

Title IX and Other Sexual Misconduct Policy Working Group Report

June, 2021

INTRODUCTION

On May 6, 2020, the Department of Education (DOE) published [new regulations](#) implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations included over 2,000 pages of preamble in addition to 20+ pages of final regulation and required recipients of federal financial assistance, including elementary and secondary schools as well as post-secondary schools, to bring their Title IX policies and procedures into compliance by August 14, 2020. This meant that the University's work to bring its own policy and procedures into compliance would need to take place over a period of 70 business days when the majority of students were home for summer break, and the remainder of the campus was largely shut down due to the COVID-19 pandemic. Despite these constraints, the University made a concerted effort to engage as many community members as possible in the process of seeking input on key decision-points related to implementing the new Title IX regulations at Harvard. Given the importance of these decisions and the challenges of trying to achieve broad community consultation within such a short time frame, the University decided to implement the updated policies and procedures on an interim basis, and to establish a process by which they could be reviewed and, if necessary, revised. Consistent with the regulatory requirements, on August 14, 2020, Harvard University adopted the [Interim Title IX Sexual Harassment Policy](#) and the [Interim Other Sexual Misconduct Policy](#) (collectively, the "interim policies"), as well as accompanying interim procedures for each.

The current regulations were the result of a lengthy rulemaking process spearheaded under the Trump Administration by then Secretary of Education Betsy DeVos. With the election of President Biden, the rules may be headed for additional changes. On March 8, 2021, President Biden signed an [executive order](#), which included a review of agency action, requesting current Secretary of Education Miguel Cardona to re-examine the regulations published under DeVos, noting that Cardona should consider "suspending, revising, or rescinding" the new Title IX regulations. While changes to the regulations seem likely, they will require the DOE to go through the full notice and comment rulemaking process, meaning that they are unlikely to happen quickly. In the meantime, the University must remain in compliance with the rules as they currently stand.

Within this shifting context, the Title IX and Other Sexual Misconduct Policy Working Group was convened with the following charge:

The Title IX Sexual Harassment Policy and Other Sexual Misconduct Policy Working Group is asked to review these interim policies and make recommendations to the Steering Committee regarding the amendment (if any) and adoption of these policies by the University. The working group will aim to ensure that these policies are as effective and inclusive as possible while remaining compliant with federal regulations.

In view of the expectation that the new administration at the Department of Education will quickly begin a process to change the regulations enacted by the previous administration, the working group is asked to consider and make a recommendation on whether the interim policies should be revised at this time or kept largely the same in anticipation of a need for revisions

when new regulations are issued. In view of it having been expressed as an urgent priority by student groups, the working group is asked to consider whether or not an affirmative consent definition should be adopted as part of our policies. In examining this question, the committee shall consider whether any changes to our consent definition should be implemented for all faculty, students, and staff covered by the University policies, or for a subgroup of the population such as undergraduate or undergraduate and graduate students.

PROCESS

The Title IX and Other Sexual Misconduct Policy Working Group was chaired by Professor Donald Pfister, Asa Gray Professor of Systematic Botany, and included faculty, students, and staff from around the University. The group began meeting in February 2021 and met approximately every two weeks throughout the remainder of the Spring semester.

In collaboration with the two parallel working groups on bullying and discrimination, this working group organized a series of listening sessions that all members of the Harvard community were invited to attend. This invitation was extended via University-wide email and was amplified with more targeted outreach to encourage people to sign up for a session. Open listening sessions were held for the following groups: postdoctoral fellows, undergraduate students, professional and master's degree students, doctoral students, managerial staff, non-managerial staff, non-tenured faculty, and tenured faculty. In addition to these sessions, the three working groups attended several faculty meetings and joined a meeting of the Council of Deans of Students. Members from the Title IX and Other Sexual Misconduct Working Group also met with students from Our Harvard Can Do Better (OHADB), members of the Title IX and Gender Equity Education Staff and Student Advisory Committees, and the Title IX Network, which includes 50+ local Title IX Resource Coordinators as well as other University resources that work in this area (e.g., University Ombuds). Finally, the working groups invited the community to share written comments with an email address set up for this purpose: communitymisconductpolicies@harvard.edu. The input that the group heard from the community is interspersed throughout this report.

