103/Mandatory-Reporters-Policy-Template_1215.pdf [<https://perma.cc/M6WA-PYRC>]. The Model Policy suggests the following language by way of explanation: “All of the above employees will maintain confidentiality except in extreme cases of immediate threat or danger, or abuse of a minor.” Model Policy, *supra* note 93, at 20. However, “[t]hese employees will submit . . . anonymous, aggregate statistical information for Clery Act purposes unless they believe it would be harmful to a specific client, patient or parishioner.” *Id.*

⁹⁷ Model Policy, *supra* note 93, at 20.

university action.⁹⁸

Despite the almost universal decision on the part of schools to mandate faculty members as responsible employees and the Model Policy provided by ATIXA which specifically includes teachers as mandatory reporters, the classroom contingent has been resistant to change. In a 2016 report by the American Association of University Professors (AAUP)⁹⁹ titled *The History, Uses, and Abuses of Title IX*, the AAUP noted a “disjuncture between OCR mandates and institutional realities” and suggested the result was a push by “overzealous administrators to implement policies that are not required under Title IX and have harmful effects on the educational mission.”¹⁰⁰ It used mandatory faculty reporting as an example:

College and university administrators often designate all faculty members as mandated reporters, although Title IX does not require such a broad sweep. Such action by colleges and universities may be a result of OCR guidelines that provide latitude to institutions in designating “responsible employees” while nonetheless being specific about exemptions for members of the clergy and health professionals; administrators generally disregard how faculty members differ from most other staff members in their degree of responsibility for the academic and personal well-being of students. . . . [A]n overly broad definition of faculty members as mandatory reporters, adopted by colleges and universities without consultation with the faculty, disregards compelling educational reasons to respect the confidentiality of students who have sought faculty advice or counsel. Indeed, many colleges and universities require “all employees” (including faculty members) to complete online sexual misconduct “training” that involves answering multiple-choice and true-false questions about, among other things, their status as mandatory reporters; this sidesteps any attempts to determine what mechanisms and policies exist for allowing appropriate exemptions, particularly when faculty members teach in areas involving the study of gender and sexuality.¹⁰¹

The report continued that labeling faculty members as responsible employees,

⁹⁸ *Id.*

⁹⁹ On its webpage, the AAUP states its mission:

[I]s to advance academic freedom and shared governance, to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education, to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good.

About Mission, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/about/mission-1> [<https://perma.cc/2YRU-UP83>]. The mission statement concludes: “[T]he AAUP has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom in this country's colleges and universities.” *Id.*

¹⁰⁰ Risa L. Lieberwitz et al., *The History, Uses, and Abuses of Title IX* 16, AM. ASS'N OF UNIV. PROFESSORS (June 2016).

¹⁰¹ *Id.* at 16–17.

coupled with the growing number of institutions requiring that course syllabi include statements informing students of faculty reporting obligations relating to sexual harassment and discrimination worked to create a “chilling effect” that “pose[s] a serious threat to academic freedom in the classroom.”¹⁰² The report focused on the potential relationship between faculty members and students, particularly minority relationships:

If many students view faculty members as “first responders” in their advising and pedagogical capacities, they should be explicitly classified by institutional policies as “confidential” rather than “mandatory” reporters. In addition, reporting mandates perpetuate sex-based double standards that disproportionately burden women and LGBTQ faculty members; students may experience these professors as more responsive to some issues without realizing how bureaucratic and legalistic dynamics may hamstring those faculty members most affected, and most invested in, advancing Title IX’s educational objectives.¹⁰³

The response to the Obama Administration’s 2014 Q&A by faculty was consistent with the AAUP’s report. Many faculty members reported concern over mandatory reporting, that fewer students would come forward if doing so meant a report, and having to explain to students that they were mandatory reporters.¹⁰⁴ Many felt they were forced to choose between complying with students’ wishes about privacy and following their institutions’ reporting requirements.¹⁰⁵ While faculty said “they wouldn’t hesitate to report imminent threats to students,” they were hesitant to report “when a student describes an event that already happened, but which the student isn’t sure he or she wants to report yet for any number of reasons.”¹⁰⁶ The professors hoped students would report misconduct but felt it should be “up to the victim to decide when a formal complaint is made.”¹⁰⁷

