

Reinstating Student Rights or Criminalizing Title IX? The Struggle to Define Sexual Harassment at Harvard Law School

Cory Cole
Tulane University, New Orleans, Louisiana, USA



Abstract: In 2013, Harvard University responded to a number of ongoing Title IX complaints by hiring a university-wide Title IX Officer named Mia Karvonides and tasking her with the creation of a new, centralized sexual harassment policy fully compliant with Title IX. Shortly after this policy was unveiled in 2014, twenty-eight members of the Harvard Law School (HLS) faculty published an op-ed in the *Boston Globe* that eviscerated this new policy, claiming that it violated students' right to due process. This case study uses evidence from Harvard's student newspaper *The Crimson*, the text of recent Office of Civil Rights (OCR) guidance documents, and several scholarly articles written by those involved in the conflict. Furthermore, it describes and analyzes the issues that the co-authors of the *Boston Globe* op-ed introduced and recounts the innovative way in which Karvonides responded to these criticisms without compromising her core values. As this country continues to see an increase in vocal and well-funded resistance to policies meant to protect survivors of sexual violence, the HLS case provides lessons for advocates for survivors' rights on campus can utilize in the upcoming wave of similar conflicts.

Introduction

In July 2014, Harvard University's Central Administration, under the advisement of Mia Karvonides, a recently-hired Title IX coordinator, unveiled a new, university-wide sexual harassment policy meant to bring the university's procedures back into compliance with Title IX. In October of the same year, over two dozen faculty members at Harvard Law School (HLS) published an open letter in the *Boston Globe* publicly decrying the policy and calling for its immediate reversal, criticizing the policy's lack of protections for the rights of accused students and faculty, its overly ambiguous definition of what constitutes sexual harassment, its lack of concern for the input of HLS faculty, and its potential to impede academic freedom (Bartholet et al. 2014). Although Harvard University's Central Administration, the body that governed all of the University's schools, rushed to defend the policy, it was unclear whether this would be enough; as one of the nation's most prestigious law schools, HLS and its faculty held significant power within their field, and a public critique from the school posed a substantial existential threat to the policy.

Under the mounting pressure of both internal and external criticism, central administration spent the month of November 2014 weighing its options: should the office continue with its original plan to enforce the new sexual harassment policy in all schools despite intense faculty resistance, or allow HLS to reject the policy at risk of losing federal funding and institutional consistency?

Title IX Origins, Purpose and Applications 1972-2014

It would be impossible to evaluate any possible solutions to Harvard University's central administration's dilemma without first understanding the legal framework that governs conduct and discipline in higher education. As the primary piece of federal legislation that blends jurisdiction over educational institutions with a focus on gender and sexual harassment, Title IX lies at the center of the dispute.

In 1972 congress passed Title IX as an amendment to the 1964 Civil Rights Act. Many advocates for women's rights considered the act, meant to ensure that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," a success, and expected that the law would bring welcome advances in educational equity (Anderson 2016). Although campus activists were quick to realize that this new legislation had the potential to serve as a useful tool for the elimination of sexual misconduct in academic settings and eager to organize to achieve these goals, progress was slow as most groups could only win battles locally (Anderson 2016).

The efforts to eliminate campus sexual violence seemed to reach peak convergence with the goals of Title IX in 2011 when the Office of Civil Rights (OCR), the federal agency responsible for enforcing Title IX, released a piece of guidance known as the Dear Colleague Letter. This document formally acknowledged that sexual violence, as a form of harassment, presents students with a real barrier to receiving "an education free from discrimination," officially rendering campus sexual assault a matter of civil rights (Anderson 2016). The document also strengthened its requirement that universities adhere to the preponderance of evidence standard in its adjudication procedures, as opposed to the clear and convincing standard (which the OCR had determined to lack fairness and impartiality) and offered suggestions for protecting complainants from retaliation and re-traumatization during the disciplinary process (Anderson 2016).

The letter came at a time in which more and more Americans were becoming aware that 1 in 5 college women will be victims of sexual assault during their time on campus, a statistic that has been continuously replicated since Mary Koss' 1985 victimization survey (Anderson 2016). Awareness of the problem spread, often through young activists using social media to organize more and more people over larger and larger geographic areas, and soon, despite the fact that campus sexual violence had undergone no discernable increase in incidence over the last thirty years, American news media labelled and publicized it as an "epidemic" (Denby 2016).

