Educational institutions are, by their very nature, policy oriented. Opportunities or problems arise. Initiatives are identified. Committees or task forces are formed. Committee meetings (usually many meetings) are held. Discussions ensue. Viewpoints are expressed and challenged. Drafts and redrafts of policies are circulated and negotiated. Eventually, a final policy is approved. The committee turns to a new agenda item and the task force is disbanded.

The policy may be created in direct response to a legal mandate. Or, the policy may be developed in response to a specific need of the university and, as such, is not necessary for legal compliance. In either case, however, the policy typically carries legal impact and exposes the university to liability.

If a policy does not reduce the university’s exposure to liability, or even worse if it creates exposure, obviously there is a “disconnect” between the policy and the desired goal of keeping the university free of liability. Identifying this “disconnect” is not as obvious. The disconnect may arise during the development of the policy, in the course of its implementation or at the assessment stage. Moreover, when identifying the disconnect, professional perspectives differ. From a legal
perspective, the most fatal disconnects exist during policy development. This paper focuses on those disconnects that sabotage a policy’s effectiveness at its inception and offers prescriptive relief for educational institutions as they embark on policy development.

**Disconnect #1 - Failure to Recognize the University as an Institution that Serves Many Roles and Constituencies Simultaneously**

An educational institution faces unique challenges in the initial task of identifying what policies are necessary for its operations and legal compliance and in the subsequent tasks of developing, implementing and assessing those policies. This is because of the breadth of the university’s roles and obligations. The university is first and foremost a provider of education. With this role comes moral, pedagogical, social and legal responsibilities to its students. The university is also an employer. As an employer, the university faces a host of legal obligations to its employees, both faculty and non-faculty. The university’s relationship with its faculty is far more involved than its relationship with its non-faculty employees. Faculty expectations create additional obligations to the university. The university is also a landlord, both in its role as a provider of housing to faculty and students and in its role as a business contractor, leasing university facilities for commercial use. The university is in the business of providing entertainment to the general public, offering performances in the arts, cultural gatherings and athletic events for the public. The university acts as a business entity, entering into contracts with commercial entities both to receive and provide services. At times, the university may be a partner with the government, receiving funding and grants with specified
purposes and conditions. At other times, the government’s relationship with the university is more dictatorial, with the government establishing parameters for the university’s actions.

Thus, the university serves various masters. The masters are all “stakeholders” of the university, demanding that the university address simultaneously each stakeholder’s interests.

Diagram A: Stakeholders of the Educational Institution

Diagram A illustrates various stakeholders of the university. At any given time, an individual may fit into the category of more than one stakeholder. Stakeholders are chameleon-like, changing their stakeholder status, in response to a particular situation. For example, a student may work for a particular department within the university, thereby holding a stakeholder interest both as a student and an employee. Similarly, an employee of the university may attend a
concert (performed by an entity unrelated to the university) held at the university’s auditorium under a facilities rental agreement. While attending the performance, the employee extends its employee stakeholder status to that of a general public stakeholder.

As a starting point, in order to create an effective policy, those developing policies must identify the intended stakeholders and consider whether the stakeholder may extend into one or more stakeholder categories under different circumstances. Once this is done, the next step is to understand the various interests of each stakeholder group.

_Disconnect #2 - Failure to Recognize the Various Interests of the Many Stakeholders of the University_

The interests of the stakeholders vary, depending upon the nature and attributes of the university. For example, whether the university is a public or private institution, whether it accepts federal and state fundings (and to what extent and for what use), whether it has scientific research laboratories involving experiments with animals or humans, whether it offers distance education courses, whether its students perform intern-work off campus as part of degree requirements, whether it has any unionized labor forces, and whether its employees are contract employees or employees-at-will, all define and redefine the stakeholders’ interests. Each stakeholder group has a most basic level (or primal) interest that defines the very essence of that group’s relationship with the university. For instance, the primal interest of the student group is to receive an education. The employee group’s primal interest is to receive compensation for
work performed. The contractor group and the public group share an immediate interest in receiving deliverables (i.e., that which they contracted for), whether in the form of an auditorium equipped as specified under a facilities rental agreement with a contractor or in the form of designated seats at an athletic event sold to a member of the public.

