

Appendix H

HARVARD LAW SCHOOL RESOLUTION AGREEMENT



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I**

5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

December 30, 2014

Martha C. Minow, Dean
Harvard Law School
Griswold 200
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138

Re: Complaint No. 01-11-2002
Harvard Law School

Dear Dean Minow:

This letter is to inform you that the U.S. Department of Education, Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint, against Harvard Law School (Law School), alleging discrimination based on sex. The Law School and Harvard University (University) have agreed to a Resolution Agreement (enclosed), which addresses compliance concerns identified by OCR during its investigation relating to the Law School. OCR will monitor the signed Resolution Agreement until the Law School and University have complied fully with its terms. OCR's investigation and findings are detailed below.¹

The Complainant in this matter alleged that the Law School's grievance policies and procedures fail to comply with Title IX by not providing for the prompt and equitable resolution of sexual harassment complaints, including sexual assault complaints, against students by: 1) requiring victims to choose between filing criminal charges and filing a Title IX complaint with the Law School; 2) allowing for "rehearings" in the Law School's Title IX grievance procedures that further delay the process; and 3) using a clear and convincing evidence standard of proof in these procedures.

OCR investigated this complaint under Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. Sections 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106 (Title IX), which prohibit discrimination on the basis of sex in education programs and activities that receive Federal financial assistance from the U.S. Department of Education. The Law School and University are subject to the requirements of Title IX because they receive Federal financial assistance from the Department. In its investigation, OCR examined the specific allegations in the complaint and more generally whether the Law School provided for prompt and equitable responses to complaints of sexual harassment and sexual assault, about which it knew

¹ OCR also has an open Title IX investigation of Harvard College and its response to sexual harassment, including sexual assault, of undergraduate students. The agreement relating to the Law School does not resolve the Harvard College complaint.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

or reasonably should have known, and whether any failure to respond appropriately allowed for the creation and continuation of a sexually hostile environment.

Background

According to the most recent *Harvard University Fact Book*, published annually on the website of the Office of the University's Provost, in 2012 the University enrolled just under 6,700 students in undergraduate programs (3,281 female students and 3,378 male students) and approximately 14,500 students in graduate and professional programs; of those, the Law School enrolled 1,956 students (1,040 male law students and 916 female law students). According to the U.S. Department of Education's Office of Post-Secondary Education Campus Security Clery Act data, there were 31 reports of forcible sex offenses at the University in 2012, 21 reports in 2011, and 31 reports in 2010.² Clery data is not available independently for the Law School. The Law School is located on the University's campus in Cambridge, Massachusetts.

Summary of Investigation

In its investigation, OCR reviewed information and documentation provided by the University, including the Law School's policies and procedures for addressing sexual harassment complaints, including complaints of sexual violence and sexual assault. OCR interviewed University and Law School administrators and staff involved in responding to complaints of sexual harassment, including the Law School's Associate Dean and Dean of Students who was identified as one of the Law School officials responsible for responding to student complaints of sexual harassment. OCR also interviewed the Director of the University's Office of Sexual Assault Prevention and Response, who informed OCR that the Office of Sexual Assault Prevention and Response functions as a victim advocate, available 24 hours for support and information. The office supports victims, including connecting them with the grievance process and/or with police and is also responsible for sexual assault educational awareness on the University campus, which includes the Law School.

OCR also reviewed documentation and records regarding sexual assault complaints filed with the Law School dating back to 2005. OCR's investigation revealed that there had been two sexual assault cases filed with the Law School during the time period reviewed. OCR interviewed one of the two Law School student-complainants; the other complainant did not respond to OCR's attempts to communicate through the University.

OCR has concluded that the Law School has complied with Title IX regulations regarding notice of non-discrimination and the provision of notice and contact information for the University's Title IX Coordinator and other individuals designated as Title IX Coordinators at the Law School. However, OCR has concluded that the Law School failed to comply with the Title IX requirements for the prompt and equitable response to complaints of sexual harassment and sexual assault. The previous and current sexual harassment policies and procedures used by the Law School do not, as written and as applied in the two sexual assault cases examined by OCR, comply with Title IX's requirements. In addition, the Law School has not ensured that

² <http://ope.ed.gov/security/GetOneInstitutionData.aspx>

individuals involved in implementing its sexual harassment policies and procedures have received training adequate to meet the requirements of OCR policy and guidance. With respect to the specific allegations raised in this complaint, OCR did not find that the Law School had either a policy or practice of requiring students to choose between filing a criminal complaint or a Title IX criminal charge or that the allowance of a “rehearing” resulted in an undue delay in the one instance where a “rehearing” process was allowed. OCR also found that the Law School improperly used a “clear and convincing” evidence standard of proof in its Title IX grievance procedures, in violation of Title IX.

A summary of these findings as well as analysis of the Law School’s compliance with the requirements of Title IX is discussed below.

Legal Authority

The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides that no person 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 operated by a recipient. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it denies or limits a student’s ability to participate in or benefit from the recipient’s program.³

In determining whether a student has been subjected to a hostile environment, OCR examines all of the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student); the setting and context in which the harassment occurred; whether other incidents have occurred at the college or university; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. For example, a single instance of rape is sufficiently severe to create a hostile environment. Title IX also protects all students at recipient institutions from sexual harassment, including male and female students.

