Fairness For All Students Under Title IX

FAIRNESS FOR ALL STUDENTS UNDER TITLE IX

Elizabeth Bartholet, Nancy Gertner, Janet Halley and Jeannie Suk Gersen

August 21, 2017

We are professors at Harvard Law School who have researched, taught, and written on Title IX, sexual harassment, sexual assault, and feminist legal reform. We were four of the signatories to the statement of twenty eight Harvard Law School professors, published in the Boston Globe on October 15, 2014, that criticized Harvard University's newly adopted sexual harassment policy as "overwhelmingly stacked against the accused" and "in no way required by Title IX law or regulation."

We welcome the current opportunity to assess the response to campus sexual harassment, including sexual assault. In the past six years, under pressure from the previous Administration, many colleges and universities all over the country have put in place new rules defining sexual misconduct and new procedures for enforcing them. While the Administration's goals were to provide better protections for women, and address the neglect that prevailed before this shift, the new policies and procedures have created problems of their own, many of them attributable to directives coming from the Department of Education's Office for Civil Rights (OCR). Most of these problems involve unfairness to the accused; some involve unfairness to both accuser and accused; and some are unfair to victims. OCR has an obligation to address the unfairness that has resulted from its previous actions and the related college and university responses.

In 2011, OCR issued a "Dear Colleague Letter" which gave colleges and universities instructions on how to regulate this area. That document was never opened for notice and comment and as a result does not itself have the force of law and could not add new obligations for regulated parties. Nevertheless the previous Administration's OCR threatened colleges and universities with the institution-wide cutoff of all federal funding if they did not

comply with the Dear Colleague Letter's instructions, including ones that had never before been considered legally required by Title IX. Terrified, administrators not only complied; they over-complied. Below is a list of some of the most severe problems left in the wake of this overcorrection.

Definitions of sexual wrongdoing on college campuses are now seriously overbroad. They go way beyond accepted legal definitions of rape, sexual assault, and sexual harassment. They often include sexual conduct that is merely unwelcome, even if it does not create a hostile environment, even if the person accused had no way of knowing it was unwanted, and even if the accuser's sense that it was unwelcome arose after the encounter. The definitions often include mere speech about sexual matters. They therefore allow students who find class discussion of sexuality offensive to accuse instructors of sexual harassment. They are so broad as to put students engaged in behavior that is overwhelmingly common in the context of romantic relationships to be accused of sexual misconduct. Overbroad definitions of sexual wrongdoing are unfair to all parties, and squander the legitimacy of the system.

Though OCR did not require schools to treat accused students unfairly in the investigation and adjudication process, its tactics put pressure on them to stack the system so as to favor alleged victims over those they accuse. The procedures for enforcing these definitions are frequently so unfair as to be truly shocking. Some colleges and universities fail even to give students the complaint against them, or notice of the factual basis of charges, the evidence gathered, or the identities of witnesses. Some schools fail to provide hearings or to allow the accused student's lawyer to attend or speak at hearings. Some bar the accused from putting questions to the accuser or witnesses, even through intermediaries. Some schools hold hearings in which the accuser participates while remaining unseen behind a partition. Some schools deny parties the right to see the investigative report or get copies for their lawyers for preparing an appeal. Some schools allow appeals only on very narrow grounds such as new evidence or procedural error, providing no meaningful check on the initial decisionmaker.

Moreover, many schools improperly house the functions of investigation and adjudication in dedicated Title IX offices. These are compliance offices with strong incentives to ensure the school stays in OCR's good graces to safeguard the school's federal funding. Title IX officers have reason to fear for their jobs if they hold a student not responsible or if they assign a rehabilitative or restorative rather than a harshly punitive sanction. Many Title IX offices run all the different functions in the process, acting as prosecutor, judge, jury, and appeals board. Appeals are to an administrator in the institution's Title IX apparatus, rather than to a person who is structurally independent and not invested in the outcome. Some Title IX officers even take on the role of advisor to an accuser through the process of complaint, investigation, adjudication, or appeal, which means they are not neutral. They do so, moreover, without providing analogous support to the accused.

Compounding matters, many institutions follow the "investigator only" or "single investigator" model, wherein the investigator is also the adjudicator. In this model, there is no hearing. One person conducts interviews with each party and witness, and then makes the determination whether the accused is responsible. No one knows what the investigator hears or sees in the interviews except the people in the room at the time. This makes the investigator all-powerful. Neither accuser nor accused can guess what additional evidence to offer, or what different interpretations of the evidence to propose, because they are completely in the dark about what the investigator is learning and are helpless to fend off the investigator's structural and personal biases as they get cooked into the evidence-gathering.

These common arrangements together offend two requirements of fairness: *neutral* decisionmakers who are independent of the school's compliance interest, and *independent* decisionmakers providing a check on arbitrary and unlawful decisions.

These substantive and procedural fairness issues are exacerbated by OCR's requirement that institutions use a preponderance of the evidence standard rather than a higher standard such as clear and convincing evidence. To be sure, our legal system uses the preponderance standard – which means "more

likely than not" – in many important fora, such as civil trials. But civil trials have many features that have been developed over centuries to produce an overall system fair to both parties, including an independent and neutral initial decisionmaker and appeal body, legal counsel, a hearing with rules of evidence, and a right of appeal that relates to all aspects of the decision. Dropping the preponderance standard into the severely skewed playing field of the new OCR-inspired procedures risks holding innocent students responsible.

