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Re: Constitutionality of the University's Student Conduct Sexual Harassment Policy

Summary

In crafting policies prohibiting students from harassing one another, the University must balance legal obligations to protect students from discrimination against the free speech guarantee of the First Amendment. The University's current Systemwide policy prohibiting students from engaging in sexual harassment is vulnerable to a challenge that it violates free speech rights. On the other hand, the University's more general anti-harassment policy may not go far enough in protecting students from discriminatory harassment. The General Counsel's Office has recommended that these policies be modified to bring them into closer alignment with U.S. Supreme Court decisions defining the scope of the University's obligation under federal law to prevent student-on-student harassment.

University Anti-Harassment Policies

The University has adopted several Systemwide policies prohibiting students from engaging in harassment. The Policy on Student Conduct and Discipline includes two provisions subjecting students to discipline for harassing activity. Section 102.09 of the Student Conduct Policy subjects students to discipline for "[s]exual harassment, as defined in University policy (see Section 160.00)." Section 160.00, the Sexual Harassment Policy, defines "sexual harassment" in part as:

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when submission to or rejection of this conduct explicitly or implicitly affects a person's employment or education, unreasonably interferes with a person's work or educational performance, or creates an intimidating, hostile or offensive working or learning environment. In the interest of preventing sexual harassment, the University will respond to reports of any such conduct.
>
> Sexual harassment may include incidents between any members of the University community, including faculty and other academic appointees, staff, coaches, housestaff, students, and non-student or non-employee participants in University programs, such as

> vendors, contractors, visitors, and patients. Sexual harassment may occur in hierarchical relationships or between peers, or between persons of the same sex or opposite sex.
>
> In determining whether the reported conduct constitutes sexual harassment, consideration shall be given to the record of the conduct as a whole and to the totality of the circumstances, including the context in which the conduct occurred.

Section 102.11 of the Student Conduct Policy subjects students to discipline for a wider array of discriminatory harassment:

> Harassment by a student of any person. For the purposes of these *Policies*, 'harassment': a) is the use, display, or other demonstration of words, gestures, imagery, or physical materials, or the engagement in any form of bodily conduct, on the basis of race, color, national or ethnic origin, alienage, sex, religion, age, sexual orientation, or physical or mental disability, that has the effect of creating a hostile and intimidating environment sufficiently severe or pervasive to substantially impair a reasonable person's participation in University programs or activities, or use of University facilities; b) must target a specific person or persons; and c) must be addressed directly to that person or persons.
>
> Prior to applying this provision of policy to any student conduct, the campus is required to consult with the Office of General Counsel regarding its proper interpretation and application in light of the specific circumstances.

The University's Legal Obligations to Prevent Discriminatory Harassment

These anti-harassment policies are, in part, an effort to comply with obligations that federal law imposes on the University to respond to student-on-student harassment. The Supreme Court has held that Title IX of the Education Act Amendments of 1972 prohibits student-on-student sexual harassment that "is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999). Similarly, the Department of Education Office of Civil Rights has opined that "A violation of title VI [of the Civil Rights Act] may . . . be found if a recipient has created or is responsible for a racially hostile environment i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient." *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, Department of Education Office of Civil Rights, 59 Federal Register No. 47 (March 10, 1994).

Institutions may become liable for injuries caused by student-on-student harassment if they fail to take appropriate action after being notified of the conduct. See *Davis*, 526 U.S. at 648

("recipients may be liable for their deliberate indifference to known acts of peer sexual harassment"); *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* US Department of Education Office of Civil Rights (January 19, 2001) ("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.").

Free Speech Restrictions on Public University Anti-Harassment Policies

Public universities have been severely challenged in their efforts to draft anti-harassment policies that comply with the limitations of the First Amendment's Free Speech Clause. Where public university anti-harassment policies have been challenged, courts have virtually uniformly struck them down. E.g., *Saxe v. State College Area School Dist.*, 240 F.3d 200, 204-11 (3d Cir. 2001); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386, 393 (4th Cir. 1993); *College Republicans at San Francisco State University v. Reed*, 523 F.Supp.2d 1005, 1017-1019 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 871-72 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 371 (M.D. Pa. 2003); *The UMW Post, Inc. v. Board of Regents of the University of Wisconsin System,* 774 F.Supp. 1163, 1172-1173 (E.D. Wis. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich. 1989).

A recent Third Circuit Case, *DeJohn v. Temple Univ.*, 537 F.3d 301, 305 (3d Cir. 2008), has received particular attention. In *DeJohn*, a student challenged Temple University's sexual harassment policy which prohibited

> expressive, visual, or physical conduct of a sexual or gender-motivated nature, when ... (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment.