If a recipient knows or reasonably should have known about sexual harassment that creates a hostile environment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that discriminatory harassment

³ The applicable legal standards described herein are more fully discussed in OCR’s 2011 Dear Colleague letter on Sexual Violence, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (April 4, 2011); for further clarification on this topic, see “Questions and Answers on Title IX and Sexual Violence,” at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (April 29, 2014). See also OCR’s 2010 Dear Colleague letter on Harassment and Bullying, which is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (October 26, 2010), and OCR’s Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (January 19, 2001).

has occurred, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and, where appropriate, remedy its effects, and prevent the harassment from recurring. These duties are a recipient's responsibility regardless of whether a student has complained, asked the recipient to take action, or identified the harassment as a form of discrimination. Additionally, under Title IX, a recipient must process all complaints of sexual assault/violence, regardless of where the conduct occurred, at a minimum to the extent necessary to determine whether the conduct occurred in the context of an education program or activity of the recipient or had continuing effects on campus or in an off-campus education program or activity of the recipient. Further, once a school is on notice of off-campus sexual assault/violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity of the recipient that are creating or contributing to a hostile environment.

The Title IX regulation, at 34 C.F.R. § 106.8(b), requires recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would be prohibited by Title IX, including sex discrimination, sexual harassment, and sexual assault/violence. Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints, including sexual assault/violence complaints. A recipient may use student disciplinary or other separate procedures for these complaints; however, a recipient's grievance procedures for handling discrimination complaints must comply with the prompt and equitable requirements of Title IX. In evaluating whether a recipient's grievance procedures are prompt and equitable, OCR reviews all aspects of a recipient's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

1. notice to students and employees of the procedures, including where complaints may be filed;
2. application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties;
3. provision for adequate, reliable, and impartial investigation of complaints, including an opportunity for both the complainant and respondent to present witnesses and other evidence;
4. designated and reasonably prompt timeframes for major stages of the complaint process;
5. written notice to parties of the outcome of the complaint and any appeal; and
6. an assurance that the institution will take steps to prevent recurrence of any sex discrimination or harassment found to have occurred, and to correct its discriminatory effects on the complainant and others if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the recipient processes complaints, the recipient's Title IX grievance procedures should also include the following in writing:

1. a statement of the recipient's jurisdiction over Title IX complaints;
2. adequate definitions of sexual harassment (which includes sexual assault) and an explanation as to when such conduct creates a hostile environment;
3. reporting policies and protocols, including provisions for confidential reporting;
4. identification of the employee or employees responsible for evaluating requests for confidentiality;
5. notice that Title IX prohibits retaliation;
6. notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
7. notice of available interim measures that may be taken to protect the student in the educational setting;
8. the evidentiary standard that must be used (preponderance of the evidence) in resolving a complaint;
9. notice of potential remedies for students;
10. notice of potential sanctions against perpetrators; and
11. sources of counseling, advocacy and support.

The procedures for addressing and resolving complaints of sexual harassment should be written in language that is easily understood, should be easily located, and should be widely distributed.

For Title IX purposes, a recipient must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the recipient has taken to eliminate the hostile environment, if the recipient finds one to exist, and prevent recurrence. Sanctions imposed after investigation that directly relate to the complainant (and that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the recipient may take to eliminate the hostile environment include counseling and academic support services for the complainant and other affected students.

To ensure individuals can invoke these grievance procedures without fear of reprisal, Title IX also prohibits a recipient from retaliating against any individual "for the purpose of interfering with any right or privilege secured by [Title IX]," or because that individual "has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title IX. Prohibited retaliatory acts include intimidation, threats, coercion, or discrimination against any such individual. Recipients should also take steps to prevent any retaliation against a student who makes a complaint or any student who provides information

regarding the complaint and take strong responsive action when it occurs. When a recipient knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. At a minimum, under Title IX, a recipient must ensure that students and their parents, if appropriate, know how to report any subsequent problems; should follow up with complainants to determine whether any retaliation or new incidents of harassment have occurred; and should respond promptly and appropriately to address continuing or new problems.

Pending the outcome of an investigation, Title IX requires a recipient to take steps to ensure equal access to its education programs and activities and to protect the complainant from further harassment as necessary, including taking interim steps before the final outcome of the investigation. The recipient should undertake these steps promptly once it has notice of a sexual harassment allegation and should provide the complainant with periodic updates on the status of the investigation. It should notify the complainant of his or her options to avoid contact with the alleged perpetrator, and allow students to change academic or living, transportation, dining and working situations as appropriate. For instance, the recipient may prohibit the alleged perpetrator from having contact with the complainant pending the results of the investigation. The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. When taking steps to separate the complainant and the alleged perpetrator, a recipient should minimize the burden on the complainant and thus should not, as a matter of course, remove the complainant from classes or housing while allowing the alleged perpetrator to remain. If an accused student is found responsible and a recipient determines that he/she must be separated from the complainant, it must do so in a manner that minimizes the burden on the complainant. Recipients should also check with complainants to ensure that the interim measures are effective and, if ineffective, identify alternatives. In addition, recipients should ensure that complainants are aware of their Title IX rights, any available resources, such as advocacy, housing assistance, academic support, counseling, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement.