It is extremely important for colleges and universities to have robust policies and procedures to address sexual wrongdoing on campus. Schools' struggles with providing fair procedures have led some observers to throw up their hands and propose 1) that schools should not decide these cases at all; 2) that schools should toss these cases off to law enforcement instead; and 3) that schools should be legally required to refer all reports of criminal acts to law enforcement regardless of whether the schools also adjudicate the cases (sometimes called "mandatory referral"). These proposals are irresponsible. A school must be able to discipline students for violating its conduct codes and protect its students from harm, whether or not the violations are also crimes. Often the conduct involved is not a crime – for example, much sexual harassment as defined by law is not criminal conduct. And even if a violation of the school's policy is also a crime, schools should be free to discipline the offending student without satisfying the very strict evidentiary standards that govern in criminal law and make it so hard to convict. Also, requiring schools to report all reported sexual misconduct to the police without the alleged victim's permission interferes with that person's autonomy, given the important privacy and relationship issues at stake.

OCR must continue to recognize the responsibility of colleges and universities to address sexual harassment and sexual assault in their communities. But in shouldering their burden, schools owe fairness to *all* students: the accuser and the accused. And they owe it to all their students to develop substantive definitions of sexual misconduct that don't invite arbitrary enforcement against innocuous conduct. Only when schools adopt both fair procedures and fair substantive definitions will the sanctions they levy send the message that sexual misconduct is unacceptable. Now, instead, they send a dreadful

message, that fairness is somehow incompatible with treating sexual misconduct seriously. That message is wholly unnecessary.

In the next phase of reform, it is crucial that OCR make clear that schools must treat all students fairly. To that end, some basic principles of fairness should be observed. Schools must:

Return to the Supreme Court's definition of sexual harassment: unwelcome sexual conduct that is sufficiently severe or pervasive to interfere with the victim's educational opportunity. Repeatedly the Court has said that a reasonable person test must be applied in determining whether conduct was wrongful, to provide a necessary check on arbitrary accusations. To impose liability, the decisionmaker must find that a reasonable person in the accuser's position would experience the incident to be abusive, and also that a reasonable person in the defendant's position would have known that the conduct was unwelcome. These traditional reasonable person limits are central to preserving academic freedom and individual autonomy.

Provide parties with the complaint and inform them of the factual basis of the complaint, the evidence gathered, and the identities of witnesses.

Provide a hearing and allow the parties the opportunity to hear the testimony in real time and to offer amendments and corrections.

Allow parties to bring counsel to any interviews and hearings, and allow counsel to speak to assert the parties' rights.

Allow parties to ask questions of other parties and witnesses in a meaningful way, even if through intermediaries rather than face-to-face or in direct confrontation.

Use a preponderance of the evidence standard *only if* all other requirements for equal fairness are met.

Provide parties copies of reports produced by investigators and adjudicators.

Separate the Title IX compliance officer role from the roles of advising individual students considering filing complaints, investigation, adjudication, and appeal of individual cases.

Separate the functions of investigator, adjudicator, and appeal into different individuals or panels independent of each other, and not invested in the outcome of previous stages of the case.

Allow appeals on any grounds, rather than limit them narrowly.

We urge OCR to thoughtfully undertake much-needed refinement or replacement of the guidance provided in the 2011 Dear Colleague Letter, to better protect the rights of sexual assault victims and accused students along the lines we recommend here.

Most of the procedural principles listed above are reflected in the procedures that Harvard Law School adopted in 2015, with OCR's approval. We attach those procedures to this statement.

Additionally, OCR should abandon its senseless blanket disapproval of mediation or restorative approaches to accusations of sexual misconduct. An exclusively disciplinary or punitive approach needlessly deprives victims of options that may benefit them in the pursuit of equal educational opportunity.

Finally, it is urgent that OCR undertake to study the disproportionate impact on racial minorities of discipline for campus sexual misconduct, just as OCR has previously done for discipline in elementary and secondary schools. Our experience as lawyers and researchers in this area leads us to fear a significant risk of race discrimination in college discipline cases. That risk must be transparently analyzed as part of the project of enforcing sex discrimination law.

The unfairness that currently infects colleges and universities' procedures is in no way necessary to address the problem of sexual misconduct. Indeed, it is counter-productive, undermining the legitimacy of the important project of addressing sexual misconduct. To address sexual misconduct effectively, appropriate definitions of misconduct must be developed that avoid risk to the relational autonomy of students and academic freedom in the classroom. Equally important is the development of procedures providing fair treatment to both accuser and accused. That is the challenge of the next crucial stage of reform in the service of Title IX's mandate against sex discrimination in education.

Attachments:

Elizabeth Bartholet *et al.*, *Rethink Harvard's Sexual Harassment Policy*, Bos. Globe (Oct. 15, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html

Nancy Gertner, *Sex, Lies, and Justice*, American Prospect (Jan. 12, 2015), http://prospect.org/article/sex-lies-and-justice

Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 123 Harv. L. Rev. F. 103 (2015), https://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/

Jacob Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, Chron. Higher Educ. (Jan. 6, 2017), http://www.chronicle.com/article/The-College-Sex-Bureaucracy/238805

Harvard Law School Sexual Harassment Resources and Procedures for Students, https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf