

# Employment Law Considerations for Law Schools Hiring Legal Writing Professors

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## I. Introduction

About thirty years ago, law schools began to hire professional lawyers to teach clinical and legal writing courses to their students. Before this change, few or no clinics existed, and legal writing was often taught by third-year students or by individual tenured faculty members, who spent little time on their legal writing teaching. Hiring young lawyers to teach and paying them a low rate was a cost-effective way of improving the instruction in legal research, writing, and analysis. Law schools hired as instructors or visitors legal writing faculty members, who had few rights. Often, legal writing faculty members had one- or two-year renewable contracts; other schools had a cap of two or three years, after which legal writing instructors had to leave the institution. In both cases, the position offered low pay and minimal job security.<sup>1</sup>

The change to full-time legal writing faculty members occurred at the same time that women began attending and graduating from law schools in record numbers. And, while many of these women found jobs in the large and small law firms upon graduation, as they began to have families, some sought alternatives to law firm associate positions. Even though legal writing teaching did not offer the prestige or pay that tenure-track teaching or law firm

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1. See Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530, 530-31 (1995) (“Historically, most law schools devoted inadequate resources to LRW programs and assigned research and writing teachers to low-status positions. Tenure-track appointments were virtually unheard of; and most full-time writing teachers, a rare group, had short-term appointments—by virtue of program design, resource allocation, and organizational or administrative structure.”); Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253, 265-68 (2004) (discussing “separate and unequal pay scales” and “lack of job security” for legal writing faculty); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551, 553-65 (2001) (discussing findings of historical surveys of legal writing programs and faculty and the continued prevalence of the “contract-track staffing model”).

associate positions did, some excellent female lawyers chose to take positions as legal writing faculty in law schools because these jobs apparently afforded the women more flexibility: Legal writing instructors did not ordinarily teach in the summer, and they were not expected to engage in scholarly publication or to serve on committees in law schools. There was (and still is), however, intense work preparing legal writing problems for their students, grading papers, and meeting with students in conferences to go over their work.<sup>2</sup>

A three-tier hierarchy ensued. At the top were the tenured and tenure-track faculty members. Next came the clinical faculty members, and, finally, the legal writing instructors.<sup>3</sup> Then, as now, the vast majority of legal writing teachers were women.<sup>4</sup>

The American Bar Association adopted Standard 405(c) to grant employment security to law school *clinical* faculty members who are not employed on the tenure track. It adopted Standard 405(d) specifically to govern the status of legal writing faculty members. Standard 405(d), however, grants lesser rights than those provided to clinical faculty members by 405(c). Standard 405(c) is preferable to 405(d) status because it at least provides security of position “reasonably similar to tenure”; 405(d) status accords only that security of position that is necessary to “attract and retain” a well-qualified

2. For a discussion of the historical trends, including the “influx of women into law schools in the mid-1970s,” the “reasons that law schools hired many more women than men as a legal research and writing instructors,” and how “[t]eaching legal writing is one of the most labor-intensive jobs in the law school,” see Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 3, 6–9 (2001). See also Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 LEGAL WRITING 521, 542 n.64 (2010) (“Teaching writing is extraordinarily labor intensive. Marking papers, conferencing with students, and creating new assignments year after year takes time. Finding time to write during the school year is difficult, if not impossible. Summers are often devoted to developing assignments or to summer teaching to supplement salaries that as a rule are lower than the rest of the permanent faculty’s.”).
3. BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 32 (2012) (“It’s true, and lamentable, that clinical teachers have second-class status within many law schools. For that matter, professors who teach legal writing—an essential lawyer skill—have even lower status, third class . . . .”); Durako, *supra* note 1, at 267 (“Writing faculty are the only class of full-time faculty who are not provided with job security and whose employment term may be limited to a maximum number of years . . . . Writing faculty are not guaranteed tenure under the ABA Standards, nor are they granted even the so-called ‘clinical tenure’ that Standard 405(c) accords other skills faculty.”)
4. See ASS’N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY vi (2014), <http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf> [<https://perma.cc/V8V3-Q5GK>] [hereinafter ALWD/LWI 2014 REPORT] (“For the schools that reported on gender diversity for all current full-time legal writing faculty, 72% of legal writing faculty were female and 28% were male (relatively constant from 73% female and 27% male in 2013).”); Kristen K. Tiscione & Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty*, 31 COLUM. J. GENDER & L. 47, 48–49 (2015) (“The over-representation of women in skills teaching positions, particularly legal research and writing, and their under-representation in podium, tenure-track positions are well-documented.”)