THE POLICIES AND PROCEDURES

As noted above, Harvard has adopted two interim policies (each with its own set of procedures) related to sexual misconduct. The first of these policies – Harvard University Interim Title IX Sexual Harassment Policy – was developed in response to the new Title IX regulations. Because Harvard is committed to continuing to address the same types of conduct that it addressed prior to the new regulations, it enacted a second policy – Harvard University Interim Other Sexual Misconduct Policy – which addresses misconduct that falls outside the jurisdiction of the Interim Title IX Sexual Harassment Policy.¹ The

¹ The Title IX regulations at 34 C.F.R. § 106.45(b)(3)(i) specifically provide, “If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in [the new regulations] even if proved, [. . . etc.], then the recipient must dismiss the formal complaint with regard to that conduct [. . . but] such a dismissal does not preclude action under another provision of the recipient’s code of conduct.” See [2020-10512.pdf \(govinfo.gov\)](#) at 30576; Preamble commentary in this regard can also be found at, e.g., pp. 30037-30038, 30090, 30091, 30093, 30095-30096, 30143, 30151, 30157, 30202, 30206, 30282, 30289, 30390, 30441, 30443, and 30457 (search term “106.45(b)(3)(i)”).

working group was charged with making recommendations for the amendment and/or adoption of both interim policies.

Because Title IX policies and procedures are highly regulated, certain requirements in the new regulations mandated specific changes. However, there were other areas in which the University had room to make decisions about what the implementation would look like. The working group reviewed each of these decision-points and focused on two key areas. First, as requested in the charge, the working group revisited the definition of consent, which is included in both interim policies. Second, the working group revisited the University's decision about who presides over the hearings that are now required as part of the Interim Title IX Sexual Harassment Procedures. Each of these issues is discussed in detail below.

Interim Title IX Sexual Harassment Policy and Procedures

Definition of Consent

As part of the new Title IX regulations that went into effect in August 2020, the University was required to include a definition of consent in its Title IX policy. While the University was required to adopt a definition of consent, the DOE did not “require recipients to adopt a particular definition of consent.” See, 34 C.F.R. Section 106.30 (a). Given the short timeframe for the changes to be made, the University adopted an ordinary dictionary definition of consent and decided to leave this as a question to be considered in greater depth by this working group. The current language around consent in the interim policies reads:

Conduct is unwelcome if a person did not consent to it. Consent is agreement, assent, approval, or permission given voluntarily and may be communicated verbally or by actions. That a person welcomes some sexual contact does not necessarily mean that person welcomes other sexual contact. Similarly, that a person willingly participates in conduct on one occasion does not necessarily mean that the same conduct is welcome on a subsequent occasion. In addition, when a person is incapacitated, meaning so impaired as to be incapable of giving consent, conduct of a sexual nature is deemed unwelcome, provided that the Respondent knew or reasonably should have known of the person's incapacity. The person may be incapacitated as a result of drugs or alcohol or for some other reason, such as sleep or unconsciousness. A Respondent's impairment at the time of the incident as a result of drugs or alcohol does not, however, diminish the Respondent's responsibility for sexual harassment under this Policy.

This working group was specifically charged with considering whether or not an affirmative consent definition should be adopted as part of the University's policies – either for all faculty, students, staff, and postdocs covered by the policies, or for a subgroup of the population such as undergraduate students or undergraduate and graduate students.

The working group began by examining the consent definitions used by other Ivy+ institutions. We found that most of these institutions use either the phrase “affirmative consent” or the term

“affirmative” within their consent definition.² However, a close look at the language revealed a great deal of variation, and we could not identify a standard affirmative consent definition. One commonality among the Ivy+ definitions is that they all state that consent can be communicated verbally or by actions, notably language already included in Harvard’s current consent definition. However, if we look at affirmative consent definitions beyond the Ivy+ institutions, we can find even more variation. For example, Antioch College was the first (and perhaps most famous) institution to adopt an affirmative consent definition, doing so in the early 1990s, and their Sexual Offense Prevention Policy continues to require a verbal expression of affirmative consent at “[e]ach new level of sexual activity[.]”³ In all of our discussions about affirmative consent we tried to keep these variations in mind – it was not sufficient to hear that someone was for or against an affirmative consent definition; we needed to dig deeper to understand what aspects of such a definition were important to them.

