

## MEMORANDUM

**To:** University Committee  
**From:** Rachel A. Jeris, Senior University Legal Counsel  
**Date:** August 25, 2017  
**Re:** Consensual Relationships Policy

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In December 2016, the University of Wisconsin System Task Force on Sexual Violence and Harassment submitted a [Report and Recommendations](#) to UW System President Raymond Cross. President Cross approved that report on December 5, 2016. One of the recommendations of the Task Force was that “the Board of Regents adopt . . . revisions to Regent Policy Document 14-8, “Consensual Relationships,” and require each Chancellor to ensure that their institution implements [this policy] in a consistent manner.” The Task Force report also included a proposed revised consensual relationships policy.

Prior to voting on the proposed revised consensual relationships policy, the Regents sought feedback on this policy from UW-Madison, which the Office of the Provost provided (after consulting with the University Committee (UC)) during the first half of November 2016. Feedback from UW-Madison to the UW System Administration and the Board of Regents resulted in some changes to the text of the consensual relationships policy before the Regents’ vote. On December 8, 2016, the Regents voted to adopt a revised consensual relationships policy.

In the Spring 2017 semester, the UC requested a comparison of UW-Madison’s existing consensual relationships policy, which is contained in [Faculty Legislation II-307, Statement on Consensual Relationships](#), and revised [Regent Policy Document 14-8, Consensual Relationships](#). The two documents are organized in a completely different format, so comparing the policies via redline would not produce a useful product. Instead, below, is my analysis of how the two policies materially differ in operation.

### **I. Summary of Faculty Legislation II-307**

- a. On its face, Faculty Legislation II-307 does not indicate that it was mandated by Board of Regent action, but it was so mandated. [Former Regent Policy Document 14-8](#) was adopted by the Regent’s on July 12, 1991, and required UW institutions to adopt a consensual relationships policy by the end of the 1991-1992 academic year. Faculty Legislation II-307 was adopted April 6, 1992. Nearly all of the operative language in Faculty Legislation II-307 is identical to former Regent Policy Document 14-8.
- b. Faculty Legislation II-307 acknowledges that “Conflicts of Interest may arise when such relationships occur between and among faculty, staff, students and prospective employees.” Faculty Legislation II-307 does not distinguish between an employee-employee relationship and an employee-student relationship.
- c. Faculty Legislation II-307 suggests that individuals should be prohibited “from evaluating the work or academic performance of others with whom they have” a

consensual relationship, “or from making hiring, salary or similar financial decisions concerning such persons.” Faculty Legislation II-307 points to unspecified policies regarding nepotism as well as ethical principles as informative for determining the scope of prohibited conduct.

- d. Faculty Legislation II-307 points out that complications can arise when individuals with a power differential are in a consensual relationship, such as: the power differential may influence an individual’s decision to enter into, maintain, or terminate a consensual relationship and a power differential could adversely impact the University’s ability to raise a sexual harassment defense.
- e. Faculty Legislation II-307 requires that the individual with the power advantage disclose the consensual relationship to their immediate supervisor.
- f. Faculty Legislation II-307 requires the immediate supervisor to “mak[e] arrangements to eliminate or mitigate a conflict whose consequences might prove detrimental to the university or to either party in the relationship.” Faculty Legislation II-307 does not specify what steps are required or appropriate in order to eliminate or mitigate the conflict.
- g. Faculty Legislation II-307 specifies that failure to comply could lead to discipline or dismissal pursuant to applicable University policies and procedures.

## **II. Summary of Regent Policy Document 14-8**

- a. On its face, Regent Policy Document 14-8 makes it clear that the content of the policy is mandated by the Board of Regents and requires consistent implementation by all UW institutions.
- b. Regent Policy Document 14-8 acknowledges that consensual relationships can result in actual or perceived conflicts of interest. Specifically, Regent Policy Document 14-8 states: “The purpose of this policy is to ensure that the employment and academic environment is free from real or perceived conflicts of interest when UW employees, students, and affiliated individuals, in positions of unequal power, are involved in consensual romantic or sexual relationships.”
- c. Regent Policy Document 14-8 contains a “Definitions” section.
- d. Regent Policy Document 14-8 distinguishes among two different categories of consensual relationships (a) instructor-student relationships (b) and other consensual relationships, i.e. employee (non-instructor)-student relationships, employee-employee relationships, or relationships with “affiliated individuals” (i.e., volunteers, vendors, and contractors).
  - i. An instructor is prohibited from commencing a relationship with a student “currently under their instruction” or with a student the instructor “reasonably believes” may be under their instruction. Instructor is defined as: “faculty and academic staff members who serve in instructional roles in relation to students. The instructional context includes: academic instruction, advising, direct or indirect evaluation of a student’s work, research collaboration or assistantships, and coaching.”

- ii. All other consensual relationships in which one party has actual or perceived “supervisory, advisory, evaluative, or other authority or influence” over the other party must be disclosed and steps must be taken to mitigate any actual or potential conflicts that might arise from such a relationship.
- iii. If an instructor is already in a consensual relationship with a student when the student comes under their instruction (and it was not a relationship prohibited under section II.d.i. above), then the policy treats the situation the same as all other consensual relationships by requiring disclosure and mitigation.
- iv. Regent Policy Document 14-8 specifies appropriate steps for mitigating any actual or perceived conflicts of interest that might arise from a non-prohibited consensual relationship.
- e. Regent Policy Document 14-8 specifies that failure to comply could lead to discipline pursuant to applicable University policies and procedures.
- f. Regent Policy Document 14-8 prohibits retaliation against individuals who report concerns about potential violations of the policy.

### **III. Differences Between Faculty Legislation II-307 and Regent Policy Document 14-8**

- a. Regent Policy Document 14-8 is clearly a directive from the Board of Regents whereas Faculty Legislation II-307 reads as if it were a policy developed by the UW-Madison faculty.
  - i. As noted above, Faculty Legislation II-307 was also mandated Board of Regent action and Faculty Legislation II-307 adopted the operative provisions of the Regent policy nearly verbatim.
  - ii. While the Board of Regents expects UW-Madison to adopt all of the operative provisions in the revised Regent Policy Document 14-8, modifying the language to signify that the policy is required by UW-Madison rather than the Regents would likely be uncontroversial.
- b. Regent Policy Document 14-8 contains an outright prohibition of a limited category of relationships. Specifically, an employee who meets the policy definition of “instructor” is prohibited from commencing a relationship with a student “currently under their instruction” or whom the instructor “reasonably believes” will come under their instruction.
  - i. The phrase “reasonably believes” leaves some room for interpretation in application and is common phrasing in legal analysis to allow flexibility of application to differing circumstances (e.g., the likelihood of a student coming under an instructor’s supervision might depend on the size of the department or whether the student has declared a major or is pursuing graduate studies in the department.)
  - ii. If a dispute over application of this policy arises between an administrator and instructor regarding whether it was “reasonably likely” for a student to come under an instructor’s instruction, the instructor can utilize any applicable disciplinary appeal or grievance policies.

- c.** While more prescriptive than Faculty Legislation II-307, Regent Policy Document 14-8 provides some helpful clarity.
  - i.** Regent Policy Document 14-8 explains expectations relating to consensual relationships for faculty, staff, and students without reference to additional University policies.
  - ii.** Regent Policy Document 14-8 provides specificity regarding appropriate steps for mitigating conflicts.