Anita Levy, AAUP’s Senior Program Officer for the Department of Academic Freedom, Tenure, & Governance¹⁰⁸, told *Inside Higher Ed* in 2015 that she continued to hear from faculty members from institutions across the country whose

¹⁰² *Id.* at 17.

¹⁰³ *Id.*

¹⁰⁴ Flaherty, *supra* note 3.

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.* The article noted that “[s]ometimes that might mean seeking counseling or talking to a faculty member over a period of weeks or months -- not immediately, as many colleges now expect from mandatory reporters.” *Id.*

¹⁰⁸ See *About Staff*, AM. ASS’N OF UNIV. PROFESSORS, <http://www.aaup.org/about/staff> [https://perma.cc/BX3C-ZGPA] (last visited Feb. 24, 2020).

administrators were ignoring their concerns and mandating that they be responsible employees for purposes of Title IX reporting.¹⁰⁹ She reaffirmed AAUP's previous position that "faculty members be made mandated reporters only if they're serving in some kind of legally mandated reporter role."¹¹⁰ Getting to the crux of the issue, "Levy said faculty members are often the 'nearest and dearest,' or 'substitute parents' to students on campus, and that any policy forcing victims to come forward before they're ready could strain that important relationship, or violate a trust."¹¹¹

ATIXA President Brett A. Sokolow, Esq. disagreed and warned of placing the same relational desires on each faculty member simply because they hold the same title.¹¹² He explained that "[t]here are some faculty members who want to be that soft landing and some faculty members who want nothing to do with it."¹¹³ He concluded that was the reason for the "uniform rules."¹¹⁴

While most of the faculty pushback has come in response to recent institutional changes in response to the 2014 Q&A, these concerns are not a new phenomenon. Shortly after the Obama Administration released the 2011 DCL, ATIXA foresaw the eventual butting of heads.¹¹⁵ Noting the inherent conflict between campus attorneys and Title IX advocates, Sokolow explained that "advocates want broad rights to preserve privacy while campus attorneys want reporting by every employee, to ensure that no complaint slips through the cracks."¹¹⁶ He acknowledged that failing to act on third party notice of an incident a victim does not necessarily want reported anyway would somehow realistically expose an institution to Title IX liability, particularly if that third party does not have any remedial authority to address the discrimination. Despite this, he supported the idea of a broader group of mandatory reporters.¹¹⁷ As reporting of sexual assault by campus employees is required by three different federal laws—Title VI, Title IX, and the Clery Act—not to mention any state statute that may come into play, Sokolow

¹⁰⁹ Flaherty, *supra* note 3. Ms. Levy was the AAUP Associate Secretary at the time of the article's publication. *See id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See* Brett A. Sokolow, *Title IX Compliance Tip of the Week*, ASS'N TITLE IX ADMIN'S BLOG (Sept. 8, 2011), <http://atixa.wordpress.com/2011/09/08/title-ix-compliance-tip-of-the-week> [<https://perma.cc/928Y-S4RW>].

¹¹⁶ *Id.*

¹¹⁷ *Id.*

suggested that “[a]ll employees should, by policy, be mandated reporters of what they know, within 24 hours of coming to know it,” with responsible employees under Title IX being required to “share ALL that they know.”¹¹⁸

In the five plus years since the 2014 Q&A, attempts have been made to carve out exceptions to what has become the common inclusion of faculty members as responsible employees.¹¹⁹ As discussed further below, while these attempts are well-intentioned and made with the interests of the students and faculty members in mind, they allow the exception to swallow the rule.