Beyond its primal interest, each stakeholder group has various secondary interests. Many of the secondary interests provide means through which the stakeholders obtain maximum fulfillment of their primal interest. For example, to achieve the maximum value of their education, students must have safe environments and must not be restricted by discrimination.

Diagram B provides a non–exhaustive listing of interests of the university’s primary stakeholders.

**Diagram B: Interests of the Stakeholders**
The stakeholders’ interests, in turn, delineate different obligations owed by the university. The extent to which the university fails to meet these obligations creates legal liabilities for which the university may be held accountable.

**Disconnect #3 - Failure to Recognize that Legal Liability Takes on a Variety of Forms and Arises from Multiple Sources**

Before it can be determined if a policy effectively reduces legal liability, it is first necessary to identify the liabilities the university seeks to avoid in the first place. While it would be a herculean task to list with finite inclusion all liabilities which may face any university at any given time, it is possible to categorize the types of liability into three general types: (1) statutory violations (which include violations of federal, state and local statutes, regulations and laws), (2) breach of contract claims (which include breach of written contracts or implied contracts, often created by the existence of written and unwritten policies) and (3) tort claims (such as, negligence, slander, defamation, libel, misappropriation, invasion of privacy, infliction of emotional distress, etc.).

The nature of the liability flows from the interests of the stakeholders. For example, employee interests are governed by many federal statutes and corresponding state laws. Violations of those statutes expose the university to claims by the employee, and also to claims by the controlling government agency (such as the Department of Labor for violations of wage and hour laws). Employee interests are also governed by promises or expectations created by the university. For example, if an employee handbook sets forth a detailed three step discipline process (i.e., oral warning, written warning, suspension or termination, all subject
to grievance), then an employee who is terminated without the disciplinary process may bring claims against the university for breach of contract or implied contract.

Similarly, student interests are intertwined with liabilities related to compliance with many different federal statutes and similar state statutes. Students too may bring claims for the university’s failure to follow its policies (for example, disciplinary procedures) or to deliver the education it promised (for example, claims for program closures or similar “non-performance” by the university).

Although some interests of stakeholders are seemingly the same, the resulting liabilities (and hence the policy initiatives) differ. For example, review of Diagram B shows students, employees, faculty, and the public share a common interest of enjoying a safe environment. The safe environment interest is consistent with the university’s moral obligation, as well as its practical goal to avoid exposure in the broad area of torts and negligence. However, no single policy may be developed and implemented to address the safe environment interest of all of its stakeholders and to prevent corresponding liabilities. This is because the extent of the university’s duty to provide a safe environment is dependent upon the stakeholder at issue. For instance, the university holds a higher standard to its students than to members of the general public attending a concert held in its auditorium. The duties that the university owes to a particular stakeholder group, such as students, also differ, depending upon the activity of the student. For example, the university’s duties and obligations to students may vary in the
following contexts: students living in residence halls, students participating in athletic programs on and off campus, or students studying abroad at international programs.\(^5\)

Therefore, no policy can be effective in avoiding liability unless the potential liabilities attendant to the particular interests of the stakeholders are articulated clearly at the policy development stage.

**Disconnect #4 – Failure to Consult, Involve and Coordinate with the Stakeholder’s Representatives (Including Legal Counsel and Experts)**

Common sense dictates that if at least one purpose of a policy is to avoid liability to particular stakeholders, then “representatives” of the stakeholders should be consulted at the time the policy is being developed. (For example, representatives of student stakeholders may include the Dean of Students or Director of Financial Aid. The Human Resources Director and managers are viewed as employee representatives.) Stakeholder representatives, in turn, should consult with both experts and legal counsel to assist during the policy development stage. Experts bring scientific data and support and/or industry expertise with which to develop and test the emerging policy. Legal counsel are sensitive to the interests (and potential liabilities) inherent to each stakeholder group and the university as a whole. Legal counsel will assist those developing policies in understanding the potential liabilities, maximize legal compliance and minimize the university’s exposure to liability.
Disconnect #5 - Creating Broad Policies in Reaction to Specific Situations: Was the Policy Needed in the First Place?