Harvard in the Era of Epidemic Sexual Assault

Between the time the Dear Colleague Letter was published in 2011 and the time Harvard University managed to develop its new sexual harassment policy, the OCR had initiated several investigations into Title IX violations throughout the university, the first and most notable of which centered around the Law School (McKay 2011). Law professor Wendy Murphy filed three complaints with the OCR at around the same time, for Yale University, Princeton University, and Harvard Law School (McKay 2011). Murphy identified three main problems with the HLS, namely: 1) its failure to investigate claims promptly, 2) its failure to adopt the preponderance of evidence (more likely than not) standard as opposed to the clear and convincing evidence (beyond the shadow of a doubt) standard as the standard of evidence required to find a respondent responsible, and 3) its failure to provide respondents with a written timeline describing the course of the complainant's investigation, an explicit requirement of Title IX guidance (McKay 2011).

This case remained open for four years before the HLS and OCR came together to produce a resolution (Delwiche, Delwiche, and Duehren 2014).

Of Murphy's criticisms, the most central was Harvard's failure to enforce a preponderance of the evidence standard across all of its schools. The preponderance standard allows an adjudicating body to find a respondent responsible as long as the evidence provided suggests that the respondent is "more likely than not" responsible. One can contrast this standard with the "clear and convincing" standard, which requires the evidence to suggest that the respondent is responsible beyond all reasonable doubt (Ferreol and Lucky 2013). Although congressional debates had stymied attempts to work a preponderance of the evidence clause into the 2013 renewal of the Violence Against Women Act, the evidentiary standard was still listed as a requirement in the 2011 Dear Colleague Letter, and for this reason, several of Harvard's peer institutions had adopted the standard between 2011 and 2014 (Ferreol and Lucky 2013). Along with Princeton, Harvard remained one of two Ivy League schools that had yet to make the switch; the Law School adhered to the clear and convincing standard, whereas the rest of the schools made use of a unique but vague standard of evidence that called for the faculty to be "sufficiently persuaded" of wrongdoing before any discipline could take place (Ferreol and Lucky 2013). The Law School's strong dedication to the clear and convincing standard, combined with the unclear nature of the other schools' policies, formed a resistance to change that Wendy Murphy described as "embarrassing" (Robbins 2012).

Harvard had also fallen short on one more of the OCR's strong recommendations: that each institution "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX" (Ferreol and Lucky 2013). Again, the university looked to peer institutions like Yale, which had hired its first Title IX director as early as 2001 (Ferreol and Lucky 2013). In order to appease this specific request from the OCR, as well as to establish a team for addressing the OCR's other demands, Harvard decided to add Mia Karvonides to its payroll.

Mia Karvonides

In March of 2013, Harvard took its first step towards Title IX compliance by hiring a university-wide Title IX coordinator, a first for the institution (Lucky 2013). To fill this important position, the university chose Mia Karvonides, an attorney specializing in the intersection of education and civil rights who had worked with the OCR for the past few years, enforcing some of the very laws of which Harvard had recently found itself in violation (Lucky 2013).

Karvonides' background was not only in civil rights law, but also in higher education administration. She had spent years working as an administrator at Bowdoin College before even dreaming of studying law, saying in a 2013 interview with the *Harvard Gazette*:

Practicing law is a bit of a second career for me. I went to law school about 10 years after I graduated from college. Before that, I was an administrator at Bowdoin College. I got to a place when I was working at Bowdoin where I wanted to have more opportunities in higher education to make a contribution and felt legal skills would make that possible. I really went to law school with the intent of returning to higher education (Harvard Gazette 2014).

While Karvonides worked to complete her second year of law school as a single mother, she compiled a report for Vermont legislature's House Education Committee on school violence, which resulted in the passage of a statewide School Safety Act (Harvard Gazette 2014).

Karvonides assumed the role of attorney for the Vermont Agency of Education, where she specialized in disability rights, from 2001 to 2007, after which she began working at the federal level with the OCR (Lucky 2013). There, Karvonides handled cases throughout the US that were related to discrimination based on gender, race, religion, and ability in collegiate settings, allowing her to witness first-hand how different institutions across the country interpreted and applied (or failed to apply) the OCR's guidance (Lucky 2013). Her coworkers, new and old, expressed near certainty that she would succeed as Harvard's Title IX coordinator (Lucky 2013).

Karvonides was, to Harvard, an outsider, but according to her first official statement after Harvard announced her employment, she had made familiarizing herself with the university and each school situated therein her first priority, saying that her first task was to "gain an understanding of how various parts of the University are currently coordinating compliance efforts" (Lucky 2013).

Soon after beginning work at Harvard, Karvonides convened a working group in May 2013 to create a university-wide policy for preventing and adjudicating sexual misconduct (Clarida 2014). While Karvonides gathered input from staff and students across the university, she reported that her main concern was compliance with federal law: first the Violence Against Women Act, then the Dear Colleague Letter (Harvard Gazette 2014). Eleven months later, Karvonides submitted the completed policy to the OCR to await federal approval (Harvard Gazette 2014). Although the OCR would not grant its approval or even feedback until 2015, Karvonides fought to implement the new policy pre-emptively, stating:

We want to have everyone ready to implement the new policy, to communicate it to students, to have the procedures up and running, and to have ODR — the new investigation office — operational. We're at a point where we risk not being prepared when the students return if we do not act now (Harvard Gazette 2014).