III. THE “RESPONSIBLE EMPLOYEE” FACULTY MEMBERS ETHICAL OBLIGATION TO THEIR STUDENTS, INSTITUTION, AND PROFESSION

Much of the criticism of the faculty responsible employee designation centers on the supposed confidential relationship and pseudo parent–child relationship between the professor and the student.¹²⁰ Faculty members claim that mandating a responsible employee designation for professors has the effect of stripping students of a valuable resource in processing and appropriately dealing with sexual violence.¹²¹ However, this assumes that every professor is willing to keep confidential information and/or sees him or herself in a parental role with regard to his or her students. These assumptions are both untrue and damaging to the professor–student relationship. Furthermore, any model which limits the number or type of professors who are designated responsible employees—or removes them from the category altogether—fails to incorporate the additional professional roles faculty may assume as members of their professional communities. As such, the Title IX guidance documents and revised school policies correctly label faculty as

¹¹⁸ *Id.*

¹¹⁹ See, e.g., Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 131-41 (2017). Professor Weiner argues that “faculty should not be considered designated reporters.” *Id.* at 141. He states that “[a]bsent a reporting policy making them mandated reporters, most students would not believe faculty have reporting obligations” and that “faculty are often a critical source of support for survivors.” *Id.*

¹²⁰ See Flaherty, *supra* note 3.

¹²¹ *Id.* Flaherty explains:

[W]hile faculty members overwhelmingly support their institutions’ transparency and accountability goals, many feel that mandatory reporting will hurt the cause more than help it. They worry that fewer students will come forward if doing so means a report – likely including personally identifiable information – will be filed with the institution, with or without victims’ permission. And for those students who do come forward, faculty members worry about awkwardly having to explain their reporting obligation. So professors in many cases resent the choice with which they are faced: complying with students’ wishes about privacy or with their institutions’ reporting requirements.

Id.

responsible employees.

A. The Confidential Professor–Student Relationship

Many of the advocates for eliminating the responsible employee role for faculty members argue that students rely on confidentiality in their relationship with the professor.¹²² A recent study exploring university students' expectations of confidentiality when making disclosures to university professors, particularly psychology professors, found that if left without any guidance, students will expect their professor to keep confidentiality:

It may . . . be assumed that if one is currently teaching and is identified as a psychologist by one's students (or self identifies as a Registered Psychologist) then those students would expect their teacher to follow the same ethical principles as other practicing psychologists. Research implies that professors, by wearing the title of "psychologist" may unknowingly influence student expectations of confidentiality. For instance, students may assume their Psychology professors have clinical training and are, therefore, professionally equipped to handle very intimate problems revealed by their students.¹²³

The study further found: (1) students reported the highest confidentiality expectations for Psychology professors; and (2) females reported higher confidentiality expectations for professors other than males.¹²⁴ These same principles may be true for professors certified in other professional disciplines. Despite the students' beliefs that their conversations are confidential, the Family Education Rights and Privacy Act (FERPA)¹²⁵ focuses on protecting the privacy of student education records.¹²⁶ It does not protect professor–student conversations simply because the student would like the information kept confidential.¹²⁷ The natural inclination of students to expect confidentiality from a professor because that professor's chosen profession is one which requires confidentiality while dealing with client—i.e., psychologists, lawyers, and accountants—is actually dangerous to the teacher–student relationship as it has the tendency to create multi–levelled groups of students. This can be destructive to the educational process and inject dissent among students into the school environment. Because of this,

¹²² See *id.*

¹²³ Gregory E. Harris & Stephanie Dalton, *University Student Expectations of Confidentiality when Disclosing Information to their Professors*, 4 HIGHER EDUC. STUD. 43, 44 (2014).

¹²⁴ *Id.* at 48.

¹²⁵ 20 U.S.C. § 1232g (2013); 34 C.F.R. pt. 99.

¹²⁶ 20 U.S.C. § 1232g (2013); 34 C.F.R. pt. 99.