Often, policy purposes and objectives, although defined broadly, are in reality a response to a very specific (and often difficult) set of facts and circumstances. A corollary of this disconnect is that the university sometimes feels paralyzed in addressing a situation unless it has a policy to guide it. Universities must remember that the absence of a policy should not render it paralyzed to address specific facts and circumstances.

Including appropriate stakeholder representatives (and legal counsel and industry experts) in discussions surrounding policy initiatives will assist in avoiding the creation of a policy for the wrong reason.

Disconnect #6 - Failure to Disseminate Policies, Failure to Train and Failure to Update Policies

Just as a policy created in a vacuum is of no value or will have negative consequences, a policy cannot exist in a vacuum. It must be disseminated. Training of appropriate persons must occur. Similarly, it is axiomatic that policies must be updated regularly to ensure legal compliance and make certain that the university still has a need for them. While these concepts seem elementary, they are often lacking within the campuses of higher educational institutions.

The need to disseminate policies, provide training on policies and update policies is best illustrated by omnipresent liabilities - sexual harassment and unlawful discrimination. Because this legal arena and university policies create constant exposure to liability, it bears emphasis.
From a legal compliance standard, the starting point for assessing the effectiveness of the university’s policies prohibiting sexual harassment and unlawful discrimination is to have an understanding of the legal parameters of this area. Guidance is found in two landmark decisions by the United States Supreme Court: *Burlington Industries, Inc. v. Ellerth*, 529 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In those cases, the Supreme Court made it clear that an employer may be held liable for unlawful sexual harassment committed by a supervisor (even when the employer was unaware of the supervisor’s actions) and addressed the steps an employer should take to prevent liability and provide itself with a potential defense. In these cases, the Supreme Court announced that where there is no tangible employment action taken (that is, there is no demotion, termination or unfavorable work assignment, etc.), the employer may raise the affirmative defense to liability if it can show that (1) it exercised reasonable care to prevent and correct promptly any harassing behavior and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Burlington* at 765.

Often, court decisions, particularly those issued by the United States Supreme Court, are extremely legalistic in nature and lack easily identifiable prescriptive advice. However, the Supreme Court’s decisions in *Faragher* and *Burlington Industries* provide a useful roadmap for those drafting, implementing and assessing these types of policies. Implicit in these two Supreme Court decisions is the need to update policies and assess their effectiveness. Before these
two Supreme Court decisions were issued in June of 1998, universities and colleges
everywhere had some forms of policies prohibiting sexual harassment, broad
diversity statements, and/or EEO statements that touched on some or all these
discrimination issues. The *Faragher* and *Burlington* decisions (and their progeny)
send the message that the university should update (or replace) those earlier
policies with a policy that forbids all forms of discrimination, not just sexual
harassment, and that the policy must be effective in order for the university to show
it exercised reasonable care to prevent and correct unlawful behavior. *Burlington*
at 764. These Supreme Court cases (and their progeny) are instructive as to the
contents of effective policies. For example, the policy should establish clear and
“workable” reporting and investigation procedures. The policy should be
disseminated and easily accessible. The policy should identify the names and
contact information (phone and office location) of the persons to whom a report of
discrimination should be made. Several people (of both genders) should be
identified as persons to whom complaints are to be made. Those persons and the
persons designated to investigate complaints should be perceived as accessible and
approachable. Some centralization of complaints should be in place to ensure the
university has complete knowledge of the type and frequency of complaints and the
nature of their resolution. Persons who are responsible for investigating complaints
should be trained in conducting investigations. Training about what unlawful
discrimination and sexual harassment is should also take place. The consequences
for those who engage in unlawful behavior should be clear.
As with these cases, many legal decisions provide guidance as to the minimum elements that should be contained in, and the goals which are to be achieved by, the university’s policies addressing particular legal liability. Thus, to be effective in avoiding liability, a policy must be updated regularly to comply with ever-changing statutes, regulations and caselaw.