One of the concerns that came up a number of times in working group discussions was the importance of using evidence to guide our recommendations. In looking at the data from both the 2015 and 2019 administrations of the Association of American University (AAU) Campus Climate Survey, we did not see a decrease in the number of students indicating they had experienced nonconsensual sexual contact at those institutions that adopted affirmative consent definitions within their policies. In fact, the AAU survey data illustrate that regardless of consent definition, the prevalence of nonconsensual sexual contact remains consistent across participating institutions. The numbers of students who indicated they had experienced nonconsensual sexual contact by physical force or inability to consent increased across all participating institutions, from 11.7% in 2015 to 13% in 2019.⁴ Similarly, Harvard saw a slight increase from 8.4% in 2015 to 8.7% in 2019. Yale, which had an affirmative consent definition in place during both iterations of the survey, also saw increases in this area, from 11.1% in 2015 to 12.8% in 2019. It is unclear whether different types of policies have had a differing effect on the prevalence of nonconsensual sexual contact and further study would be necessary to draw any conclusions.

Participants in each of our listening sessions were asked to comment on Harvard’s definition of consent in the interim policies, and we heard a range of opinions. Some groups, particularly the open listening sessions, did not have much to say on the question of consent. When we met with students from HGSU-UAW and from the advocacy group OHADB, they spoke strongly in favor of adopting an affirmative definition of consent. In a follow-up letter to the working group, OHADB noted that adopting an affirmative consent definition would strengthen efforts to prevent sexual assault by “(1) providing a model for healthy sexual contact and (2) signaling strongly that the University cares about protecting survivors and holding perpetrators accountable.” Others at a non-student listening session expressed concern that affirmative consent definitions that require a verbal “yes” from participants at each new level of sexual activity may be out of step with how the vast majority of people obtain consent, noting that in such a scenario, it is possible to imagine that almost anyone could legitimately be accused of a policy violation, potentially increasing the risk of arbitrary and discriminatory enforcement.

² The Ivy+ group included the other seven Ivy League schools as well as UChicago, MIT, and Stanford. Institutions in New York, Connecticut, California, Colorado, and Illinois are required by state law to use affirmative consent definitions.

³ [Antioch College Sexual Offense Prevention Policy \(SOPP\) & Title IX](#)

⁴ These figures reflect the number of students who indicated in the anonymous survey whether they had experienced nonconsensual sexual contact and do not reflect whether students had reported these incidents to their institutions.

With most of its outreach discussions completed, the working group took a closer look at the consent definition used by Brown University. This definition was cited by both OHADB and the HGSU-UAW as an example of what both groups would like to see in Harvard's policies addressing sexual harassment and other sexual misconduct. A side-by-side comparison showed that the language used by Harvard's Interim Title IX Sexual Harassment Policy and Interim Other Sexual Misconduct Policy is already close in substance to what is written in the Brown University policy. We noted a few areas where we thought the Harvard definition of consent would benefit from plainer language similar to that in the Brown definition.

First, Harvard's policies continue to use the word "unwelcome" to describe conduct that a person has not consented to.⁵ The students from OHADB felt strongly that the concept of welcome or unwelcome behavior was difficult to clearly explain to undergraduate students, and that prevention education would be more effective if different language could be used. While staff from the Title IX Office and soon to be Office for Gender Equity shared that it presently uses expanded language as part of prevention education beyond the definition included within the policies, students felt that it would be important for the educational materials to match the language used in the policies.

Second, the Brown policy was seen to be more positive in its language, defining consent in terms of the presence of consent, while Harvard's policy focuses on unwelcome conduct being an absence of consent. While the working group agreed that a double negative technically adds up to a positive, the impact of a more positive framing could be significant.

Third, the working group found it helpful that the Brown definition went into more detail about what it means for consent to be given voluntarily, including a clear definition of coercion.