The Third Circuit found this policy unconstitutionally overbroad because it prohibited substantial amounts of protected speech. First, the court criticized the policy's prohibition on speech that "has the purpose *or effect*" (emphasis added) of creating a hostile environment because under the policy "a student who sets out to interfere with another student's work, educational performance, or status, or to create a hostile environment would be subject to sanctions regardless of whether these motives and actions had their intended effect." *Id.* at 317. The court found that this possibility violated the requirement in *Tinker v. Des Moines Ind. Cmty Sch. Dist.*, 393 U.S. 503,

(1969), "that speech cannot be prohibited in the absence of a tenable threat of disruption." *DeJohn*, 537 F.3d at 317. Second, the court found "the policy's use of 'hostile,' 'offensive,' and 'gender-motivated' is, on its face, sufficiently broad and subjective that they could conceivably be applied to cover any speech of a gender-motivated nature the content of which offends someone." *Id.* "Absent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work—the policy provides no shelter for core protected speech." *Id.* at 317-18. *DeJohn* criticized other aspects of the policy which it found vague and potentially overbroad, commenting, for example, that "even if we ignore the 'purpose' component, the Policy's prong that deals with conduct that 'unreasonably interfere[s] with an individual's work' probably falls short of satisfying the *Tinker* standard." *Id.* at 319. The court conceded that "we do believe that a school has a compelling interest in preventing harassment. Yet, unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech." *Id.*[1]

It appears that in some instances institutions have applied definitions of prohibited harassment developed for the workplace to non-workplace student conduct. Doing so can lead to problems because courts have held that the First Amendment permits public employers a much greater latitude to control the speech of their employees in the workplace than to control non-workplace speech. See *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Application to the University's Anti-Harassment Policies

The definition of sexual harassment contained in the UC Sexual Harassment policy (which is incorporated into Section 102.09 of the Student Conduct policy) is very close to the language found unconstitutionally overbroad in *DeJohn*. Although it does not include the "purpose or effect" language criticized in *DeJohn*, other provisions are almost verbatim of those *DeJohn* held invalid. The UC policy, for example, contains the same "hostile," "intimidating," and "offensive" language that *DeJohn* found "sufficiently broad and subjective that they could conceivably be applied to cover any speech of a gender-motivated nature the content of which offends someone." The UC policy also includes the same "unreasonably interefere[s] with an individual's work" language that *DeJohn* rejected.

A policy that does not permit the University to respond to conduct that is prohibited under *Davis* may, however, have the opposite problem of exposing the University to legal risk under Title IX and Title VI. Although the general anti-harassment policy contained in Section 102.11 of the Student Conduct Policy is less concerning constitutionally (it contains a "severe or pervasive"

1 Citing *DeJohn*, the U.S. District Court for the Central District of California recently enjoined enforcement of the Los Angeles County Community College District's sexual harassment policy on similar grounds. See *Lopez, v. Candaele* (C.D. Cal. Case No. CV 09-0995-GHK, July 10, 2009).

requirement and does not include any of the language specifically disapproved in *DeJohn*) that policy does include restrictions on the University's ability to punish conduct that are not consistent with *Davis*. Section 102.11 provides that prohibited harassment "must target a specific person or persons" and "must be addressed directly to that person or persons." These requirements, which appear to have been drawn from "fighting words" case law, are not part of the *Davis* standard. Nevertheless, even Section 102.11 appears to be drafted in a way that makes it more constitutionally vulnerable than necessary because of its explicit emphasis on prohibited expressive activity ("use, display, or other demonstration of words, gestures, imagery, or physical materials").

Current Status

Questions about the Constitutionality of Section 102.09 were brought to the attention of this office by UCLA Law Professor Eugene Volokh, on behalf of the UCLA Academic Freedom Committee. In response, this office analyzed the two policies addressed in this memo, and recommended the following to the office of the Vice Chancellor for Student Affairs:

- The student sexual harassment policy should be de-coupled from the policy applicable to employees in the workplace.

- There appears to be no need for separate policies addressing sexual harassment and other forms of discriminatory harassment committed by students, and a single policy should be developed that applies to all forms of student harassment.

- The language of that policy should track *Davis* as closely as possible.

These recommendations could be implemented by adding the following language to the Student Conduct Code's list of prohibited conduct in place of current sections 102.09 and 102.11:

> "Harassment, defined as conduct that is so severe, pervasive, and objectively offensive, and that so substantially impairs a person's access to University programs or activities, that the person is effectively denied equal access to the University's resources and opportunities on the basis of his or her race, color, national or ethnic origin, alienage, sex, religion, age, sexual orientation, or physical or mental disability."

In addition, this office has discussed with Student Affairs the possibility of implementing a broader anti-harassment policy that would prohibit students from engaging in prohibited harassment (as narrowly defined) without regard to whether the harassment is based on

discriminatory motive. We are continuing to analyze the legal implications of such a policy.[2]

In response to this recommendation, the Vice President's office noted that the University currently has a Systemwide grant to reduce sexual violence on the campuses. As part of that grant, a working group (mostly Judicial Affairs directors) is reviewing the sexual harassment policies. The Vice President's office is advising the working group of this office's analysis and recommendations. The campuses will be advised of any proposed changes and given an opportunity to review and comment. A new, revised policy could then be implemented.

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[2] Concerns that the Supreme Court's decision in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), might call into question prohibitions that apply *only* to harassment based on discriminatory motives or penalty enhancements for unlawful conduct based on discriminatory motives were largely alleviated by the Court's subsequent decision in *Wisconsin v. Mitchell,* 508 U.S. 476, 487 (1993).