faculty and to “safeguard academic freedom.” In contrast, Standard 405(d) makes no comparison to the security of position afforded by tenure. Standards 405(c) and (d) state:

(c) A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

(d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 303(a)(2), and (2) safeguard academic freedom.<sup>5</sup>

Recently, a number of law schools have applied 405(c) standards to their legal writing faculty as a means of creating greater equality for them. Nonetheless, many argue that even Standard 405(c) grants insufficient protection to both legal writing and clinical faculty members. Professor Melissa Weresh’s essay examines the effect of using 405(c) status.<sup>6</sup> In this essay, I respond to Professor Weresh’s arguments by commenting on the employment law implications of applying 405(c) status to legal writing faculty. I do not address 405(c) status as it applies to clinical faculty. Neither do I comment on 405(d) status as it applies to legal writing faculty, other than to say that it clearly creates even greater inequality between tenure-track and 405(d)-status faculty than 405(c) does.

Standard 405(c) encourages the creation of long-term contracts. Interpretation 405-6 defines “long-term contracts” as a series of at least five-year contracts that are “presumptively renewable.”<sup>7</sup>

Legal writing teaching has become a discipline in itself over the years, with a number of key organizations sponsoring conferences to improve legal writing

5. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2015-2016 § 405(c), at 29 (2015) [hereinafter ABA STANDARDS].

6. See Melissa Weresh, *Best Practices for Protecting Security of Position for 405(c) Faculty*, 66 J. LEGAL EDUC. 538 (2017).

7. Interpretation 405-6 states in part:  
For the purposes of this Interpretation, “long-term contract” means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom. During the initial long-term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the entire clinical program.

*Interpretation 405-6*, ABA STANDARDS, *supra* note 5, at 29-30.

pedagogy and scholarship.<sup>8</sup> Along with these changes have come criticism that law schools do not grant sufficient employment benefits to their legal writing instructors. In response, law schools have created a variety of arrangements for legal writing professionals. Increasingly, some schools hire legal writing faculty by engaging in national searches, appoint legal writing faculty to the tenure track,<sup>9</sup> and expect that legal writing faculty members fulfill similar or the same criteria for tenure as required of doctrinal faculty members. Other law schools have created specialized tenure tracks for legal writing faculty members that have different requirements for tenure than those for doctrinal faculty, normally with a focus on teaching and a different or no publication requirement. Still others have created mechanisms for appointing their legal writing faculty to 405(c) contract status. Finally, a number of schools continue to employ legal writing teachers on short-term contracts.<sup>10</sup>

Interpretation 405-6 makes clear that the term of the long-term contract should be at least five years, that job security be “reasonably similar to tenure,” and that once a faculty member has a 405(c) contract, the contract is “presumptively renewable.”<sup>11</sup> It does not, however, define either of these two terms. For tenure-track faculty members, each law school creates its own substantive and procedural rules for determining whether a faculty member has earned tenure. Likewise, in the case of a 405(c) contract, law schools should create their own substantive and procedural rules for earning such a contract. Law schools should also write procedural rules for “presumptive renewal” of faculty members with 405(c) status.