¹²⁷ See 20 U.S.C. § 1232g (2013).

school policies must be clear that faculty are not the keepers of student information.

B. In Loco Parentis for Adult Students

Professors also point to a pseudo parent-child relationship to advance the argument for not reporting.¹²⁸ As students in undergraduate and graduate programs are often times far from home, they develop a rapport with their professors and look to them for guidance on all aspects of their day-to-day lives. Faculty argue that it is destructive to the learning process and to the student's coping and growth following an incident of sex discrimination to turn them away or force them to report the incident to a Title IX Administrator.¹²⁹

Although some students do develop close relationships with their professors, many do not. As such, the lines must be clearly drawn. University professors do not stand *in loco parentis*.¹³⁰ Because "institutional authority to control student behavior [is significantly] reduced" in the college setting, "it [is] reasonable to assume that college responsibility for students' personal safety... ha[s] diminished commensurately."¹³¹ Consequently, any scheme which eliminates faculty members from the responsible employee category necessarily forces some faculty members to keep confidences they may have no interest in keeping. The rule was not designed to force all faculty members to keep their students' confidences, whether based upon a duty of *in loco parentis* or just as an extension of the professor-student relationship. Anything further would put too great a burden on professors to be the caretakers and confidants of their students.

C. Professional-Based Confusion

Professors in undergraduate and graduate programs, having attained doctorate degrees themselves, often hold other professional titles. These professional associations have their own standards of conduct and rules. As such, a faculty member's role as both professional and professor must be accounted for in crafting clear and appropriate Title IX responsibilities. This responsibility is even more apparent when dealing with professionals who must abide by particular rules of confidentiality as set forth by their profession. Failure to consider the potential effects on the faculty member's professional livelihood could jeopardize his or her

¹²⁸ See Flaherty, *supra* note 3.

¹²⁹ See *id.*

¹³⁰ Robert C. Cloud, *Safety and Security on Campus: Priority Number One in Higher Education*, 295 ED. L. REP. 457, 458-60 (2013).

¹³¹ *Id.* at 460.

standing in the chosen professional community. Two such examples are lawyers and psychologists–psychiatrists. The Model Rules of Professional Conduct for lawyers suggests attorney–professors do not owe a duty of confidentiality to their students.¹³² The relative ethics codes that govern psychologists–psychiatrists are far clearer in their prohibition of a faculty member acting as both teacher and counselor to a student.¹³³ A Title IX policy that removes faculty members from the group of responsible employees required to report instances of sexual discrimination also places some faculty members in jeopardy of violating their own professional ethics code.

The Model Rules of Professional Conduct for lawyers, and the way in which the issue of confidentiality has been promulgated and interpreted, is a clear example of the conflict that would arise if licensed law professors were exempted from the category of mandatory reporters under Title IX. Most law professors are licensed attorneys. Lawyers also find themselves teaching in numerous undergraduate programs, including, for example, Media Studies, Political Science, History, and English. Students who are aware of the professor’s professional credentials can, without proper guidance, become confused with regard to the professor’s proper role. The Model Rules of Professional Conduct have been interpreted as requiring lawyers to comply with the rules even when not acting in a professional capacity.¹³⁴ Therefore, even when lawyers hang up their practicing attorney hat and enter the world of academia, they are still to follow the rules governing lawyer conduct.¹³⁵

The world of confidentiality is apparent to a lawyer long before he graduates and accepts his first client. Even the most disinterested law student’s ears perk up when an issue of attorney–client confidentiality arises. The hypothetical world of harboring secrets, and determining whether they can be divulged, is a welcome addition to any class. Along these lines, the rules of confidentiality are proscriptive, with numerous exceptions.¹³⁶ In particular, a lawyer is generally required to keep

¹³² MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 1983). MODEL RULES OF PROF’L CONDUCT r. 1.18 cmt. 2 (AM. BAR ASS’N 1983).