In addition, if there is an incident involving potential criminal conduct, a recipient must determine, consistent with state and local law, whether appropriate law enforcement or other authorities should be notified, bearing in mind that a recipient's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve a recipient of its independent Title IX obligation to investigate the conduct. A recipient therefore should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation; and if needed, must take immediate steps, as described above, to protect the complainant in the educational setting.

Grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints; however, it is improper for a complainant to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the recipient (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a faculty member or administrator). The complainant must be notified of the right to end the informal process at any time and begin the formal stage of the

complaint process. Moreover, in cases involving allegations of sexual assault/violence, mediation is not appropriate even on a voluntary basis.

Throughout the recipient's investigation and in any hearing, both parties must have equal opportunity to present relevant witnesses and other evidence and to otherwise participate in the process. Also, as noted above, in order for a recipient's grievance procedures to be consistent with the Title IX evidentiary standard, the recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence. If a recipient provides for appeal of the findings or remedy, it must do so for both parties. The recipient must maintain documentation of all proceedings.

In addition, a school must ensure that responsible employees with the authority to address sexual assault/violence know how to respond appropriately to reports of sexual assault/violence; that other responsible employees know that they are obligated to report sexual assault/violence to appropriate school officials; and that all other employees understand how to respond to reports of sexual assault/violence. A school should provide training to all employees likely to witness or receive reports of sexual assault/violence, including professors, university law enforcement unit employees, university administrators, university counselors, general counsel, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual assault/violence, including same-sex sexual assault/violence; the behaviors that may lead to and result in sexual assault/violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual assault/violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training also should explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, and it should provide the contact information for the school's Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students' options to request confidentiality, available confidential advocacy, counseling, or other support services; and students' rights to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

The Title IX implementing regulation, at 34 C.F.R. § 106.8(a), requires that a recipient designate at least one employee to coordinate its responsibilities to comply with and carry out its responsibilities under that law. The recipient is further required, by the Title IX implementing regulation at 34 C.F.R. § 106.9(a), to notify all students and employees of the name (or title), office address, and telephone number of the designated employee(s). In addition, OCR's 2011 Dear Colleague Letter on Sexual Violence states that recipients should notify all students and employees of the electronic mail (email) address of the Title IX Coordinator. The coordinator's responsibilities include overseeing the recipient's response to Title IX reports and complaints of sexual harassment, including sexual assault/violence, and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. The coordinator or designee should be available to meet with students, as needed. The Title IX coordinator should not have other job responsibilities that may create a conflict of interest. Also, as noted above, recipients

must ensure that employees designated to serve as Title IX coordinators have training or experience in handling sexual harassment, including sexual assault/violence complaints, and in the operation of the recipient's grievance procedures.

The regulation implementing Title IX, at 34 C.F.R. § 106.9, requires that recipients notify applicants for employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in its education programs or activities, and that it is required by Title IX not to discriminate in such a manner. The notice must also state that questions regarding Title IX may be referred to the recipient's Title IX coordinator or to OCR.

Facts and Analysis

The Law School's Title IX information, including its non-discrimination notice, contact information for the Law School's Title IX Coordinators as well as the University-wide Policy and the Law School's Interim Procedures, which are currently effective, are currently found at <http://hls.harvard.edu/about/title-ix-information>.

- Non-discrimination Notice

OCR determined that the Law School's Notice of Non-discrimination prohibits discrimination on the basis of sex "in admission to, access to, treatment in, or employment in its programs and activities." The Law School's Notice of Non-discrimination specifies that the Law School does not discriminate on the basis of sex in the educational program or activity which it operates; the notice apprises of protection against discrimination based on sex as assured by Title IX; it specifically states that the requirement not to discriminate in education program or activity extends to employment and to admission; and it refers inquiries concerning the application of the Law School's notice of non-discrimination to certain designated employees. The notice provides contact information for inquiries regarding its non-discrimination policy as well as contact information for OCR. OCR concludes that the University has complied with the Title IX regulation regarding notice of non-discrimination with respect to the Law School's notice.

OCR noted that the Law School's previous notice did not include email addresses for the individuals listed as Law School Title IX Coordinators, did not include information relating to the University's Title IX Coordinator and included an incorrect room number listed for OCR Boston. The Law School's current Notice of Non-discrimination corrects these omissions and room number error, and the Resolution Agreement provides that the Law School will continue to publish an appropriate notice of nondiscrimination.

- Title IX Coordinator

The University informed OCR that there are several Title IX Coordinators who respond to complaints of discrimination at the Law School depending on whether the complaint involves a student, faculty or staff member. Previously, the University's Compliance Officer for Equal Opportunity Employment and Affirmative Action served as Acting Title IX Coordinator at the University level. In March 2013, the University hired a new university-wide Title IX Coordinator.

In the Law School's former sexual harassment policy, "*Policy and Guidelines Related to Sexual Harassment*" (former Sexual Harassment Policy), the listed Title IX Coordinators included: the University's Title IX Coordinator, as well as the Law School's Associate Dean and Dean of Students, the Law School's Assistant Dean for Career Services and the Law School's Assistant Dean for Public Service. According to the University, the former Sexual Harassment Policy was included in the *Academic Handbook* emailed to students each fall and was also available in hard copy outside of the Dean of Students' office. The University also reported that the Dean of Students gave a presentation at student orientation that specifically mentioned the Law School's former Sexual Harassment Policy and made students aware that it could be found in the *Handbook*.

