

**BACKGROUND ON HARVARD'S TITLE IX POLICY AND PROCEDURES
AND
STATEMENT OF POSITION ON THE HGSU-UAW PROPOSAL FOR
ARBITRATION OF MATTERS OF HARASSMENT AND DISCRIMINATION**

Background on Harvard University's Title IX Policy and Procedures:

- Harvard's Title IX [Policy](#), compliant with federal requirements, applies to all faculty, staff, students and affiliates (see Jurisdiction section of the Policy).
- The University has in place [procedures](#) for complaints against faculty, staff and students "*designed to provide prompt and equitable methods of investigation and resolution to concerns regarding sexual and gender-based harassment, remedy any harm, and prevent its recurrence.*"
- In line with the University procedures, any member of the Harvard community "*may request information or advice, including whether certain conduct may violate the Policy; seek informal resolution; or file a formal complaint.*"
- All complaints regarding sexual or gender-based harassment brought forward by any member of the Harvard community are subject to the University's Title IX policy and the University's process for responding to and investigating such complaints.
- Complaints of sexual or gender-based harassment or discrimination brought against any member of the Harvard community are filed with the University's Office for Dispute Resolution (ODR), or in the case of the Harvard Law School or the Harvard Business School, through either ODR or, as applicable, the appropriate process under those respective schools' procedures (see ODR [Policy and Procedures](#)). In all instances, the procedures include the "prompt and equitable" processing of the complaint, including an investigation led by a trained, impartial investigator, compliant with federal Title IX regulations.
- See detailed overview of the ODR investigation process ([here](#)).
- Upon completion of the ODR investigation, a draft report is provided to both parties, and both parties have the opportunity to respond to the draft.
- The final report on an ODR investigation provides a determination on whether the University's Title IX policy has been violated. It does not determine or make recommendations on sanctions or punishment of an individual (see below).
- *Note:* two components of the University procedures that are in addition to the ODR investigation:
 - Appeals Process*
 - Either party, upon receipt of the final report can appeal determinations included in the report to an independent panel on two grounds: 1) a procedural error that may change the outcome of the investigation decision, and 2) substantive and relevant new information that was not available at the time of the investigation.
 - Appeals panelists are selected from a group of trained, impartial University personnel. Either party may object to an individual panelist on the basis of potential conflict of interest, and if determined to be the case, another panelist is chosen.
 - Sanctions/Punishment:*
 - ODR does not issue sanctions. That authority rests with Respondent's School or Unit, for example, in most cases the authority lies with a Dean of a School or Dean's designee.
- Each year ODR publishes in its [annual report](#) data and information regarding complaints filed and investigations completed. In FY18, 46 new complaints were received by ODR. Of complaints that proceeded to investigation from FY15-FY18, 45% of them were found to involve a violation

of the University's Title IX Policy, with an additional 9% resolved through informal resolution, which is a voluntary process for both parties (pages 23-24).

What does "equitable" mean in the context of Federal Title IX Regulations:

- Title IX regulations, [34 CFR § 106.8 \(b\)](#) require that the University provide a "prompt and equitable resolution" of student and employee complaints of sexual and gender-based harassment and discrimination.
- The U.S. Department of Education provides guidance on what is considered "equitable" in their September 2017 [Q&A on Campus Sexual Misconduct](#) (Question 6), which states, among other things, that an "equitable investigation of a Title IX complaint requires a trained investigator" and also states that "Any rights or opportunities that a school makes available to one party during an investigation should be made available to the other party on equal terms."

University Concerns over the HGSU-UAW's proposal for a traditional labor arbitration:

What is Arbitration?

- HGSU-UAW has proposed a traditional labor arbitration process for the resolution of matters of harassment and discrimination.
- A labor arbitration is an adversarial process between a union and an employer, not individual employees.
- Only a union can take a matter to arbitration if it believes the employer has violated terms of the union's collective bargaining agreement with the employer.
- An arbitrator does not come to an arbitration hearing in the role of investigator, rather an arbitrator hears cases in which a union alleges an article within a collective bargaining agreement has been violated by an employer, and the employer argues that no such violation occurred.
- Labor arbitration, being an adversarial process, often involves attorneys presenting the case of the union and the employer before an arbitrator, including cross examination of the parties involved in the matter and witnesses.