¹³³ See ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (AM. PSYCHOL. ASS’N, amended 2016); CODE OF ETHICS (NAT’L BOARD OF CERTIFIED COUNS. 2016); CODE OF ETHICS AND STANDARDS FOR PRACTICE (AM. COUNSELING ASS’N 2014).

¹³⁴ See *In re Discipline of Peters*, 428 N.W.2d 375, 380 (Minn. 1988); see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 336 (1974).

¹³⁵ See *In re Discipline of Peters*, 428 N.W.2d 375, 380 (Minn. 1988); see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 336 (1974).

¹³⁶ MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (AM. BAR ASS’N 1983); MODEL RULES OF PROF’L CONDUCT r. 1.6(b) (AM. BAR ASS’N 1983).

his client's confidences confidential,¹³⁷ unless there is an exception which allows him to reveal.¹³⁸ Even under circumstances where disclosure is permitted, the attorney is to divulge as little as necessary to accomplish his or her goal.¹³⁹

Despite this, before an attorney can wade through the potential pitfalls of guarding or revealing confidential client information, the attorney must have a client, or at least a potential client. The responsibilities of the attorney hinge, in large part, on whether an attorney–client relationship exists. Unfortunately, whether one such understanding is present is not as simple as it probably should be. “Most of the duties flowing from the client–lawyer relationship attach only after the client has requested the lawyer to render legal services and that lawyer has agreed to do so.”¹⁴⁰ However, whether an attorney–client relationship exists may be inferred from the surrounding circumstances.¹⁴¹ If the lawyer and the client disagree as to the existence of the relationship, the court will defer to the client's reasonable belief.¹⁴²

In the event the attorney ultimately decides not to represent the potential client, and that potential client does not dispute that the attorney is not going to be hired, the attorney is bound to keep any confidential information as he or she would for one of his or her official clients.¹⁴³ However, in order to even be considered a prospective client and worthy of having one's information kept confidential, there must have been some bilateral conversation where it would be reasonable to believe the lawyer is conversing with the potential client for the purpose of determining

¹³⁷ MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 1983). Pursuant to subsection (a): “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” *Id.*

¹³⁸ MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR ASS'N 1983). Subsection (b) allows a lawyer to “reveal information relating to the representation of a client to the extent the lawyer believes necessary” if at least one of seven exceptions exist. *Id.*

¹³⁹ *See id.* MODEL RULES OF PROF'L CONDUCT r.1.6(c) (AM. BAR ASS'N 1983).

¹⁴⁰ MODEL RULES OF PROF'L CONDUCT, Scope 17 (AM. BAR ASS'N 1983). This passage reminds attorneys that “principles of substantive law external to the[] Rules determine whether a client-lawyer relationship exists.” *Id.* *See also* Togstad v. Vesely, 291 N.W. 686, 692–93 (Minn. 1980).

¹⁴¹ *See* Rallis v. Cassidy, 100 Cal. Rptr. 2d 763, 773–74 (App. 2d Dist. 2000).

¹⁴² *See* Bartholomew v. Bartholomew, 611 So. 2d 85, 86–87 (Fla. Dist. Ct. App. 1992).

¹⁴³ *See* MODEL RULES OF PROF'L CONDUCT, r. 1.18(b) (AM. BAR ASS'N 1983) (“Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information[.]”).

whether he or she will, in fact, commence representation.¹⁴⁴ Unilateral declarations, without more information, are insufficient.¹⁴⁵

Finally, the Association of American Law Schools (AALS) has stated that:

When in the course of counseling a law professor receives information that the student may reasonably expect to be confidential, the professor should not disclose that information unless required to do so by university rule or applicable law. Professors should inform students concerning the possibility of such disclosure.¹⁴⁶

This statement from AALS is in conformity with Model Rule 1.6(b)(6), which allows disclosure of confidential information to comply with a court order of other law.¹⁴⁷ The Comment to this portion of Rule 1.6 notes that another law may supersede Rule 1.6 and require disclosure.¹⁴⁸

Like lawyers, psychologists–psychiatrists can often be found teaching in both undergraduate and graduate programs. Their various ethical codes specifically forbid them from engaging in a counseling relationship with their students.¹⁴⁹ The American Counseling Association *Code of Ethics and Standards for Practice* states that “[c]ounselor educators do not serve as counselors to students currently enrolled in

¹⁴⁴ MODEL RULES OF PROF'L CONDUCT r. 1.18 cmt. 2 (AM. BAR ASS'N 1983).