## II. Best Practices under ABA Standard 405(c)

Professor Melissa Weresh’s account of “best practices” urges that once a faculty member has a long-term contract under 405(c), she or he should have the same or similar contractual rights regarding security of position as the AAUP guidelines grant to tenured faculty members. Presumably, law schools would create clear substantive rules and procedures for a probationary period for law faculty members hired into jobs leading to long-term contracts that is similar to that of tenure-track faculty members and a rigorous process after that probationary period (similar to that for granting tenure) for determining

8. One example is the Legal Writing Institute, whose website announces conferences, awards, and accomplishments. See LEGAL WRITING INST., <http://www.lwionline.org>; another is the Association of Legal Writing Directors (ALWD), which offers information on its website that pertains to teaching legal writing, see ASS’N OF LEGAL WRITING DIRS., <http://www.alwd.org>.
9. According to the most recent ALWD/LWI survey of legal writing directors, about ten percent of programs employed only tenured or tenure-track individuals to teach legal writing in 2014. About thirty-four percent of programs employed a hybrid approach, and the majority of them used a mixture of tenured and tenure-track individuals and contract-status individuals to teach legal writing. See ALWD/LWI 2014 REPORT *supra* note 4, at v.
10. See generally ALWD/LWI 2014 REPORT, *supra* note 4.
11. Interpretation 405-6, *supra* note 7.

whether the faculty member has earned 405(c) status and its concomitant benefits. Once earned, that status, according to “best practices,” would accord the same or “reasonably similar” job security rights to legal writing faculty members with a 405(c) contract that a faculty member would have with tenure.

To the extent the particular institution has adopted the AAUP guidelines in law school policies that reference university or system policies, a contractual right to job retention may exist unless the university carries the burden of proving that it has declared financial exigency, has eliminated the legal writing program, or that the law school has cause to terminate or not renew the individual legal writing professor’s contract—for incompetence or misconduct.

If the law school has post-tenure review for tenured faculty members, a similar review would also apply to faculty members with 405(c) contract status. If exigency or elimination of a program for cause is shown, the legal writing faculty member on a 405(c) contract, just like a tenured faculty member, would be dismissible upon the proper proof in accordance with the AAUP guidelines and the bylaws of the law school and university even before the expiration of the five-year contract.

While full tenure-track status on a unitary track or specialized tenure of legal writing faculty is the preferable means to recognize excellent teaching and to encourage valuable scholarship,<sup>12</sup> some law schools have opted to give 405(c) status to their legal writing faculty; therefore, it is important to consider the employment situation of those faculty members with 405(c) status. Moreover, given the time-intensive teaching of some legal writing jobs, some schools may wish that their legal writing faculty members focus on teaching and service and not engage in scholarship. While specialized tenure might serve this purpose, some universities do not permit specialized tenure. An alternative, if the job of the legal writing professor is *significantly different from* that of the tenure-track or tenured faculty member and the standards for achieving job security are different, 405(c) status may be an attractive option. It gives law schools the flexibility to tailor the requirements of earning the long-term contract to the job envisioned.

### III. Discrimination Issues in Legal Writing Programs

A sticky problem for law schools that decide to use 405(c) contracts instead of tenure-track appointments for legal writing teachers is the predominance of female faculty members who teach writing. Legal writing teaching has long been considered a “pink ghetto” in law schools, because legal writing faculty members are mostly women who have less status, worse employment conditions, and lower salaries than tenure-track and tenured faculty.<sup>13</sup> The

12. See generally Kathryn Stanchi, *The Problem with ABA 405(c)*, 66 J. LEGAL EDUC. 558 (2017); Linda Berger, *Rhetoric and Reality in the ABA Standards*, 66 J. LEGAL EDUC. 553 (2017); Mary Beth Beazley, *Finishing the Job of Legal Education Reform*, 51 WAKE FOREST L. REV. 275 (2016).