On July 2nd, 2014, Harvard unveiled the policy that Karvonides and her committee had spent the last year working on, and vowed to implement it by the time classes resumed in the fall (Clarida and Conway 2014).

A New Policy

Karvonides' new university-wide policy included a number of major departures from the patchwork of school-specific policies that had preceded it. Among the most dramatic was the creation of a single, centralized office that would handle the intake, investigation, and adjudication of all sexual misconduct cases. Known as the Office of Gender and Sexual Dispute Resolution (ODR), this office would be the sole handler of cases from each of Harvard's fifteen schools (Clarida and Conway 2014). As expected, the new policy introduced the preponderance of evidence standard university-wide, and took one more unexpected turn: using the "unwelcomeness" standard (differentiating welcome sexual conduct from unwelcome sexual conduct) to define sexual harassment instead of the more popular "yes means yes standard" promoted by hundreds of college-aged activists across the country (Clarida and Conway 2014). Karvonides defended this choice saying that the unwelcomeness standard was "consistent with the standard in all federal civil rights laws that apply in an education setting, including Title IX" (Harvard Gazette 2014). She also noted that because the policy applies to all types of gender-based harassment and not simply sexual assault, the unwelcomeness standard can be used in a wider range of situations (Harvard Gazette 2014).

Although the policy broke significantly with the tradition of each school having the power to determine the way in which its own students would be disciplined, Karvonides assured the Harvard community that the schools had not been overlooked:

I think the role of the Schools is critical. They will be engaged at every step along the way. For instance, they'll have the opportunity to have their designee involved as part of the investigative team. A School's Title IX coordinator will be involved with putting in place supports and other interim measures to assist the affected person and possibly the broader community, pending the outcome of the investigation. And they will also be updated as we go through every stage of an investigation. Also, the Schools will continue to make any disciplinary decisions with the benefit of the report from the professional investigators. (Harvard Gazette 2014).

Furthermore, Karvonides had made it clear from the beginning that institutional consistency was among her top priorities in policy-making, asserting, "the first thing to recognize is that, while Harvard is made up of multiple schools, we are one community at the end of the day. Our responsibility is to protect all students, all faculty, all staff, affiliates and visitors from discrimination" (Harvard Gazette 2014)

Reception of the New Policy

For the first few months after the policy's introduction, criticism among students and individual professors flourished on social media, with many showing concerns about the fact that the policy chose to eschew the affirmative consent paradigm in favor of the "unwelcomeness" standard, and several other sharing concerns about the effects that the policy would have on academic freedom of speech (Clarida 2014). However, these flecks of opposition were scattered and for the most part inconsequential, and the university's central administration had already begun touting the policy as a wise move. University president Drew Faust quickly offered her support of the policy, saying "This new, progressive policy—alongside the new, centralized procedures for investigating reports—will significantly enhance Harvard's ability to address these incidents when they occur," the day after she and Karvonides unveiled the policy (Clarida and Conway 2014).

The conversation changed abruptly on October 15th, 2014 when an op-ed by the title of "Rethink Harvard's Sexual Harassment Policy" appeared on the *Boston Globe's* website. The publication contained the most powerful attack on Harvard's policy yet, but this attack did not come from any of the usual suspects for such criticism – groups like the Foundation for Individual Rights in Higher Education (FIRE) and Save Our Sons, weary of Title IX and fiercely protective of due process within collegiate settings. Rather, this scathing letter came from within the institution; to be specific, it came from the Law School.

Twenty-eight members of the Harvard Law School (HLS) faculty, including twenty-one men and seven women had co-authored and signed the letter, urging the university's Central Administration to either abandon its new policy or allow HLS to keep its own policy (Clarida 2014). The co-authors began by assuring their readers that their opposition to the new policy was not to be read as an opposition to protecting students, saying:

We strongly endorse the importance of protecting our students from sexual misconduct and providing an educational environment free from the sexual and other harassment that can diminish educational opportunity. But we believe that this particular sexual harassment policy adopted by Harvard will do more harm than good (HLS Faculty 2014).

The co-authors went on to list a number of specific grievances regarding the policy. Firstly, they decried Karvonides' disregard for HLS' autonomy and input, saying that the policy had "destroyed" the long-held tradition of faculty governance at each Harvard school (HLS Faculty 2014). The co-authors also took aim at the policy's use of the unwelcomeness standard, claiming that this definition of sexual harassment that went "significantly beyond Title IX and Title VII law" (HLS Faculty 2014). Although this was, of course, the standard recommended by the OCR in its 2011 Dear Colleague Letter, the co-authors claimed that this was a guidance document and not codified law, and that "the goal must not be simply to go as far as possible in the direction of preventing anything that some might characterize as sexual harassment" (HLS Faculty 2014). Unlike other critics of the unwelcomeness standard, the co-authors did not champion or even mention affirmative consent, nor did they provide an alternative definition of sexual misconduct.