¹⁴⁵ *Id.* With regard to the reasonableness of the potential client's expectation, the Comment states:

[A] consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. [...] In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client."

Id.

¹⁴⁶ 2000 HANDBOOK: ASSOCIATION OF AMERICAN LAW SCHOOLS, 90 (2000).

¹⁴⁷ MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 1983).

¹⁴⁸ 2000 HANDBOOK: ASSOCIATION OF AMERICAN LAW SCHOOLS, 89–90 (2000); MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 12 (AM. BAR ASS'N 1983). Comment twelve states:

Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt 12 (AM. BAR ASS'N 1983).

¹⁴⁹ See ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (AM. PSYCHOL. ASS'N, amended 2016).

a counseling or related program and over whom they have power and authority.”¹⁵⁰ The American Psychological Association’s *Ethical Principles of Psychologists and Code of Conduct* specifically advises psychologists to “take reasonable steps to avoid harming their” students and “to minimize harm where it is foreseeable and unavoidable.”¹⁵¹ It goes on to state that a psychologist should not enter into a “multiple relationship”—e.g., being “when a psychologist is in a professional role with a person and . . . at the same time is in another role with the same person”—in the event that relationship “could reasonably be expected to impair the psychologist’s objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.”¹⁵²

These two examples make clear why professors in undergraduate and graduate programs cannot be exempted from the responsible employee category and should, instead, be considered mandatory reporters of potential sexual misconduct at their institutions. Furthermore, any policy that attempts to bifurcate labels based upon additional professional credentials, academic discipline, or manner of course study, would end in confusion and misunderstanding for students.

IV. INSTITUTIONAL RESPONSE TO TITLE IX IS WORKING

Despite the non-exhaustive list including them, nothing in the Title IX guidance documents categorically mandates that teachers be responsible employees. However, since the beginning of the guidance document onslaught in 1997, OCR has included faculty members in its examples of personnel who should be considered responsible employees.¹⁵³ From the 1997 Guidance where OCR included teachers as examples of responsible employees,¹⁵⁴ to the 2001 Revised Guidance wherein OCR found schools could receive notice from a student

¹⁵⁰ CODE OF ETHICS AND STANDARDS FOR PRACTICE, § F.10.e (AM. COUNSELING ASS’N 2014).

¹⁵¹ ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, § 3.04 (AM. PSYCHOL. ASS’N, amended 2016).

¹⁵² *Id.* at § 3.05. See also CODE OF ETHICS, § 84 (NAT’L BOARD CERTIFIED COUNS. 2016). “NCCs shall carefully consider ethical implications, including confidentiality and multiple relationships, prior to conducting research with students, supervisees or clients. NCCs shall not convey that participation is required or will otherwise negatively affect academic standing, supervision or counseling services.” CODE OF ETHICS, §84 (NAT’L BOARD CERTIFIED COUNS. 2016).

¹⁵³ See 2017 DCL, *supra* note 84; 2017 Q&A, *supra* note 84 at 1–2; 2014 Q&A, *supra* note 9 at 16; 2011 DCL, *supra* note 9 at 4; 2001 Revised Guidance, *supra* note 9 at 13; 1997 Guidance, *supra* note 9.