13. See Ann C. McGinley, *Discrimination in Our Midst: Law Schools’ Potential Liability for Employment Practices*, 14 UCLA WOMEN’S L.J. 1, 6–10 (2005); Kristen Konrad Tiscione, “Best Practices” A Giant Step Toward Ensuring Compliance with ABA Standard 405(c), *A Small Yet Important Step Toward*

most recent survey of the Association of Legal Writing Directors/Legal Writing Institute (ALWD/LWI) from 2014 demonstrates that 72% of full-time legal writing teachers were women and 28% were men. The vast majority of legal writing teachers were Caucasian (87.9%).<sup>14</sup> These demographic data raise serious questions for schools that seek to use 405(c) status for legal writing faculty.

#### **IV. Potential Legal Liability for Employment Practices and Long-term Contracts under 405(c)**

Law schools have potential legal liability for gender-based employment discrimination under Title VII of the Civil Rights Act of 1964<sup>15</sup> and Title IX of the Education Amendments of 1972<sup>16</sup> where legal writing faculty members in the law school are predominantly female. If the 405(c) program creates contractual rights that are lesser than the rights created by tenure, a group of female plaintiffs could bring a class action alleging that the employer intentionally engaged in systemic disparate treatment, discriminating against them by granting them differential and inferior employment rights because of their gender. In the alternative, an individual plaintiff or a class of plaintiffs could bring a Title VII or Title IX claim alleging that the law school's policies and practices have a disparate impact on women. In either case, law schools may be liable for illegal discriminatory employment practices.

##### *A. Systemic Disparate Treatment under Title VII*

The systemic-disparate-treatment cause of action would allege that the employer engaged in a pattern and practice of sex discrimination, and that sex discrimination was the "standard operating procedure" of the law school.<sup>17</sup> If the plaintiffs prove that women were hired into these positions because of their sex, and that men who were no more qualified than the women were hired into full tenure-track positions, the women could potentially prevail. To prove a systemic-disparate-treatment case, the plaintiffs would use statistics about the pool of qualified individuals for the jobs of legal writing and tenure-track jobs and compare the proportions of women and men who are hired

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*Addressing Gender Discrimination in the Legal Academy*, 66 J. LEGAL EDUC. 566 (2017); Beazley, *supra* note 12, at 289-95; Stanchi & Levine, *supra* note 2; Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000).

For an insightful explanation of the unique difficulties suffered by women of color who teach legal writing, see Teri A. McMurtry-Chubb, *On Writing Wrongs: Legal Writing Professors of Color and the Curious Case of 405(c)*, 66 J. LEGAL EDUC. 575 (2017).

14. See ALWD/LWI 2014 REPORT, *supra* note 4, at vi.

15. 42 U.S.C. §§ 2000e-2000e-17 (2012).

16. 20 U.S.C. §§ 1681-1688 (2012).

17. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (holding that the plaintiffs could use statistics to prove that racial discrimination was the "standard operating procedure" of the defendant).



for those jobs.<sup>18</sup> Additionally, the plaintiffs would offer anecdotal evidence that indicates that the law school harbored stereotypes about women's qualifications for the job of legal writing professor or other comments that indicate that the employer considered gender in making its employment and/or status decisions.<sup>19</sup> Comments about expectations that students need women (or particular women) in the legal writing jobs because women do well giving students individual attention, etc., could potentially demonstrate stereotyping. Under Title VII, discrimination based on gender stereotyping is discrimination based on sex.<sup>20</sup> Moreover, evidence of differential treatment of male and female legal writing faculty members would be important anecdotal evidence in a systemic-disparate-treatment case. Research demonstrates that employers tend to promote men in predominantly female-occupied jobs more rapidly than women.<sup>21</sup>

Employers would have a potential defense under *EEOC v. Sears, Roebuck & Co.*<sup>22</sup> if they can demonstrate that the 405(c) jobs are different from the tenure-track jobs and that women took the 405(c) jobs out of choice, rather than discrimination. The choice defense, however, has come under attack by legal academics,<sup>23</sup> and would likely be problematic in many schools that have policies that prevent faculty members in 405(c) contract positions from being hired onto the tenure track from those positions. In other words, the presence of a policy that forbids hiring into a tenure-track position from a 405(c) position, especially if the individual legal writing faculty members are not notified about that policy before working at the law school, tend to belie choice of the women in the 405(c) jobs. Moreover, this policy of preventing faculty members with