The co-authors' third central accusation, perhaps the most contentious, was that the policy unfairly interfered with the due process of the student accused of sexual assault (referred to in these situations as the respondent) and "stacked the odds" in favor of the student making the accusation (likewise referred to as the complainant) (HLS Faculty 2014). The faculty members took this to mean an affront on their integrity as law educators, stating:

As teachers responsible for educating our students about due process of law, the substantive law governing discrimination and violence, appropriate administrative decision-making, and the rule of law generally, we find the new sexual harassment policy inconsistent with many of the most basic principles we teach. We also find the process by which this policy was decided and imposed on all parts of the university inconsistent with the finest traditions of Harvard University, of faculty governance, and of academic freedom (HLS Faculty 2014).

The co-authors elaborated, taking issue with 1) the fact that a single office would be handling every step of every case, a structure that they believed would eliminate any possibility of impartiality, and 2) the lack of procedural protections afforded to the respondent (HLS Faculty 2014). In particular, the co-authors claimed it was unfair that the complainant should not be afforded the opportunity to hire a lawyer, face their accuser in a hearing with cross-examination upon request, and appeal the result of the proceedings without overcoming several obstacles (HLS Faculty 2014). The co-authors also went so far as to say that it was unjust for Harvard not to pay the respondent's legal fees, and demanded that Harvard withdraw the policy immediately (HLS Faculty 2014).

In the month following the arrival of the op-ed and the initial aftermath thereof, Karvonides consistently proved unavailable for comment, as did Harvard University president Drew Faust (Clarida 2014). Undoubtedly, the two had quite a bit of deliberation to attend to: the first step was to, as the co-authors of the op-ed had suggested, "begin the challenging project of carefully thinking through what substantive and procedural rules would best balance the complex issues involved in addressing sexual conduct and misconduct in our community" (HLS Faculty 2014).

One could easily call the coauthors unfair or condescending here in their insinuation that despite having worked for decades in education and civil rights law and taking over a year to formulate the university-wide policy, Karvonides had somehow failed to think critically about how to best address campus sexual misconduct, but even so, circumstances had changed, and the time had come to reevaluate the policy. Karvonides, along with Faust and the rest of Central Administration would have to determine whether the deficiencies that the HLS faculty brought forward truly constituted deficiencies, and if so, whether it would be better to amend the university-wide policy or grant the HLS Faculty's request to allow them to formulate their own alternative policy. In the event of the latter, how much of the original policy could be kept? How much of it would prove worth keeping? The team began their newest "challenging project."

Does the policy unfairly violate the rights of the accused?

Theoretically, if the University's policy did, in fact violate the accused's right to due process, it would be well within the Law School's right to reject or at least alter the policy and remain compliant with Title IX. Michelle Anderson, Dean of CUNY School of Law notes in a recent Yale Law Journal article that the 2011 Dear Colleague Letter states that the rights a university grants its respondents must be consistent "with any federally guaranteed rights involved in a complainant proceeding," and that states and universities are permitted to grant additional rights to respondents (Anderson 2016). However, the same guidance document stipulates that a truly fair procedure ensures the due process of both the respondent *and* the defendant, and that any attempts to strengthen the due process afforded to the respondent should never come at the expense of "the protections provided by Title IX to the complainant" (Office of Civil Rights 2011).

But did the University's policy fail to provide respondents with due process consistent with their existing constitutional rights? Know Your IX co-founder Alexandra Brodsky notes in an *American Prospect* article that according to various Supreme Court decisions, the only part of the due process described in the US Constitution that has been determined to apply to respondents involved in disciplinary proceedings within academic settings is the 5th amendment right to receive notice that a complainant has alleged an offense (Brodsky 2015). In fact, Brodsky continues, because Title IX comes with guidance detailing how a university can conduct an investigation based in the law's guiding principle of equality, students accused of sexual harassment automatically enjoy more procedural protections than students accused of any other offense handled in the academic conduct system (Brodsky 2015).

Considering that the University's policy did provide respondents with the right to be notified, and that the policy was developed by a Title IX office well-versed in the equality principles of the legislation, it is likely that the policy provided respondents with at least if not more than the minimum amount of procedural protections required by federal law within an academic context. However, Title IX guidance would allow the University, as the Law School professors demanded in their op-ed, to promulgate a sexual harassment policy with any number of additional protections for the accused so long as they did not upset the goal of equality between complainant and respondent or somehow "restrict or delay" the rights of the complainant (Office of Civil Rights 2011). The next step of evaluating the law professors' concerns is to examine the rights of the accused they claim are lacking from the University's policy – the accuser's access to an attorney, the accuser's right to a hearing, and in some cases a cross-examination of the complainant, and the accused's right to appeal the disciplinary decision – and whether they compromise the equality of the process or the rights of the complainant.

