



Dozens of Harvard Law Professors Publicly Criticize The University's Revised Sexual Harassment Policy

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It may seem surprising – but even one of the most prestigious universities in the country got mixed in the U.S. Department of Education's recent enforcement efforts to combat campus sexual misconduct. To make matters worse, in addition to receiving scrutiny from the U.S. Department of Education, complainants, and accused students, Harvard, in a somewhat unconventional case, is now facing criticism from twenty eight professors regarding its handling of sexual misconduct claims.

By way of brief background, in May 2014, the U.S. Department of Education named Harvard as one of fifty-five institutions then under investigation for allegedly mishandling sexual misconduct complaints in violation of Title IX. As a result, Harvard, like many institutions across the country, quickly revised its sexual harassment policy (the "Policy") and investigative procedures. The new Policy expressly defines what type of conduct constitutes sexual harassment, discusses how intoxication and/or impairment may affect one's ability consent to sexual activity, and establishes a preponderance of the evidence standard to establish the "guilt or innocence" of the accused. Harvard also recently established The Office for Sexual and Gender-Based Dispute Resolution, which is charged with the responsibility of investigating sexual and gender-based misconduct complaints. In the eyes of many, Harvard should arguably be applauded for its valiant effort, through revision of its Policy and procedures, to further ensure a safe and respectful campus community.

Upon closer review, however, the new Policy has received stark criticism from a group a twenty-eight (28) Harvard Law School professors, who, on October 15, 2014, published an [open letter](#) (the "Open Letter") in the *Boston Globe*. Among their objections, the professors believe the new Policy:

- Fails to guarantee adequate representation for the accused;
- Fails to provide the accused with "any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing;"
- Establishes rules governing sexual relations between incapacitated students that are "starkly one-sided as between complainants and respondents, and entirely inadequate to address the complex issues involved in these unfortunate situations involving extreme use and abuse of alcohol and drugs by our students;"
- Establishes a "structurally impartial" investigative process, as the "the lodging of the functions of investigation, prosecution, fact-finding, and appellate review" are all conducted in one office, namely, the Office for Sexual and Gender-Based Dispute Resolution;

- Violates “many of the most basic principles we teach,” among which are “due process of law, the substantive law governing discrimination and violence, appropriate decision-making, and the rule of law generally.”

The professors’ Open Letter further alleges, “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.” “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.”

Not everyone at Harvard Yard believes the Policy will “do more harm than good.” A group of student activists titled *Our Harvard Can Do Better* believe that the professors’ concern for lack of due process protections demonstrates their “callous lack of understanding of sexual violence and its effect on survivors in educational institutions.” Harvard also issued a statement in response to the Open Letter, stating that the new Policy is a “neutral, fair and objective mechanism for investigating sexual misconduct cases involving students.” University spokesperson Jeff Neal further indicated, “The University appreciates that not every member of the community will agree with every aspect of the new approach. Some believe the policies and procedures go too far; others believe that they do not go far enough. This type of discussion is fundamental to any vibrant academic community.”

As a result, Harvard’s quagmire is indicative of the procedural nightmare affecting colleges and universities across the country. By rapidly changing these policies in response to heightened media and political attention, institutions have opened a collective Pandora’s Box from which all sides find ammunition to criticize the new policies.

As a result Title IX is being used by both victims and accused students in an effort to punish institutions for improperly responding to claims of sexual misconduct. In fact, “reverse Title IX” claims, where the accused files suit for failing to conduct a fair and equitable investigation, have become commonplace. Accused students have already filed claims against a number of institutions alleging that the “presumed guilty” mindset that many colleges and universities maintain has resulted in serious miscarriages of justice for accused students.

In drafting their sexual misconduct policies, institutions must not forget that the foundation of Title IX is built on equity, objectivity, and justice for both the alleged victim and the accused. This is no easy task. In light of the recent criticism and focus on the rights of accused students, institutions should review their policies to ensure that they protect the rights of complainants, while at the same time, protect accused students against inequitable and improper discipline as well.

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