Contact information for the current Title IX Coordinators is available on the Law School's Title IX webpage. The listed individuals include: the University's Title IX Coordinator, as well as the Law School's Associate Dean and Dean of Students and the Law School's Associate Dean and Dean for Academic and Faculty Affairs. The Law School's Handbook of Academic Policies for the 2014-15 academic year also includes contact information for the University's Title IX Coordinator and Law School Title IX Coordinators.⁴

OCR has determined that the Law School has designated at least one person to coordinate its compliance with Title IX in accordance with 34 C.F.R. § 106.8(a) and 106.9(a) and has provided notice and contact information of the University's Title IX Coordinator and other individuals designated as Title IX Coordinators at the Law School, with the exception of the email addresses for these individuals.

As discussed above, OCR's 2011 Dear Colleague Letter also indicates that recipients must ensure that employees designated to serve as Title IX coordinators have adequate training regarding what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. In addition, OCR's Dear Colleague Letter explains that all persons involved in implementing grievance procedures (including Title IX coordinators, investigators, adjudicators) must have training or experience on handling complaints of sexual harassment and violence and on the recipient's grievance procedures.

During OCR's investigation, the Law School's former Sexual Harassment Policy, discussed in more detail below, stated that "[t]he Dean's Office, working with the Dean of Students and the Assistant Dean and Chief Human Resource Officer, as well as with appropriate University bodies, will endeavor to provide training on issues of harassment to all contact persons and decisionmakers named in these guidelines." OCR determined that the Associate Dean of the Law School and Dean of Student and the Assistant Dean and Chief Human Resource Officer, both of whom served as responders to Title IX student complaints for the Law School during the timeframe OCR investigated, had received some training on sexual harassment and/or assault. However, the evidence did not establish that the Administrative Board (Ad Board) members as well as other individuals involved in the decision-making process, including Law School faculty,

⁴ See <http://law.harvard.edu/academics/handbook/handbook-of-academic-policies-2014-159.26.142.pdf>. As noted, contact information for the Title IX Coordinators is also available on the Law School's Title IX webpage, at <http://hls.harvard.edu/about/title-ix-information/>.

received appropriate training. The Law School informed OCR that in 2010, the Law School's Ad Board members received copies of the Title IX and the 2001 Sexual Harassment guidance. For the reasons set forth above, OCR determined that the Law School failed to take adequate steps to ensure that all decision makers were adequately trained to meet the requirements of OCR policy and guidance. The Resolution Agreement requires training for Title IX coordinators and others, including faculty, staff, and students.

- Title IX Grievance Procedures

A. Law School's Former Sexual Harassment Policy and Procedures

Given the specific nature of the allegations, OCR's investigation focused on the Law School's grievance policy and procedures for addressing student-on-student complaints. OCR determined that, as of the time this complaint was filed, the Law School had adopted a policy and grievance procedure to address allegations of discrimination or harassment asserted on the basis of sex, namely its *Policy and Guidelines Related to Sexual Harassment* (former Sexual Harassment Policy).⁵ The Sexual Harassment Policy was available in the Law School's handbook, posted on its website and emailed to law students each fall. (Subsequently, separate University-wide Title IX Policy and Procedures were adopted in July 2014, followed by new Interim Law School Sexual Harassment Procedures, effective for the 2014-15 academic-year; and on December 18, 2014, the Law School adopted New Procedures incorporating the University-wide policy. Each of these is discussed in detail below.)

For complaints against students, the Policy designated the Law School's Ad Board as the decision-making body and provided that the "Ad Board Procedures" would be used to determine whether a violation had occurred. The Policy also identified additional procedures relating to confidentiality, notice, timetable, special investigators/hearing officers, written proceedings, hearings, burden of proof, and sanctions.⁶ OCR identified several concerns with these procedures, described below.

The additional procedures stated, "formal disciplinary sanctions shall be imposed only upon clear and convincing evidence." This higher standard of proof was inconsistent with the preponderance of the evidence standard required by Title IX for investigating allegations of sexual harassment or violence.

The additional procedures also stated that the "decisionmaker shall establish a timetable for each case to be followed insofar as reasonably possible to assure a prompt resolution of the formal complaint procedure." No specific timeframe was designated for resolution of formal complaints, as is required by Title IX.

Although the Ad Board Procedures, as written, afforded both complainants and respondents comparable rights during the hearing process with respect to the presentation of evidence and

⁵ The Law School had several policies that address claims of harassment including the Law School's *Policy and Guidelines Related to Sexual Harassment*; *Notice of Non-Discrimination* (as discussed above); and the *University Policy on Sexual Harassment*, which relates to employees.