Nancy Gertner, one of the HLS faculty members who signed the *Boston Globe* op-ed,

argues in a Yale Law Journal article that adding these additional protections for respondents is consistent with Title IX's goal of equality in that it corrects for the fact that many sexual harassment policies, including Harvard University's new policy, center on increased protections for the complainant without any equivalent protections for the respondent (Gertner 2016). Gertner calls these unmatched protections for the complainant an effect of "excessive zeal" from the policy's creators and suggests that they result in a system inherently biased against respondents (Gertner 2016).

Michelle Anderson, in contrast, argues that this type of approach – adding additional protections for students accused of sexual misconduct but not for students accused of plagiarism or nonsexual assault – constitutes a dangerous type of "rape exceptionalism," a phenomenon that, at least in the realm of criminal law, results in sexual violence charges being subjected to a much higher standard of proof than other offenses (Anderson 2016). Gertner responds to this assertion by claiming that the OCR, having developed specific guidelines for sexual misconduct adjudication ensuring more protections for complainants in sexual harassment cases than for complainants in other student conduct disputes, holds the responsibility for introducing exceptionalism into the adjudication process, and that a truly just policy would have to provide nothing short of an equal exceptionalism for the respondent's benefit (Gertner 2016).

Georgetown Law professor Nancy Cantalupo, in her own Yale Law Journal article suggests that what Gertner perceives as excessive protections given to the complainant do not warrant correction via increased rights for the respondent, but are themselves only a corrective measure meant to offset and provide an alternative to a criminal justice system that does nothing but deny rights to victims of sexual violence (Cantalupo 2016). According to Cantalupo, efforts to expand the rights of respondents in academic settings put university systems at risk of importing the worst aspects of the criminal justice system, the aspects that consistently discourage victims of sexual violence from using the criminal justice system, into Title IX law (Cantalupo 2016).

Alexandra Brodsky claims to be in agreement with Gertner in the sense that she believes respondents in academic conduct processes should have a more robust interpretation of constitutional due process at their disposal, and in the sense that she supports the right of respondents in sexual misconduct cases to access an attorney, but draws issue with Gertner and the twenty-seven other signatories of the op-ed's call for adversarial hearings (Brodsky 2015). Brodsky's argument here echoes that of both Anderson and Cantalupo; in *American Prospect*, Brodsky points out that the discomfort many people feel immediately after confronting the idea of a sexual misconduct adjudication that involves significant deviations from criminal procedure (for instance use of the preponderance of evidence standard or the absence of cross-examination) paired with an absence of similar discomfort when similar procedures are used to adjudicate other offenses like plagiarism or theft "speaks to the monopoly that the criminal law holds in Americans' understanding of responses to gender-based violence" (Brodsky 2015). Brodsky suggests that this unshakeable yet statistically unfounded association between sexual violence and criminal law can make it harder for academics and administrators to accept systems too distinct from the criminal justice system, even if they are based on equality (Brodsky 2015).

Furthermore, Brodsky argues that a university cannot possibly add the right of the accused to face or cross-examine their accuser without restricting the accuser's rights because Title IX's equality principle mandates that a university must take the respondent's physical and psychological wellbeing into account when developing adjudication procedures (Brodsky 2015). Because direct contact with the respondent or their attorney carries the potential of retraumatizing the complainant, such confrontations during the hearing process might "contribute to the kind of

hostile environment that these proceedings are supposed to remediate” (Brodsky 2015). Brodsky concludes her article by pointing out correctly that the Clery Act, as amended by the Violence Against Women Act reauthorized in 2013, mandates that universities must make accommodations for students who do not wish to “live or study or even speak with their assailants,” and that any attempt to enact a cross-examination in one of these cases would directly violate federal law (Brodsky 2015).

Is a centralized Title IX office inherently biased against respondents?

One of the major criticisms that the HLS faculty levied against the University’s sexual harassment policy was its focus on centralization. The policy’s proponents argued that centralizing the entire investigation and adjudication process allowed for a consistency between schools that would ultimately benefit students. For example, when the *Boston Globe* reached out to expert campus safety consultant S. Daniel Carter for comment on the University’s new policy, Carter specifically praised the centralization aspect, saying, “Consistency is good. It helps guarantee quality control and that everyone is being treated fairly and knows where to go to report” (Rocheleleau 2014). Despite these perceived benefits of the creation of a central office, the policy’s critics claimed that centralization under the University’s Office of Sexual and Gender-Based Dispute Resolution (ODR) rendered the process biased against the accused party (Bartholet et al. 2014).