**Disconnect #7 – Failure to Implement the Correct Policy**

A by-product of the failure to appreciate the university’s many constituencies is the failure to implement the correct policy or policies. Because of the complexities inherent to the university’s obligations to its many stakeholders, it is sometimes difficult to recognize the varied interests of the many stakeholders (and hence the attendant legal obligations) presented in a given situation. Several existing policies may address some or all of the issues presented by a particular situation. Failure to disseminate policies and to seek input from representatives of the impacted stakeholders will result in certain policies being overlooked and not implemented. A university’s failure to follow one of its own applicable policies may expose the university to additional liabilities, ranging from breach of contract claims to violations of applicable statutory requirements.

**Disconnect #8 - Failure to Assess the Effectiveness of the Policy**

Assessment of the effectiveness of a policy can take several forms. Assessment mechanisms may include informal and formal review and analysis. Informal review may include an analysis addressing the disconnects on policy development and implementation, as discussed above. Regardless of whether assessment is informal or formal, at a minimum, the university must compile the
number of claims (both internal/informal and external/lawsuit) it receives in relation to a particular policy. Often, a university does not centralize its claim data. Without centralization, there can be no validity to the data and the resulting assessment analysis, on either a formal or informal basis. Claims data should be compared to external statistical data available in the public realm, as well as to the university’s own past records and internal goals for future performance. The educational institution is wise to conduct formal assessments of its policies by engaging experts to assess the overall effectiveness of its policies and to assist in necessary realigning of its policies.

Conclusion

In conclusion, a policy will not be effective in preventing liability unless the following occurs:

- The purpose and goal of policy must be articulated.
- The legal liabilities to be avoided by the policy (and possibly created by the policy) must be identified and understood.
- The policy must be developed with intended (and potentially unintended) impacted stakeholders in mind.
- The policy must be developed with input from representatives of the impacted stakeholders, including legal counsel and industry and scientific experts.
- The policy must be disseminated through publication and training.
- The policy must be followed.
- The policy must be updated to reflect changing laws, changes in the university’s environment and changes in the interests of the university’s stakeholders.
The policy must be revisited to assess if it is meeting all of its purposes, including the avoidance of legal liabilities.

The policy must receive support from leadership in the drafting, implementation and assessment stages.

Training Exercises

The purpose of these training exercises is not to use a single situation to create a policy. (In fact, to do so results in a disconnect between policy development and effectiveness in avoiding liability.) Rather, the training exercises are designed to illustrate the conflicting interests of stakeholders and overlapping liabilities inherent to many campus situations and policies. For each hypothetical, consider the following:

1. Identify the university's stakeholders who may be impacted in the hypothetical.

2. Identify the representatives of the university's stakeholders who may be impacted in the hypothetical.

3. Identify the potential legal liabilities arising from the hypothetical.

4. Identify existing university policies invoked by the hypothetical and identify any policies the university does not have, but perhaps should have, to address the legal issues raised by the hypothetical.

5. Triage the interests of the stakeholders and the potential liabilities.

Hypothetical No. 1

A staff member who has worked at the University Museum meets with a Human Resources representative. She wants to state “in confidence” that she is concerned about the relationship between the Manager of the Special Collections Division at the Museum and a student who works at the Museum. She says the
interaction between the two is “unbecoming” and impacting the work of other people who work at the Museum. She says that everyone believes that the Manager and the student are having some sort of relationship and engage in “high school” behavior.