⁶ The Policy stated that these additional procedures "shall also apply and in cases of conflict shall prevail."

witnesses, the Ad Board Procedures provided additional post-hearing rights to the respondent if the sanction imposed involved dismissal or expulsion. In such cases, the respondent-student was afforded the right to a supplementary hearing on the facts before a hearing officer appointed by the Dean. The Ad Board Procedures required the hearing officer to issue a written statement of findings of fact. The Ad Board Procedures provided that the Ad Board then “may modify its findings of fact in light of the findings of the hearing officer, and may modify the sanction previously voted.” The Ad Board Procedures further required the faculty to review all cases where the sanction imposed was dismissal or expulsion and provided that “[n]o student shall be expelled or dismissed except by the vote of at least two-thirds of the members of the faculty present and voting at the faculty meeting at which the recommendation of the Administrative Board is considered.” The Ad Board Procedures also provided that the faculty could substitute “its judgment for the Board’s on matters of policy including the severity and nature of the sanction imposed.” The Procedures stated, “The [Ad] Board’s findings of fact shall not be modified unless, on the basis of the whole record, including the findings, if any, of the hearing officer, the Board’s findings are not supported by substantial evidence.”

OCR’s 2011 Dear Colleague Letter states, “if a school provides for appeal of the findings or remedy, it must do so for both parties.” Here, the Ad Board Procedures, on their face and in practice (as discussed below), did not afford a similar opportunity to both parties to seek review of Ad Board decisions when the sanction imposed involved dismissal or expulsion. Respondents were afforded the right to dispute Ad Board findings and to call and examine witnesses during the supplemental hearing process, while the Procedures did not afford any rights to complainants during this post-hearing process even though it could result in modified findings of fact and/or sanctions.

OCR identified other concerns regarding the Law School’s former Sexual Harassment Policy. The policy addressed complaints of sexual harassment carried out by employees or other students, but did not address complaints against third parties, as required by Title IX and OCR policy and guidance. The former Sexual Harassment Policy did not require written notification of the outcome of the complaint; or contain an assurance that the Law School will take steps to end and prevent recurrence of harassment and to correct its discriminatory effects on the complainant and others, if appropriate, as required by Title IX and OCR policy and guidance.

The former Sexual Harassment Policy, on its face, did not contain provisions related to interim measures to protect the complainants pending the outcome of their complaints, although OCR noted that information provided by the Law School indicated that no contact orders and scheduling adjustments were implemented as interim measures.

OCR also determined that, contrary to the guidance detailed in OCR’s 2011 Dear Colleague Letter, the former Sexual Harassment Policy did not expressly state that mediation must not be used to resolve complaints of sexual assaults and violence complaints or that complainants in complaints of sexual assaults and violence should not be required to work out an issue directly with the accused.

Moreover, the former Sexual Harassment Policy did not mention police involvement or criminal investigations, contrary to OCR guidance recommending that grievance policies expressly state

that a complainant may proceed with a criminal investigation and a Title IX complaint simultaneously. OCR interviewed the Associate Dean and Dean of Students (Dean) regarding the specific complaint allegation that the Law School requires students to choose between criminal proceedings or filing a complaint with the Law School. The Dean acknowledged that in one sexual assault case she initially suggested to a complainant-student that she might want to wait until the criminal matter was resolved before filing a formal complaint with the Law School. The Dean informed OCR that after she spoke with University legal counsel, she then immediately followed up with the student to inform her that she could file a formal complaint at any time. During an interview with OCR, the student confirmed that immediately after telling her that she might want to wait until the criminal matter was resolved before filing a formal complaint with the Law School, the Dean notified her that she could file a complaint at any time, and the student indicated that the initial communication had not deterred her from filing a complaint.

Finally, the former Sexual Harassment Policy did not specifically define sexual assault and violence as a form of sexual harassment prohibited by Title IX; and did not specifically provide for written notification of the outcome of the complaint, though OCR found evidence indicating that it was the Law School's practice to provide written notification.

As part of its investigation, OCR also examined the Law School's handling of the two sexual assault complaints filed during the time period reviewed, both of which were processed under the Law School's Former Sexual Harassment Policy and Procedures. For both complaints examined by OCR, the Law School improperly used the "clear and convincing" standard of evidence, rather than the "preponderance of the evidence" standard. For one complainant, OCR found that the several months it took for a rehearing to be held did not result in an undue delay where the complainant requested an extension of the process. This was the only instance in which a rehearing was allowed. However, OCR also noted significant delays between the filing of one complaint, the Ad Board's decision (five months after the filing of the complaint), and the Hearing Officer's report affirming the Ad Board's decision (nine months after the complaint filing), as well as an even greater delay until the final resolution of the case when the Law School faculty dismissed the complaint (13 months after the initial filing) and provided written notice to the complainant of this outcome (16 months after the complaint filing). In addition, in that case, the complainant was excluded from participation in any review of the outcome beyond the Ad Board's decision. Specifically, the respondent-student benefited from a supplemental hearing with representation by counsel and was allowed to provide testimony; the supplemental hearing and faculty review resulted in the reversal of the decision to dismiss the student. As a result, the Law School failed to provide an equal opportunity for both parties to participate in the post-hearing review of the Ad Board's recommended sanctions for the accused student, and, as such, the complainant was not provided an adequate, reliable and impartial investigation of that sexual assault complaint. OCR concluded that the Law School failed to provide a prompt and equitable resolution of the two complaints. The evidence did not support, however, that the Law School's actions allowed either student to be subjected to a continuing sexually hostile environment, as interim measures were timely implemented to protect the complainants and prevent further harassment, and the respondent students in both cases were removed from the Law School campus from the time of the Ad Board decisions through the remainder of the complaining students' enrollment at the Law School.