¹⁵⁴ See 1997 Guidance, *supra* note 9, at 41, 44–45.

complaining “to a teacher or other responsible employee,”¹⁵⁵ to the 2011 DCL in which OCR included teachers in the group to require a higher level of training as they would be “likely to witness or receive reports of sexual harassment and violence,”¹⁵⁶ to the 2014 Q&A wherein OCR specifically exempted a list of employees from the mandatory reporters list and did not include faculty members among them,¹⁵⁷ through the 2017 DCL and 2017 Q&A where, even having withdrawn the 2011 and 2014 guidance documents,¹⁵⁸ OCR’s reversion to the 1997 and 2001 guidance documents did not alter the fact that faculty members have seemingly always been considered an *ipso facto* member of the responsible employee group. As such, it can be said it has always been the intention of OCR to include faculty members within the group of personnel to be labeled responsible employees and trained accordingly.

Despite the faculty backlash, labeling all faculty members as responsible employees appears to make the most sense for students, teachers, and administrators. The group is clearly defined, no extensive training is necessary to know how to report information to the Title IX Coordinator, and it allows faculty members to focus their time and energy on teaching. Exempting all faculty members from the responsible employee category leaves teachers with an extra-pedagogical burden of keeping confidences and holding secrets—a role with which many faculty members may find themselves quite uncomfortable. Finally, the hybrid approach of allowing some faculty members to be designated responsible employees while leaving other faculty members off the list would lead to confusion and chaos among the student body and between students and teachers. Additionally, a faculty member’s desire to be considered a responsible employee does not mean that students will naturally want to share their experiences with that particular teacher. As comfort is based on each individual person’s rapport with another, a pre-ordained confidential faculty member does not guarantee that the comfort level will be present for each student. Consequently, any other system of reporting other than to include all faculty members as responsible employees would do a disservice to the Title IX objectives.

Furthermore, recent data tracking campus reports of Title IX violations suggests students have adjusted to their institutions’ policy changes without issue. As a result of what some have attributed in part to the #MeToo movement, college Title IX officers continue to see a steady uptick in students coming forward to

¹⁵⁵ See 2001 Revised Guidance, *supra* note 9, at 13.

¹⁵⁶ See 2011 DCL, *supra* note 9, at 4.

¹⁵⁷ See 2014 Q&A, *supra* note 9, at 16.

¹⁵⁸ See 2017 DCL, *supra* note 84 at 1–2.

report incidents of sexual violence and sex discrimination.¹⁵⁹ For example it was noted that “the number of complaints at Harvard rose by [sixty-five] percent between the 2013-14 and 2016-17 school years.”¹⁶⁰ Disclosures increased another fifty-six percent in 2018.¹⁶¹ Noting that disclosures differ from formal complaints of sexual misconduct, the Harvard Title IX officer attributed the increase in reporting to better training across the University and the global #MeToo movement.¹⁶²

The increase in reports could be based upon any number of factors, including: (1) an increased confidence in an institution’s ability and willingness to handle the complaint; (2) a greater sense of pride based upon cultural changes in the way the recipient of unwanted sexual advances is viewed; (3) consistent training for students on institutional employee roles and responsibilities; or (4) a combination of all of these factors. The important take away is that students are starting to feel more comfortable sharing their experiences. It would do a great disservice to the progress Title IX has fostered to exempt a group of mandatory reporters that OCR never intended to exempt. As such, OCR should officially adopt in form what it has historically and consistently applied in substance and should explicitly include professors and instructors as responsible employees under Title IX for purposes of reporting alleged acts of sexual violence in undergraduate and graduate institutions.

CONCLUSION

As a responsible employee, with no confusion as to her role, Professor Liu’s options are clear. She is tasked with reporting perceived allegations of sexual violence—unwanted sexual acts against the purported victim’s will or when the

¹⁵⁹ Lena Felton, *How Colleges Foretold the #MeToo Movement*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-metoo-movement/550613/> [<https://perma.cc/QK5W-3KYZ>]. The article notes that “[t]he Harvard Crimson last month reported that the institution has seen a 20 percent increase in sexual-harassment complaints since the allegations against [Harvey] Weinstein surfaced in October” of 2017. *Id.*

¹⁶⁰ *Id.* (noting that the #MeToo movement has given a platform for women to come forward).