18. *Id.* For more discussion of the systemic-disparate-treatment cause of action, see McGinley, *supra*, note 13, at 575-80.
19. See McGinley, *supra*, note 13, at 575-80 (explaining how female legal writing faculty could prove sex discrimination against their employer law schools).
20. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).
21. See, e.g., David J. Maume, Jr., *Glass Ceilings and Glass Elevators: Occupational Segregation and Race and Sex Differences in Managerial Promotions*, 26 *WORK & OCCUPATIONS* 483 (1999) (finding in empirical study that white men occupying jobs traditionally held by women are promoted more rapidly than white women, black women, and black men). Of course, to the extent that legal writing faculty who are of color are promoted less readily than their white counterparts or are judged more harshly, this would be evidence of racial discrimination as well. See also *McMurtry-Chubb*, *supra* note 13 at 580-82 (detailing how the structure of many legal writing programs with white women as directors and better status supervising white women and women of color leads to inequitable results in particular for women of color).
22. 839 F.2d 302 (7th Cir. 1988) (affirming judgment in favor of employer in sex discrimination case because plaintiff had failed to present sufficient evidence rebutting employer's evidence that women occupied the lower-paid positions because they were not interested in more highly paid jobs).
23. See, e.g., Vicki Schultz, Essay, *Life's Work*, 100 *COLUM. L. REV.* 1881, 1894-98 (2000) (arguing that women do not choose to be channeled into lower-paying lesser jobs); Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 *HARV. L. REV.* 1749 (discussing how employers channel women into less desirable jobs).

405(c) jobs from hiring onto the tenure track may create a disparate impact on female faculty members, as I explain in the next subsection.

*B. Disparate Impact Theory under Title VII*

Any policy or practice that has a disparate impact on women and that the law school cannot prove is “consistent with business necessity” and “job related” is vulnerable to legal challenge under Title VII.<sup>24</sup> A challenge that a neutral policy creates a disparate impact on a protected group does not require the plaintiffs to prove that the employer intentionally discriminated against the group because of its protected status. Rather, in this situation women would demonstrate that the policies have a disparate effect on women. Such proof would shift the burden of persuasion to the law school to demonstrate that the policy is “consistent with business necessity” and “job related.” Policies or practices that prohibit movement from 405(c) contract status to tenure-track status can be attacked as creating an illegal disparate impact on women because of the statistics demonstrating that women predominate in these contract statuses. Once these statistics are offered into evidence, the women will have proved that the neutral policy has a disparate effect on women. At that point the employer has the burden of proving that the policy is job-related and consistent with business necessity. It may be difficult for law schools to defend the policy. When asked about the reasons for this policy, most law schools with the policy argue that it is too difficult for the faculty not to hire a well-regarded, well-performing faculty member on a 405(c) contract onto the tenure track. In other words, faculties will be pressured by their relationship with their colleague to hire her. This does not seem to meet the job-related and consistent with business necessity standard. Of course, this does not mean that each faculty member with a 405(c) contract should be hired onto the tenure track. It merely means that the policy not permitting faculty members to judge the individual accomplishments and qualifications of the 405(c) faculty members who apply for tenure-track jobs is suspect.

Other policies that limit the rights of legal writing faculty, such as differential pay or benefits or less support for travel or scholarly pursuit, may also create legal liability if the employer cannot prove that these policies are related to the specific job of the legal writing professor and consistent with business necessity of the law school. If, however, the employer can demonstrate that the jobs of legal writing professor and tenure-track or tenured professor who teaches and

24. In pertinent part, the disparate impact provision in Title VII states:

(k) Burden of proof in disparate impact cases.

(i)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity

...

<sup>42</sup> U.S.C. § 2000e-2(k) (2012).



does research in a substantive area are different, the court may find that the policies are job-related and consistent with business necessity. The employer would need to articulate why it needs differential standards and treatment of legal writing teachers, given the predominance of women teaching legal writing and the predominance of men teaching doctrinal courses in many schools.