Finally, the working group discussed whether to include the word "affirmative" in the recommended definition of consent. The group considered a draft definition of consent as "mutual agreement, given voluntarily and may be communicated verbally or by actions" and discussed whether the word "affirmative" should be included in this sentence. Some members of the working group felt that students who have advocated for the adoption of an "affirmative consent" definition would be dissatisfied if the word affirmative was not part of the consent definition, regardless of whether the policy otherwise achieved the goals that they had articulated. Members also noted that the consent definition could be seen as an articulation of the values that we as a community would like to see enacted in romantic relationships. Others questioned, however, whether a definition within a policy was an appropriate or effective vehicle for changing culture, or whether putting in place a requirement in the hope that it will change behavior might have the unintended consequence of opening up large numbers of people to complaints or cross complaints for violating the policy. Additionally, some in the group noted that the word affirmative does not have one common-sense definition and would need to be clearly defined if it were to be used in a policy. Ultimately, the group concluded that the word "active" met the same goals as the word "affirmative," while having the advantage of having a clearer

⁵ The word "unwelcome" is used in the new regulations at 34 C.F.R. § 106.30(a) for defining the term "sexual harassment," in relevant part: "*Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) [. . .]."

common-sense definition. The working group recommends⁶ that the following language be used to define consent in the Interim Title IX Sexual Harassment Policy and the Interim Other Sexual Misconduct Policy:

“This Policy requires consent to engage in sexual activity with another person. Specifically, it is the responsibility of anyone participating in sexual activity to obtain the consent of the other participant(s). It is important not to make assumptions about consent if confusion arises during a sexual interaction.

Consent is active, mutual agreement given voluntarily and may be communicated verbally or by actions.

- Consent is not voluntary if it is obtained by coercion. Coercion is verbal and/or physical conduct that would reasonably place a person in fear of immediate harm, and that is employed to compel someone to engage in sexual activity. Coercion is more than an effort to persuade, entice, or attract another person to engage in sexual activity.
- Consent can be withdrawn at any time.
- A person may consent to some kinds of sexual activity and decline to consent to others.
- A person may consent to participate in sexual activity on one occasion and may choose not to do so on a later occasion.

In addition, when a person is incapacitated, that person is so impaired as to be incapable of giving consent. Engaging in sexual activity with a person whom the Respondent knew or reasonably should have known to be incapacitated constitutes sexual harassment under this Policy. The person may be incapacitated as a result of drugs or alcohol or for some other reason, such as sleep or unconsciousness. A Respondent’s impairment at the time of the incident as a result of drugs or alcohol does not, however, diminish the Respondent’s responsibility for sexual harassment under this Policy.

Whether consent is voluntary depends on the totality of the circumstances, as described in the “Evidence” section of the procedures for this Policy.”

[Alternative Proposed Consent Definition](#)

In a June, 2021 letter to the Department of Education’s Office for Civil Rights, three members of the Harvard Law School faculty, including one member of this working group, signed on to a letter to the Department of Education’s Office for Civil Rights. The letter was related to a public hearing on Title IX held by OCR in early June, 2021, following the adoption of the new Title IX regulations. Among the suggestions in the letter was that consent be defined as follows:

A person acts without consent when, in the context of all the circumstances, he or she should reasonably be aware of a substantial risk that the other person is not voluntarily and willingly engaging in the conduct at the time of the conduct

The working group had previously received a substantially similar suggestion directly from one of the letter’s signers, but ultimately chose to proceed with the language laid out in the previous section.

⁶ One member of the working group has expressed strong disagreement with this definition. The definition this member advocated for is described in the following section, titled “Alternative Proposed Consent Definition”

Hearing Panels

One of the major changes included in the 2020 DOE regulations was the requirement for colleges and universities to provide live hearings when adjudicating complaints of Title IX sexual harassment. Under Harvard's procedures, the hearing serves as the second part of a two-step process and is preceded by an investigation conducted by the Office for Dispute Resolution (ODR). While previously ODR was responsible for investigating allegations of sexual misconduct and determining whether or not the respondent is responsible for violating University policy, the new Title IX regulations require "live hearings with cross-examination" resulting in a determination regarding responsibility. Under this new process, ODR issues an investigative report with only recommended findings of fact, which is then passed on, along with all evidence "directly related" to the allegations at issue, for a hearing. The regulations require that during the live hearing, advisers for each party be allowed to engage in cross-examination of the parties to the complaint, the witnesses who were interviewed as part of the investigation process, and the investigator. Notably, decision-maker(s) presiding over the hearing must rule on the relevance of questions posed during cross examination in real time.