The Manager received a one semester contract to teach an elective course in the graduate art department. The student is a second semester senior and has worked in various offices of the university since she has been enrolled. She has submitted an application for a full-time position in the Museum after graduation. The job is very important to her because she wants to use that position to advance her career.

1. Who are the stakeholders?
   - The Manager, as an employee or as a graduate school faculty member
   - The student, as a student or as an employee
   - Other people working in the museum, as employees
   - Other?

2. Who are the representatives of the stakeholders?
   - Human Resources Department
   - Director of Museum
   - Student Development Office
   - Academic Dean of the Graduate School
   - Legal Counsel
   - Other?
3. What possible legal liabilities may the university be facing?

- Sexual harassment claim by student (is the relationship consensual?)
- Sexual harassment, gender discrimination claims by others who work in the museum (depends on factual investigation)
- Sexual harassment, gender discrimination claims by a coworker who applies for, but does not get the job (depends on facts)
- Breach of contract by the manager to the extent the investigation into the claim is not consistent with the policy applicable to his status (as employee? as graduate school faculty member?)
- Tort claims by the manager (and/or student), claiming the inquiry into a consensual relationship is a breach of his privacy
- Other?

4. What policies may be involved?

- University policy regarding consensual relationships between managers and staff
- University policy regarding consensual relationship between university employees and students
- University policies regarding sexual harassment for faculty
- University policies regarding sexual harassment for staff employees
- University policies regarding sexual harassment for students
- Other?

5. Triage the stakeholders’ interest and liabilities.

- Is the student’s involvement consensual?
- Is there a hostile work environment?
- Is there discrimination involved in the hiring for the new position?
- Is there a breach of applicable policies?
- Do all applicable policies co-exist without conflict or overlap?
- Other?

**Hypothetical No. 2**

On the first day of classes following the end of a two week holiday recess, a work study student and a long-time cafeteria employee reported to work at the main cafeteria at 5:00 a.m. As they entered the back of the kitchen area, they noticed that the lock to an outside service door was broken. The food storage area was ransacked. The closets where sets of industrial kitchen carving knives were stored were emptied. Propane tanks used for special barbecue events were missing. Two cases of cooking wines were also missing, along with cases of food.

The Director of Security and the Head of Food Services are called. Per standard (unwritten) policy, the Director of Security calls the local police. The police investigation reveals no leads as to identity of the vandal(s). The campus and cafeteria were closed down during the holiday break. The police say that because there were no witnesses, it is unlikely that they would catch the perpetrators.

Another employee tells his supervisor he saw two very tall men carry objects the size of gas tanks up from the basement and then put them into their trucks on the day the holiday recess began. He is not certain who they were, but believes they were college building and grounds employees. (The building and grounds employees are subject to a collective bargaining agreement.)

The work study student, a senior who is also a resident advisor (R.A.) at the largest freshman dormitory on campus, seeks assistance from the Dean of Students. She tells the Dean of Students that she believes that a freshman from her dormitory
may have been involved in the break-in and she is concerned that the freshman may use the knives and propane to harm himself. The R.A. refuses to identify the freshman or to state why she believes the student is in danger because the freshman told her “in confidence” about some sessions he had with the College’s Mental Health Center. The R.A., who will be entering graduate school next semester to pursue a doctorate in clinical psychology, does not want to breach the freshman’s confidence. The R.A. does say that the student sent "troubling" e-mails to her and the part-time administrative assistant at the Mental Health Center (who is a friend of the R.A.’s). The R.A. does not want to share the e-mails. The Dean of Students thinks to herself that this is quite a concern, for a number of reasons. Most recently, a student committed suicide while on campus, although very few people know the true cause of death. Also, the Dean of Students knows that a faculty member in the psychology department spoke to the Director of the Mental Health Center “in confidence” just before vacation to express his concerns about a series of poems written by an unidentified junior, involving weapons and self-destruction.