¹⁶¹ Jamie D. Halper, *In Wake of #MeToo, Harvard Title IX Office Saw 56 Percent Increase in Disclosures in 2018, Per Annual Report*, HARV. CRIMSON (Dec. 14, 2018), <https://www.thecrimson.com/article/2018/12/14/2018-title-ix-report/> [<https://perma.cc/8MAD-R864>].

¹⁶² *Id.* Nicole M. Merhill, Harvard’s Title IX Officer stated: “I certainly think that we’re seeing the ongoing ripple effects from the #MeToo movement and more people coming forward.” *Id.* She continued that “[o]ften [] times individuals will reach out directly to my office or our local coordinators and will specifically say, ‘I’m finally feeling that I can come forward because of the #MeToo movement.’” *Id.*

purported victim is incapable of giving consent.¹⁶³ Claire appears to be alleging that she would not have given her consent to this encounter if she had had the ability to do so. Claire is neither Professor Liu's client nor her prospective client. Appropriate school training for students, coupled with language in Professor Liu's syllabus (or on another document the students are required to read for class) will solidify this lack of relationship.¹⁶⁴

But what exactly is Professor Liu reporting? There are several aspects to Professor Liu's situation that make requirement to report particularly sketchy. Professor Liu's access to information can be broken down into two groups: (1) what she saw; and (2) what she was told. Professor Liu saw Claire and Matt's disjointed meeting outside her office. She saw Claire visibly shaken by the encounter. Maybe it wasn't because of the encounter at all. She also saw Matt try to invite Claire for coffee. He seemed visibly upset by her refusal to talk. Or maybe he was upset for a different reason. And she observed his crestfallen demeanor as he walked away. With regard to what Professor Liu was told, it really wasn't that much. Claire never accused Matt of anything. She claimed she was drunk, that she didn't know what happened, that she remembered being given multiple drinks by Matt, and that she woke up in Matt's bed and both of them were unclothed. Claire also asked Professor Liu to keep the matter confidential. That request could have been because she felt she was raped and didn't want anyone to know. It could also have been because as she talked through the scenario, she realized that nothing really happened (or at least nothing really bad happened in her mind) so she was going to figure it out and move on.

In light of the particular facts, Professor Liu has two options. She can, as a responsible employee, report what she knows and leave it in the hands of the Title IX coordinator. Or, because more may be needed to conclude this was an act of sexual violence, Professor Liu could follow up with Claire to make sure she understands what occurred. She will then have the ability to reaffirm her duty to report incidents of sexual violence and explain to Claire that her story seems to fit that category. Claire may be able to explain the situation better and leave Professor Liu without any need to report. For example, if Claire was just upset that she slept with Matt, but did so willingly, this would not be a situation that Professor Liu would have to report. However, if further conversation reveals Matt may pose a continued risk to Claire or to other students, Professor Liu would need to report this and

¹⁶³ 2014 Q&A, *supra* note 9, at 1–2.

¹⁶⁴ Even if an attorney-client relationship were formed, it appears Title IX would preempt any ethics rules that exist in the jurisdiction and require Professor Liu to divulge her confidential information nonetheless. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 1983).

explain to Claire what the next steps will be.

This all makes sense if Claire has been adequately informed ahead of time via a Title IX training session accompanied by a follow-up statement by Professor Liu. If done so, Claire will not be surprised and Professor Liu is not caught between her responsibility to the institution and any other potential students, and a misunderstood sense of loyalty Claire feels she owes her. Clear designations protect the student, the faculty member, the institution, and any other students who may at some point become involved. Clear designations—in which all faculty are mandatory reporters—should not only remain the institution norm but should be officially incorporated into the patchwork of Title IX regulations.