The bottom line is the following: Where the standards for achieving the long-term contract status and the job of legal writing are well-aligned and sufficiently different from those for achieving tenure and the job of a tenured professor, a 405(c) contract is a viable option for the law school. If, however, the standards (teaching, scholarship, and service) are the same or very similar, the legal writing faculty should be on a tenure track if the law school is to avoid liability based on disparate treatment or disparate impact under Title VII.<sup>25</sup>

Under the “substantially similar” language of 405(c) combined with AAUP guidelines incorporated by reference, a person who has achieved a long-term contract as a result of a rigorous procedural and substantive process (similar to that of tenured faculty) should have job security that is nearly the same as or substantially similar to that of tenured faculty members. Since there is a presumption of renewal, the legal writing faculty member should be renewed if the employer cannot demonstrate that there is cause not to renew, defined as misconduct or incompetence. And, for the job security to be “substantially similar” to tenure, the employee with a 405(c) contract should have procedural rights that are either the same as or similar to those of the tenured faculty members, which differ depending on the university. Job security protects academic freedom of faculty members to teach and publish in a manner consistent with their educational goals.

### *C. Title IX Liability*

Title IX of the Education Amendments prohibits discrimination because of sex in employment practices by educational institutions receiving federal financial assistance.<sup>26</sup> Under Title IX, it is illegal to segregate or classify employees based on sex and to use neutral practices that create a disparate impact on persons because of sex, unless those policies are, as in Title VII, job-related and consistent with business necessity. Title IX regulations make clear that Title IX applies to job classifications and to hiring and tenure decisions, etc.<sup>27</sup> For example, 34 C.F.R. § 106.55 states:

25. A law professor who taught doctrinal courses for thirty years and then taught legal writing for a semester disputes that the job is different, at least in his institution. See John A. Lynch, Jr., *Teaching Legal Writing After a Thirty-Year Respite: No Country for Old Men?*, 38 CAPITAL U. L. REV. 1 (2009).

26. 20 U.S.C. §§ 1681-1688 (2012).

27. 34 C.F.R. §§ 106.51, 106.55 (2016).

A recipient shall not: . . .

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.

While (c) appears to refer to classifications explicitly based on sex, there is a good argument that the classifications used by law schools in legal writing programs are based on sex because neutral hiring and promotion policies have a disparate impact on female faculty members. The language of the regulation refers to “similar jobs.” As with Title VII, a law school whose legal writing faculty members perform “similar jobs” may be liable under Title IX for sex discrimination.

Persons aggrieved by Title IX can bring a private cause of action or can file a complaint with the Department of Education, Office of Civil Rights, which will conduct an investigation into the complaint.

Courts interpreting Title IX often resort to Title VII for guidance, and have applied disparate treatment and disparate impact theories discussed above in the Title IX context. Thus, it is likely that an educational employer would not escape Title IX liability and/or an investigation by the Department of Education’s Office of Civil Rights.

## **V. Conclusion**

Law schools have for decades struggled with unequal employment conditions for their clinical and legal writing faculty. While Standard 405(c) was an attempt to create more equal conditions for clinical faculty members, and a number of schools have applied 405(c) to their contracts with legal writing faculty, 405(c) contracts are not a magic bullet. In the legal writing context, these contracts may expose schools to legal liability for sex discrimination, especially if the jobs performed by legal writing faculty members are substantially similar to those performed by tenured and tenure-track faculty members. Standard 405(c) contracts are preferable to short-term contracts because they, combined with AAUP guidelines incorporated by reference into employment contracts, offer significantly more job security than in the past. Nonetheless, as others have argued, a preferable system to assure that legal writing faculty teach and publish up to their potential is for law schools to hire legal writing faculty onto the tenure track or, in the very least, to create a form of specialized tenure that is tailored to the performance expectations of legal writing faculty.