In implementing the regulations, the University needed to decide if the hearings would be comprised of a single decision-maker (i.e., hearing officer) or by a panel of decision-makers, and whether this one or more person(s) would be from inside Harvard or external to Harvard. The requirement that decision-makers be able to rule on the relevance of questions indicated a need for at least one decision-maker with a specific kind of legal expertise, including experience in a litigation-like setting. The University considered a range of options when developing the Interim Title IX Sexual Harassment Policy, and after soliciting input from various community members and student organizations, ultimately decided on a hearing panel comprised of one external attorney (unaffiliated with Harvard) member selected from a pre-vetted pool, which may include arbitrators and retired judges, and two internal members selected from a pool of Harvard faculty and administrators, who would be trained through Title IX as well as ODR on behalf of Title IX. This model is similar to the model that Harvard used for appeals under the pre-August 14, 2020 Title IX Policy and continues to use under the procedures for both of the interim policies.

The working group discussed the composition of the hearing panel at length and returned to this discussion over the course of multiple meetings. As part of our deliberations, we considered how peer institutions have defined their own hearing panels. In looking at a chart of hearing panel composition and decision-making processes at Ivy+ institutions, the most notable takeaway was that there is no convergence around a particular model. Some use fully internal panels, some use a mix of internal and external, and some define panel compositions that vary depending on whether the respondent is a student, a staff member, or a faculty member. Stanford University stands out in its use of a single, non-Stanford hearing officer to preside over the hearing and issue a determination regarding responsibility.

While we would have liked to also learn from Harvard's own experience, no cases have gone through a hearing under our Interim Title IX Sexual Harassment Policy. Based on comments received from the community by, e.g., Title IX and ODR, this is due at least in part to changes to the definition of sexual harassment set forth in the new Title IX regulations as well as changes to the jurisdictional requirements set forth in the new Title IX regulations, combined with the fact that far fewer people have been physically present on campus during the COVID-19 pandemic. Thus, since the new Title IX regulations

went into effect last August, the University has received only complaints that fall under our previous policy or under the Interim Other Sexual Misconduct Policy. Of note, DOE issued guidance clearly articulating that the DOE will not apply or enforce the new Title IX regulations to conduct that occurred before August 14, 2020. As a result, allegations of sexual harassment or other sexual misconduct involving Harvard community members that occurred prior to that date are subject to the University's Sexual and Gender-Based Harassment Policy in effect since September 2014, or previous similar policies. Consequently, at present, there is no experience yet from which we can draw.

The working group's discussions about the hearing panels were wide-ranging, and in the section below we attempt to summarize these discussions under a few themes.

1. Balancing the University's role in community governance in an increasingly legalized environment

The University has a longstanding tradition of self-governance, and some working group members noted that the Title IX process is meant to be a community process for the University. Some members of the working group were concerned that ceding the University's role in the process by opting for all external panelists would be, in a sense, abdicating our collective responsibility for the University community. Furthermore, the implication that Harvard is incapable of ensuring the impartiality of community members who preside over parts of the Title IX process could have implications well beyond Title IX.

Others argued that while the original intention may have been for community governance, the Title IX process has already become quite legalized and complicated to navigate. Respondents as well as complainants have been more active in seeking legal representation in recent years, and there is a pool of lawyers with significant experience in this area who are well-prepared to navigate a hearing process.⁷ The process has been further legalized by the addition of a live hearing and cross-examination. Some working group members noted that such a setting calls for a high degree of professionalism and expertise in the hearing panel function, and that it would be difficult to provide the training needed to sufficiently prepare senior faculty and administrators for their role on a hearing panel, especially if they only participate infrequently. On the other hand, some worried that convening a hearing panel comprised solely of retired judges would only serve to promote further legalization of the process.