Meanwhile, the Director of Security meets with the Director of Human Resources. Unknown to most, there have been many recent thefts throughout the campus, primarily involving money and laptop computers. He wonders if the cafeteria break-in is another incident of employee theft. The Vice President to whom the Human Resource Director reports thinks the college has sat back and done nothing for too long. The Vice President wants immediate action, including
installing security cameras, conducting searches, interviewing "suspects", and implementing any necessary policies to make sure no more break-ins take place.

1. Who are the stakeholders?
   - Cafeteria employees
   - R.A./Senior student
   - Freshman student
   - Junior student
   - The “two very tall” employees
   - Psychology professor
   - Other employees
   - Other students
   - Other? (Parents of freshman and junior; general public?)

2. Who are the representatives of the stakeholders?
   - Director of Security
   - Dean of Students
   - Human Resources
   - Business Agent of Union
   - Mental Health Director
   - Experts (Mental Health, Social Science, Security)
   - Legal Counsel
   - Other?

3. What possible legal liabilities may the university be facing?
   - Negligence claims
- Wrongful death claims
- Breach of privacy claims
- Breach of contract/implied contract claims
- Claims for statutory violations
- Claims for violation of Constitutional rights
- Other?

4. What policies may be involved?
- Mental health – release of clinical information
- Technology policies – review of email
- Search policies – student
- Search policies – employees
- Disciplinary policy – union employee (under collective bargaining)
- Disciplinary policy – employee (under handbook)
- Disciplinary policy – student
- Other?

5. Triage the stakeholders’ interests and liabilities
- Freshman student and junior student injury to self and others
- The "two very tall" employees - misuse of propane tanks
- Other students’ safety
- Employees’ safety
- Director of Mental Health Services - ethical obligations
- Psychology professor’s ethical obligations
- R.A.’s obligations
- Student privacy
- Employee privacy
- Public safety
- Do all applicable policies co-exist without conflict or overlap?
- Other?
REFERENCES

1 A number of excellent resources describe the legal obligations of higher educational institutions, including:

- Robert D. Bickel and Peter F. Lake, *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?*, (Carolina Academic Press, 1999);


3 Federal statutes governing the university’s obligations to its employees include, but are not limited to:

- Americans with Disabilities Act, 42 U.S.C. §12101 et seq.;

- Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq.;


- Family and Medical Leave Act, 29 U.S.C. §2601 et seq.;


- Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §2101 et seq.; and

- Occupational Safety and Health Act, 29 U.S.C. §651 et seq.
Federal statutes pertaining to the university's interaction with students include, but are not limited to:

- Drug Free Schools and Communities Act Amendment of 1989, 20 U.S.C. §1231(g);
- Americans with Disabilities Act, 42 U.S.C. §12101 et seq.;
- The Crime Awareness and Campus Security Act of 1990 (Clery Act), 20 U.S.C. §1001 et seq.; and
- Family Education Rights and Privacy Act (FERPA), 20 U.S.C. 1232(g).


For a comprehensive discussion of the *Burlington* and *Faragher* decisions, see Edward N. Stoney, II and Catherine S. Ryan, *Burlington, Faragher, Oncall and Beyond: Recent Developments in Title VII Jurisprudence*, 26 J.C. & U.L. 645 (Spring 2000).


In addition, various state laws govern the contents of an employee's sexual harassment policy and/or training programs. See, for e.g., Massachusetts General Law, ch.151B, §3A; Maine Revised Statutes, Title 26, Ch. 7, §807; Rhode Island General Laws §28 -51-2; Connecticut General Statutes §46a-54(15); and California Gov. Code §12950 et seq.

This hypothetical should not be viewed as an endorsement for the development of a consensual relations policy. The issue is complex in terms of legal liabilities, privacy concerns and practical realities. For a commentary addressing the subject, see Jerome W.D. Stokes and D. Frank Vinik, *Consensual Sexual Relations Between Faculty and Students in Higher Education*, 96 Ed. Law. Rep. 899 (March 1995).