In an interview with two *Crimson* journalists just days after the *Globe* published the twenty-eight professors’ op-ed, Karvonides denied these charges, claiming that she strove to “approach the work as neutral,” and that she was working to hire ODR personnel who were similarly committed to impartiality (Lee and Patel 2014).

Crimson reporters Steven Lee and Dev Patel also interviewed law professor Janet Halley, who argued emphatically that any system in which a single office must produce charges, investigate allegations, adjudicate claims, and hear appeals (roles that are separated within the legal system outside the world of academic conduct), is inherently unable to attain impartiality, stating:

Karvonides is under immense pressure to increase the number of complaints filed and the number of people held responsible. This is structural. She can be and is a professional and an expert, but she can’t undo that structure. (Lee and Patel 2014)

Karvonides responded to these assertions by dismissing them, saying, “in my mind, we fail in our work under Title IX if we are viewed as being biased or even advocates, or in any way that this isn’t a fair process. If we’re going to make progress, people need to understand, to have trust and have confidence that this is an unbiased process” (Lee and Patel 2014).

Epilogue

Ultimately, Karvonides, Faust, and the rest of Harvard University Central Administration decided to allow the Law School to reject the new sexual harassment policy on the condition that it develop a new policy of its own that complied with Title IX. In November 2014, HLS Dean Martha Minow appointed professor John Coates as chair of the committee to develop HLS-specific procedures for investigating and adjudicating sexual harassment claims (Delwiche and Duehren 2015). Over two months, the committee gathered input from both students and faculty from the Law School, as well as university administrators, including Karvonides herself (Delwiche and

Duehren 2015). None of the twenty-eight professors who had signed the letter to the *Boston Globe* sat on the committee (Delwiche and Duehren 2015).

On December 18th, the HLS faculty voted to implement the resulting new set of procedures as soon as the OCR could approve them (Delwiche and Duehren 2015). This HLS-specific policy, which is still in place, allows students accused of sexual misconduct to hire an attorney at the Law School's expense (Delwiche and Duehren 2015). In addition to being able to access legal counsel, the accused has the same right as the respondent to request an appeal from the HLS Administrative Board (Delwiche and Duehren 2015). Either party may request the chance to face their counterpart in a hearing, but the adjudicatory panel may decide what form this hearing takes, for example, whether the respondent's advisor may speak directly to the complainant or if it would better serve both parties for the cross-examination to take place on a TV monitor (Delwiche and Duehren 2015). Instead of tasking the same office with investigating and adjudicating complaints, HLS mandates that its trained investigators send their reports to an independent adjudicatory panel made up of people unaffiliated with Harvard (Delwiche and Duehren 2015). Although the HLS policy bypasses the University's ODR entirely and institutes a set of procedures very different from that of the University's, the policy retains the preponderance of evidence standard, as well as the University's new definition of sexual harassment under the unwelcomeness standard (Harvard Law School 2015). The retention of these standards, two of the most hotly contested components of the original policy, demonstrates the strong influence that Karvonides ultimately exercised over the HLS procedures; both represented core elements of the OCR's recommendations for making the adjudication process for sexual harassment complaints function more as a civil rights hearing than a criminal trial. Although the OCR's 2011 Dear Colleague Letter "strongly recommended" against allowing the kind of cross-examinations and direct encounters between complainant and respondent that the HLS faculty demanded in their *Boston Globe* op-ed, Minow and Karvonides crafted a sort of hybrid policy that included a space for these encounters situated behind a rigorous system of procedural protections meant to prevent the re-traumatization of the complainant (Office of Civil Rights, Department of Education 2011).

Through careful involvement in the HLS policy creation process, Karvonides helped to ease the committee into a masterful compromise; while the new set of procedures fulfilled the HLS faculty's desire for the independence and impartiality they perceived as lacking from the original university-wide policy, it did not go so far as to abandon its predecessor's values. Karvonides had sacrificed the institutional consistency she had sought for the university in exchange for the opportunity to ensure that complainants did not lose any protection in the process.

The Crimson reported that the OCR gave final feedback on the HLS-specific policy in August 2015, allowing HLS to implement its new procedures for the 2015-2016 school year (Duehren 2015). After responding to a few minor revisions, both Harvard University and Harvard Law School were able to establish sexual harassment policies compliant with Title IX.