The working group also discussed the question of local context and the value that internal members of the University would add in helping the external panelist(s) understand the setting. Some working group members questioned how much local knowledge would really be needed and whether that insight could be provided in some other way (for example, through an internal person whom the panel could consult with but who would not have a vote). The Title IX and ODR representatives on the working group noted that in their interviews with attorneys and retired judges who the University might consider calling upon to serve on a hearing panel, every person they have interviewed independently expressed interest in a panel that included one or more member(s) from

⁷ This discussion also pointed out how a system in which those with the means to do so hire a lawyer to advise them in the process could amplify the power disparities between, for example, a wealthy faculty respondent and a graduate student complainant.

within the Harvard community. These individuals noted that in their experience they have benefited from having an internal partner(s) to help them understand, for example, how an institution works.

2. Bias

Some working group members feel that it would be impossible for anyone within Harvard to be truly disinterested when making judgements. Based on our working group and outreach discussions, this seems to be of particular concern to graduate students who might bring a complaint against a faculty member. It is not clear that all members of the community share these concerns about the ability of faculty or administrators to be objective, nor is it clear that having only external decision makers would prevent people from sensing bias in the process. To this point, some working group members noted that it would be important to also ensure that external panelists did not have any connection to Harvard or other conflicts of interest. Title IX and ODR assured that group that they have been carefully vetting the CVs of external candidates and have ruled out any that have even an appearance of a connection to Harvard (though while external panelists are independent from Harvard, the University would still be compensating them for their time).

Other working group members noted that the University has successfully used a trained, internal pool of faculty and administrators for Title IX appeals since 2014; concerns about bias do not appear to have been an issue in that setting. The University conducts a thorough check for potential conflicts of interest before selecting members for an appeals panel and will do the same for hearing panels under the Interim Title IX Policy.

3. Diversity

Several working group members also expressed serious concerns about the diversity of the pool of retired judges, noting that this is a group that is very likely to be older, whiter, and more male than the Harvard community.

4. Time commitment

The group also expressed concerns about the time commitment that the training and function as a hearing panelist might require, and that this time commitment might represent a significant drain on internal panelists. One proposal for mitigating this effect would be to always draw one panelist from a pool of administrators and the other from a pool of faculty in order to spread the burden across these constituencies. However, as noted in point 3 above, the University has been drawing from a pool of trained faculty and administrators for Title IX appeal panels since 2014, and the time commitment does not seem to have been a serious issue in that setting.

5. Cost

Retired judges often charge high hourly rates, and there is some concern about the costs that would be incurred if the University needed to retain three such individuals for every hearing.

Ultimately, the group did not reach consensus on this issue. An informal in-meeting poll indicated that five working group members were in favor of keeping the current model, four were in favor of a three-member panel comprised of two external members and one internal member, and two were in favor of

a three-member panel comprised only of external members.⁸ Several working group members indicated that it was difficult to vote without more context or the ability to note caveats, and some stated that their greatest concern was that the panelists be well-trained and capable of handling the process with care and expertise. Some indicated that their concerns about the balance of the panel could be mitigated by the external member of the panel being appointed as its chair. A chair with legal expertise would also be well-trained to handle issues of relevance and cross-examination.

As a final comment, we note that the requirement for a live hearing was one of the more controversial elements of the new Title IX regulations, and some believe that it may be removed under revised regulations the Biden administration has indicated that it plans to propose. However, as noted earlier in our report, regulatory changes, if they come, will take time. Given that the DeVos DOE went through a formal rulemaking process in developing and enacting the new regulations, changing them would require a similar process and could take a year or more. In the meantime, we must comply with the regulations as they currently stand.