For the reasons detailed above, OCR concluded that the Law School's former Sexual Harassment Policy and applicable procedures, as written and as applied, failed to meet the requirements of Title IX.

B. July 2014 University-wide Policy and Procedures

During OCR's investigation, University counsel informed OCR that the University was in the process of conducting a comprehensive, university-wide review of policies and procedures for addressing sexual harassment, including sexual assault. The University informed OCR that it hired the new university-wide Title IX Coordinator. OCR also learned that the University had formed a Committee, composed of more than 40 administrators, to examine the University's approach to student sexual and gender-based harassment cases. The University also informed OCR that it had developed a university-wide Title IX website to serve as a one-stop resource for the University community: <http://diversity.harvard.edu/pages/title-ix-sexual-harassment>.

On April 16, 2014, the University's General Counsel provided OCR with the revised Title IX Policy and Procedures, "Sexual and Gender-Based Harassment Policy" ("July 2014 University-wide Title IX Policy") and "Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Policy" ("July 2014 University-wide Title IX Procedures") that the University planned to adopt. The General Counsel indicated that the policies and procedures "represent careful and extensive work by a committee from across the University" and have "broader reach" than the Law School as they encompass "all members of the Harvard community." He further stated, "The procedures represent a dramatic departure from Harvard's ordinary structures, which rely heavily on School-based activities, and instead create a University-wide approach to the investigation of sexual harassment complaints brought against a Harvard student."

The University adopted a Title IX Policy and Procedures in July 2014. The University emphasized that, because the Policy was adopted by the University, it applies to all Schools, University-wide, and no School can adopt a conflicting policy. The University also indicated that the Procedures would be applicable to all University students, including Law School students, effective at the start of the 2014-15 academic year. Meanwhile, as discussed below, the Law School examined the content and status of its former Sexual Harassment Policy in consideration of the July 2014 University-wide Title IX Policy and Procedures.

OCR reviewed the July 2014 University-wide Title IX Policy and Procedures and advised the University that, in a few respects, they failed to meet the Title IX requirements and recommendations outlined in OCR's April 4, 2011 Dear Colleague Letter on Sexual Violence and OCR's more recent April 2014 Questions and Answers on Title IX and Sexual Violence. Specifically, Section II of the University-wide Title IX Procedures, entitled "Requests for Informal Resolution," does not include language to make clear that a party has the right to end the informal process and bring a formal process at any time and that mediation is prohibited in sexual assault and sexual violence cases. Relatedly, it is not clear that students who report sexual harassment will not be required to resolve the problem directly with the alleged harasser, as OCR's Dear Colleague letter recommends. In Section III, regarding formal complaint

procedures, at H, “Coordination with Law Enforcement Authorities,” the University-wide Title IX Procedures do not clearly indicate that the complainant has a right to proceed simultaneously with a criminal investigation and a Title IX investigation, and that the University may defer its investigation for a limited time for fact gathering but then will promptly resume the investigation. In the University-wide Title IX Policy’s “Jurisdiction” Section, the language indicates that the policy applies to conduct that may have the effect of creating a hostile environment on campus, without making clear that the policy applies to conduct that may have the effect of contributing to and/or continuing a hostile environment.

In addition, the July 2014 University-wide Title IX Policy and Procedures do not include a statement ensuring that students know that the University is committed to responding to incidents of sexual harassment that the University knows or should know about, even if a complaint or report has not been filed. The July 2014 University-wide Title IX Policy and Procedures do not include explicit documentation protocols for the University’s responses to sexual harassment and sexual assault complaints.

Finally, as the University has indicated that the July 2014 University-wide Title IX Policy and Procedures are intended to be a departure from the University’s traditional School-based approach to University policymaking, it is critical for the University to make clear that no School or unit-based policy, procedure or process can reverse or alter a factual finding, remedy, or other decision made through the University’s Title IX Procedures. Also, to the extent that any School-based discipline process is part of the review process relating to the Title IX process, both parties must be provided an equal opportunity to participate in the review process.

Under the Resolution Agreement, the University is required to address each of the concerns identified relating to the July 2014 University-wide Title IX Policy and Procedures in supplemental guidance that will be posted and provided with the University-wide Title IX Policy and Procedures. Specifically, the guidance will include:

1. Language clarifying that the University has an obligation to address incidents of sexual harassment that it knows or should know about, even when a complaint or report is not filed, and to respond to all complaints, reports and other incidents of sexual harassment it knows or should know about;
2. Language clarifying that no School or unit-based policy, procedure or process can reverse or alter a factual finding, remedy, or other decision made through the University’s Title IX Policy and Procedures;
3. Language clarifying that the University has an obligation to consider the effects of off-campus conduct when evaluating whether there is a hostile environment in a University program or activity;
4. A statement that complainants have a right to proceed simultaneously with a criminal investigation and a Title IX investigation, and that the University may defer its investigation for a limited time for fact gathering and then will promptly resume its investigation;
5. Provisions for maintenance of detailed records of each informal and formal complaint, including individuals involved, investigative steps taken, documentation received,

- individuals interviewed, decisions reached, and reason(s) for decision(s) reached;
6. A statement that mediation will not be used in sexual assault and sexual violence cases; and students who report sexual harassment will not be required to resolve the problem directly with the alleged harasser; and
 7. To the extent that the discipline process is part of the Title IX review and/or appeal process, assurance that both parties are to be provided an equal opportunity to participate in the process.