References

- Anderson, Michelle J. 2016. "Campus Sexual Assault Adjudication and Resistance to Reform." *Yale Law Journal* (125) 7.
- Brodsky, Alexandra. 2015. "Fair Process, Not Criminal Process, is the Right Way to Address Campus Sexual Assault," *The American Prospect*, 21 January, 2015. <http://prospect.org/article/fair-process-not-criminal-process-right-way-address-campus-sexual-assault> (Accessed October 10, 2016).
- Cantalupo, Nancy C. 2016. "For the Title IX Civil Rights Movement: Congratulations and Cautions." *Yale Law Journal* (125).
- Clarida, Matthew Q. 2014. "Law School Profs Condemn New Sexual Harassment Policy," *The Harvard Crimson*, 15 October, 2014). <http://www.thecrimson.com/article/2014/10/15/law-profs-criticize-new-policy/> (Accessed October 24, 2016).
- Clarida, Matthew Q and Conway, Madeline R. 2014. "Univ. Announces New Sexual Assault Policy Including Central Office, 'Preponderance of the Evidence' Standard," *The Harvard Crimson*, 3 July, 2014. <http://www.thecrimson.com/article/2014/7/3/new-sexual-assault-policies/> (Accessed October 24, 2016).
- Delwiche, Theodore, Delwiche, Noah, and Duehren, Andrew 2014. "Law School found in Violation of Title IX After Years-Long Probe," *The Harvard Crimson*, 30 December, 2014. <http://www.thecrimson.com/article/2014/12/30/law-school-violation-title-ix/> (Accessed October 24, 2016).
- Delwiche, Thloedore, and Andrew Duehren. 2015. "New Law School Sexual Harassment Procedures Break from University Framework," *The Harvard Crimson*, 3 January, 2015. <http://www.thecrimson.com/article/2015/1/3/pending-procedures-law-school-title-ix/> (Accessed October 24, 2016).
- Denby, Natalie. 2016. "The Sexual Assault Epidemic Is Real." *Huffington Post* (blog). August 25, 2016. https://www.huffingtonpost.com/entry/yes-the-sexual-assault-epidemic-is-real_us_57be7905e4b06384eb3e4ae0. (Accessed November 17, 2017).
- Duehren, Andrew. 2015a. "After Federal Feedback, Law School Implements New Title IX Standards," *The Harvard Crimson*, 6 August, 2015. <http://www.thecrimson.com/article/2015/8/6/law-school-implement-titleix/> (Accessed October 24, 2016).
- . 2015b. "In Memo, Law Profs Pushed for Title IX Procedural Changes," *The Harvard Crimson*, 13 February, 2015. <http://www.thecrimson.com/article/2015/2/13/law-school-professors-memo/> (Accessed October 24, 2016).
- Ferreol, Michelle Denise L., and Lucky, Jared T. 2013a. "Harvard Hires Title IX Coordinator," *The Harvard Crimson*, 21 February, 2013. <http://www.thecrimson.com/article/2013/2/21/title-ix-coordinator-policy/> (Accessed October 24, 2016).

- . 2013b. "VAWA Renewal Could Spell Change," *The Harvard Crimson*, 22 February, 2013. http://www.thecrimson.com/article/2013/2/22/vawa_evidence-standard-educational/ (Accessed October 24, 2016).
- Gertner, Nancy. 2016. "Complicated Process." *Yale Law Journal*. <http://www.yalelawjournal.org/forum/complicated-process> (Accessed October 10, 2016).
- Harvard Gazette "Q&A with Harvard's Title IX Officer." 2014. *The Harvard Gazette*. (2 July 2014). <https://news.harvard.edu/gazette/story/2014/07/qa-with-harvards-title-ix-officer/> (Accessed October 24, 2016).
- HLS Faculty. 2014. "Rethink Harvard's Sexual Harassment Policy - the Boston Globe." (15 October 2014). <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (Accessed October 10, 2016).
- Lee, Steven, and Dev Patel. 2014. "Karvonides Assures Neutrality After Law School Op-Ed," *The Harvard Crimson*, 21 October, 2014. http://www.thecrimson.com/article/2014/10/21/karvonides_neutrality-op-ed/ (Accessed October 24, 2016).
- Lucky, Jared T. 2013. "Mia Karvonides, Federal Civil Rights Attorney, Named Harvard's New Title IX Coordinator," *The Harvard Crimson*, 13 March, 2013. <http://www.thecrimson.com/article/2013/3/13/Karvonides-Title-IX-Coordinator/> (Accessed October 24, 2016).
- McKay, Caroline M. 2011. "Law School Challenged Under Title IX," *The Harvard Crimson*, 22 April, 2011. <http://www.thecrimson.com/article/2011/4/22/harvard-law-school-title-ix-wendy-murphy/> (Accessed October 24, 2016).
- Office of Civil Rights, US Department of Education. 2011. "Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali. Pg 1." <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (Accessed November 8, 2016).
- Robbins, Rebecca D. 2012. "Harvard's Sexual Assault Policy Under Pressure," *The Harvard Crimson*, 11 May, 2012. <http://www.thecrimson.com/article/2012/5/11/harvard-sexual-assault-policy/> (Accessed October 24, 2014).
- Rocheleau, Matt. 2014. "Harvard to Overhaul Way it Handles Sexual Assault Reports," *The Boston Globe*, 2 July, 2014. <https://www.bostonglobe.com/metro/2014/07/02/harvard-overhaul-way-handles-sexual-assault-reports/f9vQgdGeHTeg3vByODQ7jO/story.html> (Accessed October 10, 2016).
- Harvard Law School. 2015. "Title IX Information." <http://hls.harvard.edu/about/title-ix-information/> (Accessed November 8, 2016).