Interim Other Sexual Misconduct Policy and Procedures

While the working group's discussions largely focused on decision-points related to the new Title IX regulations and Harvard University's Interim Title IX Sexual Harassment Policy and Procedures, including issues of consent and hearing panel configuration, we also looked at the Interim Other Sexual Misconduct Policy and Procedures to see if changes were needed (beyond the consent definition, which will be the same across both policies). One suggestion that was raised during this discussion was that the University explore adjusting the language around jurisdiction in the Interim Other Sexual Misconduct Policy. The interim policy applies to "other sexual misconduct that is committed by students, faculty, staff, Harvard appointees, or third parties, whenever the misconduct falls outside of the Interim Title IX Sexual Harassment Policy and occurs: 1. On Harvard property; or 2. Off Harvard property, if: a) the conduct was in connection with a University or University-recognized program or activity; or b) the conduct may have the effect of creating a hostile environment for a member of the University community." The suggestion discussed by the working group was whether we should add language under "a)" to include other faculty work-related activities, for example: attending a conference, conducting research in the field, providing expertise to policy makers or presenting a talk at another institution.

One member of the working group also expressed concerns, shared with the working group via email, about the fairness of having different procedures to adjudicate complaints brought under the Interim Title IX Policy and the Interim Other Sexual Misconduct Policy. This individual contended that the procedures for the two policies should be the same, both including a live hearing and opportunity for cross examination for reasons of fairness and due process. This objection was raised after the working group had concluded its meetings and had largely finalized its report. Because the working group did not have a chance to discuss this issue, we note it here as a minority opinion.

⁸ This poll was used only to get a general sense of the group's direction; not all working group members were in attendance.

Other areas of discussion

Legal assistance. As discussed in the hearing panel section, the working group noted a sense that the procedural requirements set forth under the Title IX regulation have become increasingly legalized in recent years. The stakes are high for all parties involved in the formal complaint process and, as a result, it has become common for one or both parties to hire an attorney for consultation or to serve as their personal advisor during the formal complaint process. At the moment, ODR estimates that in at least half of the complaints proceeding to investigation, one or both parties engage legal counsel, with no stark difference between the number of complainants versus respondents who do so. With the addition of a live hearing involving cross-examination as part of the interim Title IX Sexual Harassment procedures, it's possible that parties will be even more motivated to select a personal advisor with legal training. The University has a responsibility to ensure a fair process for all parties to a complaint, regardless of whether they have legal counsel, and ODR has not observed a trend favoring parties who engage legal counsel. However, there remains a concern that if only one party is able to engage a lawyer – for example, because one party has the resources to pay for a lawyer themselves, or because one party has access to free legal resources – that the other party may feel at a disadvantage. This is a particular concern for members of the community who are already facing a power imbalance relative to the other party to the complaint (for example, a graduate student who brings a complaint against a faculty member).

Time limits for investigations. The working group discussed a suggestion that investigations under the interim policies be limited to 60 days. A guidance document issued by the Obama administration in 2011 (and which was [revoked](#) in 2017) stated that “a typical investigation takes approximately 60 calendar days following receipt of the complaint.” It is important to note, however, that DOE’s guidance went on to state,

Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that occurred in a classroom during school hours with a single complainant.

Staff from ODR explained that subsequent to the issuance of the above-referenced guidance document, very few schools had actually been able to conclude their investigations within the 60-day timeframe, and that schools prioritizing speed over a careful search for and consideration of available evidence had consistently lost when their determinations were challenged in court.

The interim procedures under the Interim Title IX Sexual Harassment Policy, state that “The initial review, investigation, hearing, and determination regarding responsibility, including the outcome of any remedies process, will be completed and the final determination regarding responsibility provided to the Complainant, the Respondent, the University Title IX Coordinator, the School or unit Title IX Resource Coordinator, and the appropriate officer in the School or unit, ordinarily within 90 business days of receipt of the formal complaint.” The procedures also note that there may be circumstances requiring longer timeframes, including “in the interest of the integrity and completeness of the initial review, investigation, hearing, and any remedies process, to accommodate witness availability, or to comply with requests by or not to prejudice investigations or processes of external law enforcement, or for other legitimate reasons, including the complexity of the investigation and the severity or extent of

alleged misconduct.” The interim procedures note that parties will be notified of any extensions of timeframes.