C. September 2014 Law School's Interim Procedures

As noted, the July 2014 University-wide Title IX Policy and Procedures went into effect at the start of the 2014-15 academic year. In September 2014, the Law School adopted the "Interim Harvard Law School Sexual Harassment Policy and Procedures" ("September 2014 Interim Procedures") in place of its former Sexual Harassment Policy.⁷ The Law School indicated that the Interim Procedures were adopted "on an interim basis to align them with the new University policy" and would be subject to change upon faculty review. The September 2014 Interim Procedures include procedures for disciplinary proceedings against students who violate the University-wide Title IX Policy. The Law School website states that "separate University procedures now govern the investigation and determination of whether a violation of the University policy has occurred. Because in cases of alleged sexual harassment by a student, the Law School's disciplinary procedures incorporate the University's investigative procedures . . ."⁸

OCR reviewed the September 2014 Interim Procedures and noted that a majority of the Title IX concerns OCR identified with respect to the Law School's former Sexual Harassment Policy procedures have been addressed. For example, the Interim Procedures no longer use the "clear and convincing" evidentiary standard for investigating sexual harassment allegations and instead, specifically provide for use of "preponderance of evidence standard," which is consistent with Title IX and OCR policy. The Interim Procedures also provide both parties an opportunity to participate in decisions regarding possible sanctions. However, OCR also identified Title IX deficiencies in the September 2014 Interim Procedures, and the Resolution Agreement requires that these deficiencies be corrected.

OCR found that the September 2014 Interim Procedures lack specific timeframes for determining whether disciplinary sanctions will be imposed after a Title IX violation has been found and the matter has been referred to the Law School for disciplinary proceedings. As noted in Section F-8 of OCR's "Questions and Answers on Title IX and Sexual Violence," OCR's expectation is that the 60-day timeframe for investigations should include the process of imposing sanctions against perpetrators and providing remedies for the complainant and school community. It does not appear that the Law School's Interim Procedures, when combined with the July 2014 University-wide procedures, will allow for meeting that standard. Also, the Interim Procedures do not expressly provide for notification of the outcome of the disciplinary proceedings to both parties, including any disciplinary sanctions that directly relate to the complaining party.

⁷ <http://hls.harvard.edu/content/uploads/2014/09/hls-titleix-interimpolicy1.pdf>

⁸ <http://hls.harvard.edu/about/title-ix-information/>

In addition, because the Law School's September 2014 Interim Procedures state that the July 2014 University-wide Title IX Policy and Procedures adopted in July are fully incorporated in the Law School's Interim Procedures, the same concerns OCR identified with regard to the University-wide Title IX Policy and Procedures apply to the Law School's Interim Procedures. We note, however, that the Law School's Interim Procedures affirmatively state that the Law School proceedings "must accept as final and non-reviewable the findings of fact and conclusions as to the presence of a violation contained in the ... Final Report" from the University-wide process.⁹

The Law School's September 2014 Interim Procedures do not make clear that, with respect to sexual harassment, the Interim Procedures supersede all prior Law School-specific policies and guidelines relating to sexual harassment, including any Ad Board Procedures. In addition, because the Interim Procedures incorporate the July 2014 University-wide Title IX Policy and Procedures, but also include summaries of the procedures, separate commentary, complementary elements (such as the role of the Law School Title IX Coordinator in the process), and distinct procedures for disciplinary proceedings, OCR found that the interplay between the Law School's Interim Procedures and the University-wide Title IX Policy and Procedures may not be clear for a student seeking to file a complaint. Title IX requires clear notice to students and employees of procedures relating to sexual harassment and sexual assault, including where complaints may be filed, that is easily understood, easily located and widely distributed,

The Resolution Agreement includes specific requirements to address the above deficiencies and also requires that the September 2014 Interim Procedures include:

- A statement that, to the extent the Law School's Board undertakes any investigation or solicitation of additional information of any facts or circumstances raised to it, it will ensure such investigation is conducted in an adequate, reliable, and impartial manner, including providing the parties an equal opportunity to present witnesses and relevant evidence;
- A statement of assurance that the Law School will take steps to prevent recurrence of harassment and to correct its discriminatory effects on the complainant and others, if appropriate;
- A requirement that the Law School inform the students at regular intervals of the status of the proceeding; and
- The email addresses for each designated Title IX coordinator.

In summary, based on OCR's review of the Law School's Sexual Harassment policies and procedures, including the former Sexual Harassment Policy and September 2014 Interim Procedures, and its handling of the two sexual assault cases filed, OCR has concluded that the Law School's previous and current sexual harassment policies and procedures, as written and as applied to the two sexual assault complaints reviewed by OCR, have not provided for a prompt

⁹ The Law School's Interim Procedures do carve out "a narrow mechanism by which either party can bring a new fact or circumstance before the [Law School's Ad] Board," when "the fact or circumstance in question was raised with the Investigative Team, yet was not addressed, explicitly or implicitly, in the Final Report."

and equitable resolution of complaints of sexual assault and violence, as required by 34 C.F.R. §§ 106.8(b) and 106.31.