Appendix A: “Rethink Harvard’s Sexual Harassment Policy.”

Op-Ed Submitted by 28 HLS Faculty Members to the Boston Globe on October 15th, 2014

AS MEMBERS of the faculty of Harvard Law School, we write to voice our strong objections to the Sexual Harassment Policy and Procedures imposed by the central university administration and the Corporation on all parts of the university, including the law school.

We strongly endorse the importance of protecting our students from sexual misconduct and providing an educational environment free from the sexual and other harassment that can diminish educational opportunity. But we believe that this particular sexual harassment policy adopted by Harvard will do more harm than good.

Twenty-eight current and retired Harvard Law School professors are asking the university to abandon its new sexual misconduct policy and craft different guidelines for investigating allegations, asserting that the new rules violate the due process rights of the accused.

As teachers responsible for educating our students about due process of law, the substantive law governing discrimination and violence, appropriate administrative decision-making, and the rule of law generally, we find the new sexual harassment policy inconsistent with many of the most basic principles we teach. We also find the process by which this policy was decided and imposed on all parts of the university inconsistent with the finest traditions of Harvard University, of faculty governance, and of academic freedom.

Among our many concerns are the following:

Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation. Here our concerns include but are not limited to the following:

- The absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing.
- The lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, and the fact that that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial.
- The failure to ensure adequate representation for the accused, particularly for students unable to afford representation.

Harvard has inappropriately expanded the scope of forbidden conduct, including by:

- Adopting a definition of sexual harassment that goes significantly beyond Title IX and Title VII law.
- Adopting rules governing sexual conduct between students both of whom are impaired or incapacitated, rules which are starkly one-sided as between complainants and respondents, and entirely inadequate to address the complex issues in these unfortunate situations involving extreme use and abuse of alcohol and drugs by our students.

Harvard has pursued a process in arriving at its new sexual harassment policy which violates its own finest traditions of academic freedom and faculty governance, including by the following:

- Harvard apparently decided simply to defer to the demands of certain federal administrative officials, rather than exercise independent judgment about the kind of sexual harassment policy that would be consistent with law and with the needs of our students and the larger university community.

- Harvard failed to engage a broad group of faculty from its different schools, including the law school, in the development of the new sexual harassment policy. And Harvard imposed its new sexual harassment policy on all the schools by fiat without any adequate opportunity for consultation by the relevant faculties.

- Harvard undermined and effectively destroyed the individual schools' traditional authority to decide discipline for their own students. The sexual harassment policy's provision purporting to leave the schools with decision-making authority over discipline is negated by the university's insistence that its Title IX compliance office's report be totally binding with respect to fact findings and violation decisions.

We call on the university to withdraw this sexual harassment policy and begin the challenging project of carefully thinking through what substantive and procedural rules would best balance the complex issues involved in addressing sexual conduct and misconduct in our community.

The goal must not be simply to go as far as possible in the direction of preventing anything that some might characterize as sexual harassment. The goal must instead be to fully address sexual harassment while at the same time protecting students against unfair and inappropriate discipline, honoring individual relationship autonomy, and maintaining the values of academic freedom. The law that the Supreme Court and lower federal courts have developed under Title IX and Title VII attempts to balance all these important interests. The university's sexual harassment policy departs dramatically from these legal principles, jettisoning balance and fairness in the rush to appease certain federal administrative officials.

We recognize that large amounts of federal funding may ultimately be at stake. But Harvard University is positioned as well as any academic institution in the country to stand up for principle in the face of funding threats. The issues at stake are vitally important to our students, faculties, and entire community.

Elizabeth Bartholet

Scott Brewer

Robert Clark

Alan Dershowitz, Emeritus

Christine Desan

Charles Donahue

Einer Elhauge

Allen Ferrell

Martha Field

Jesse Fried

Nancy Gertner

Janet Halley

Bruce Hay

Philip Heymann

Volume 2, Issue No. 1.

David Kennedy

Duncan Kennedy

Robert Mnookin

Charles Nesson

Charles Ogletree

Richard Parker

Mark Ramseyer

David Rosenberg

Lewis Sargentich

David Shapiro, Emeritus

Henry Steiner, Emeritus

Jeannie Suk

Lucie White

David Wilkins