Victim advocates. The working group discussed a suggestion that the University have a “victim’s advocate” position to advise victims of misconduct on legal and administrative procedures. While Title IX Resource Coordinators must remain impartial, the University is in the process of hiring new Counselors who can support victims. Title IX Resource Coordinators are able to provide guidance regarding the resources and options available, including information pertaining to the applicable procedures, but because they must remain impartial during the process, they cannot advise either party and/or act as advocates. The soon to be Office for Gender Equity will include three SHARE (Sexual Harassment/Assault Resource Education) Counselors specifically dedicated to supporting complainants and respondents. These newly created roles will also meet Harvard’s requirements under [new Massachusetts legislation](#) requiring the designation of confidential resource advisors. Title IX staff indicated that these counselors will be expected to have a level of fluency around Harvard’s policies and procedures that will allow them to assist the person in navigating the process and making informed decisions, while providing support and counseling when needed.

Clarity for postdoctoral fellows. During a listening session, we heard that some postdocs feel lost when trying to navigate the Title IX process because the materials are so geared towards faculty, students, and staff, and they aren’t sure where they fit in. This is in line with feedback that the Title IX Office has heard from postdocs in the past.

Procedures language regarding credibility. The interim procedures state that information about the relative credibility of the parties and witnesses may be helpful in determining whether consent was communicated, so long as credibility determinations are not based on a person’s status as a complainant, respondent, or witness. One working group member raised a concern that this could be interpreted as allowing personal attributes (e.g., status within the University) to be part of determining credibility. ODR staff clarified that not only was this not the intent of this section, but that the regulations actually prohibit credibility from being weighed in this way. The group agreed that language could be added to the procedures to make it clear that credibility determinations may not be based upon a party or witness’s role at the University. Thus, the “Evidence” provision of the procedures could be revised to read (italics added to highlight the proposed additional language): “The following types of information may be helpful in making that determination, while avoiding prejudgment of the facts at issue: [. . .] information about the relative credibility of the parties and witnesses, so long as credibility determinations are not based on a person’s status as a complainant, respondent, or witness, *or their status within the University community.*”

CULTURE, EDUCATION, AND PREVENTION

The Interim Title IX Sexual Harassment Policy and Procedures and the Interim Other Sexual Misconduct Policy and Procedures describe prohibited behavior and outline how to process formal allegations in this regard. They do not speak directly to the type of community that we hope to create, or how we can prevent violations from occurring in the first place. In his [letter](#) sharing the [report](#) of a recent External Review Committee with the Harvard community, President Bacow wrote that “culture is—and always will be—rooted in our care for one another. We must hold those who harass, and those who

discriminate, to task for their actions. My hope for Harvard, however, is that we will find a way to prevent unwelcome behavior by standing up and speaking out for what is right.” Similarly, our working group believes that these policies and procedures must be part of broader efforts at all levels of the University to create a culture in which all community members can thrive, and, as the External Review Committee noted, that expectations of ethical and professional conduct be more deeply embedded into Harvard’s culture and practice.

Over the past few years, Harvard’s Title IX Office (soon to be the Office for Gender Equity) has vastly expanded efforts towards preventing sexual harassment and sexual assault at Harvard. The Office launched bystander intervention trainings in 2019, providing participants with practical tools enabling them to detect and respond to signs of harassment in their own learning and work environments. And through the NASEM Action Collaborative, the Title IX Office is playing a leading role in nationwide efforts to identify and develop innovative and evidence-based solutions to address sexual harassment, including looking for effective ways to measure and monitor the climate within an organization.

As noted by a participant in one of our listening sessions, the beginning of the 2021 fall semester will be a critical moment for educating students about sexual misconduct. The University will welcome a larger-than-usual number of students on campus in the fall, and in addition to the first year students who have never been on campus, we will also have many students who have been away from campus for an extended period of time. Further, those students who *were* on campus during the past academic year were subject to social distancing restrictions that significantly altered the nature of on-campus social life. This would seem to call for expanded efforts to educate students about our community’s policies and behavioral expectations, particularly as they relate to sexual conduct and consent.

Asking our community members to play a more active “bystander” role in response to harassment that they may witness is important, and we hope that these efforts can continue and expand under the Office for Gender Equity. It will take time and repetition for these efforts to truly take hold. They will also need to be supported by clear, consistent, and repeated messaging from leaders at all levels that sexual harassment and other sexual misconduct run counter to Harvard’s values, are detrimental to the University’s mission, and will not be tolerated from any community members.