D. December 2014 Law School's New Procedures

After the Law School's September 2014 Interim Policy and Procedures became effective for the 2014-2015 academic year, on December 18, 2014, the Law School adopted – but has not implemented – new Title IX procedures, the *Harvard Law School Sexual Harassment Resources and Procedures for Students* (December 2014 New Procedures). The Law School's December 2014 New Procedures incorporate the July 2014 University-wide Title IX Policy, but unlike the Interim Procedures, the investigation and adjudication of Title IX grievances filed by Law School students will be addressed by the Law School through its New Procedures, rather than by the University. The New Procedures include a Law School Title IX Unit, consisting of a Title IX Coordinator and two Deputy Title IX Coordinators, which will oversee implementation of the University-wide Policy, including receiving reports of sexual and gender-based harassment, determining interim measures, and supervising investigation and resolution of complaints under the Law School's New Procedures.

Pending OCR's review and approval of the Law School's December 2014 New Procedures as part of the monitoring of the implementation of the Resolution Agreement, and until such time as the Law School fully implements the New Procedures, the Interim Policy and Procedures will continue to apply to sexual harassment and sexual assault complaints by law students. As with the Law School's September 2014 Interim Procedures, because the December 2014 New Procedures state that the University-wide Title IX Policy adopted in July 2014 is incorporated in the New Procedures, the same concerns OCR identified above with regard to the University-wide Policy apply to the Law School's New Procedures. Thus, the Resolution Agreement requires that the Law School's New Procedures be in compliance with Title IX and OCR policy and address the concerns identified for the University-wide Policy.

Conclusion

The Law School and the University have agreed to address OCR's concerns outlined above through the attached Resolution Agreement. In the Agreement, subject to OCR's review and approval, the University has agreed to revise the guidance it has created to supplement its July 2014 University-wide Policy and Procedures, to ensure compliance with the Title IX regulation and OCR policy. The Law School, likewise, has agreed to revise its sexual harassment policies and procedures to ensure consistency with Title IX and OCR policy and to make clear which policy and procedures (University-wide and/or Law School specific) apply in cases of sexual harassment and sexual assault involving law students.

Pursuant to the Agreement, the Law School's Title IX Coordinator will provide information to students and employees and oversee the Law School's response to complaints. The Law School has also agreed to take steps to ensure continued coordination among Title IX coordinators and student services in both the Law School and the University, including the Harvard University Police Department.

The Law School has also agreed to offer information sessions for students; and it has committed to provide training for administrators, faculty and staff, including staff specifically responsible for recognizing and reporting incidents of sex discrimination, and staff who will be involved in processing, investigating, resolving and/or reviewing Title IX complaints, which will include any faculty who participate in the adjudication or review of complaint decisions.

In addition, the Law School will conduct an annual assessment of the campus climate to ascertain the effectiveness of the steps taken to provide for a campus free of sexual harassment. As part of this assessment, the Law School will utilize an annual student survey or other instrument to obtain feedback regarding incidents of, attitudes toward, and effectiveness of responses to sexual assault and sexual violence. The Law School's Title IX coordinator will review the results of the assessment and work to address any systemic problems identified. Throughout the monitoring, the Law School will submit to OCR copies of all Title IX complaints and its responses.

This letter of finding sets forth OCR's determination in an individual OCR complaint and should not be construed to cover any other issue regarding the University's compliance. This letter is not a formal statement of OCR policy and should not be relied upon, cited or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

It is unlawful to harass, coerce, intimidate or discriminate against any individual who has filed a complaint, assisted in an OCR investigation, or participated in actions to secure protected rights.

If you have any questions, please contact Attorneys Anthony Cruthird or Jane López, at (617) 289-0037 and (617) 289-0083, respectively, or by email at Anthony.Cruthird@ed.gov or Jane.Lopez@ed.gov. You may also contact me directly at (617) 289-0111.

Sincerely,

/s/

Joel J. Berner
Regional Director

Enclosure

cc: Ellen Fels Berkman, University Attorney (w/enclosure)

Vita

Audrey Sherrill was born in Hickory, North Carolina to J.C. and Christine Sherrill and raised in Newton, North Carolina. She earned a Bachelor of Science degree in Sociology from Wingate College (now Wingate University) in 1990. She later earned a Master of Sports Science degree in Sport Coaching from the United States Sports Academy in 1992, a Master of Arts degree in Counseling-College Student Personnel from the University of North Carolina at Charlotte in 1994, and an Educational Specialist degree in Higher Education Administration from Appalachian State University in 2010. In August 2013, Audrey began working toward a Doctor of Education degree in Educational Leadership at Appalachian State University.

Audrey has worked in the North Carolina community college system for over 23 years and is now the Associate Vice President for Student Affairs at Gaston College. She previously worked in the counseling area at both Gaston College and Isothermal Community College. She was the recipient of Gaston College's Staff Excellence Award and the Altrusa Award for Excellence in 2008. She also received the National Institute for Staff and Organizational Development (NISOD) Excellence Award in 2008.

Audrey has presented on topics such as student conduct, classroom management, Title IX, and Student Affairs reorganization to faculty and staff at her current institution and at the North Carolina Community College System Conference. She hopes to continue her exploration of Spivak's concept of the *machine* within higher education in relation to Title IX and Student Affairs.