Arbitration, as proposed by HGSU-UAW, does not meet federal Title IX requirements for an equitable investigation:

- What HGSU-UAW has proposed is a standard labor arbitration of harassment and discrimination matters. Arbitration is not an investigation. It is a process for resolving contract disputes between a union and an employer.
- Additionally, an arbitrator is not a trained investigator, as defined by, we believe, federal Title IX regulations and guidance.
- Under the HGSU-UAW proposal, the student worker through union representation, would have access to an arbitration process, but other non-HGSU-UAW members of the Harvard community would not.
- In the University's view, that does not meet the Title IX requirement of an equitable investigation process because it does not ensure "any rights or opportunities" available to one party is available to the other party "on equal terms."
- The labor arbitration proposed would not meet the requirements of an equitable investigation led by a trained investigator for three reasons: 1) arbitration is not an investigation, 2) an

arbitrator is not a trained investigator, and 3) the arbitration would only be available to members of HGSU-UAW, and thus not available to each party on equal terms.

Cross examination could have a chilling effect on reporting:

- A standard labor arbitration process, as HGSU-UAW has proposed, would potentially subject any individual who is a complainant or respondent, and witnesses, to a cross-examination setting, with attorneys, whether they are members of the bargaining unit or not.
- The University has [written](#) in opposition to this type of cross examination, which the U.S. Department of Education included in proposed changes Title IX regulations. The University believes the prospect of this type of adversarial cross-examination would have a chilling effect among community members reporting of instances of harassment and discrimination.
- [UAW International](#), in its own written comments to the U.S. Department of Education, has also opposed cross examination, stating that:

The proposed regulations improperly permit confrontational litigation tactics in an administrative proceeding.

(Proposed section 106.45(b)(3)(vii))

The proposed regulations require that live hearings be conducted at institutions for higher education, and allow for “cross-examination . . . conducted by the party’s advisor of choice....” Proposed section 106.45(b)(3)(vii). These requirements for a live hearing and subjecting complainants to potential cross-examination by attorneys is: (1) unnecessary to gather relevant evidence, (2) possibly detrimental to effectuating the purpose of Title IX, especially for survivors who might choose not to report for fear being subjected to an onslaught of highly invasive questions by an experienced attorney, and (3) for the aforementioned reasons, needlessly likely to re-traumatize the survivor by shifting from a trauma-informed hearing process to a trial.

HGSU-UAW says that arbitration would only include cross-examination if the University chooses to do so:

- A labor arbitration is an adversarial process between a union and an employer, not an employee and another employee. It is used when a union believes the employer has violated the union's collective bargaining agreement. With that, only a union (in this case HGSU-UAW) can take an employer to arbitration.
- If an HGSU-UAW member alleges a Title IX violation by another member of the University community (faculty, staff or student), the University must ensure an equitable investigation, by a trained investigator of the matter. In effect, that means that Harvard’s ODR would be asked to conduct an investigation through which University would have a basis to determine if there was a Title IX Policy violation.
- If a violation is found by ODR, the University would take appropriate remedial action, and presumably the case would not proceed to arbitration. (*Note: In this outcome scenario, the Respondent would not have access to arbitration if in disagreement with University investigation outcome).*
- However, if the University investigation determines that the Title IX Policy was **not** violated, HGSU-UAW would then have the option (under its proposal) to take the matter to arbitration on behalf of the Complainant.

- In such an adversarial setting, the University would be asserting, based on ODR's investigation, that the Title IX Policy had not been violated by the alleged conduct, and defending itself (and indirectly defending the Respondent).
- The Complainant, who would necessarily have to testify about what happened, would be subject to cross examination by University attorneys, just as the Respondent would be subject to cross examination by Union attorneys. In a standard labor arbitration, both parties would also likely have to testify with the other party in the hearing room.
- While the Union counters these arguments by saying that "no one would be forced to go to arbitration" and that the Union would only file for arbitration if the Complainant wanted to do so, it is still the case that such matters often involve other students and possible faculty or staff members as necessary witnesses for one side or the other. And, those witnesses would also likely have to testify and be subject to cross examination.
- Furthermore, arbitrators do have subpoena powers. This could result in witnesses being required to attend and testify against their wishes through the issuance of a subpoena. This would inevitably result in other students with no wish to be testifying in a legal arbitration setting to appear at such hearings and be cross examined by attorneys on both sides.
- The University does not believe this type of adversarial setting is the appropriate venue for dealing with sensitive matters related to potential harassment or discrimination. *(See ODR investigation process, which does not place Complainant and Respondent, nor witnesses, in such an adversarial setting, but does provide for an impartial and thorough investigation.)*

An arbitrator would not have authority to punish bad actors:

- Under the HGSU-UAW proposal, an arbitrator would have no authority to issue sanctions or punishment on an individual if a violation of the University's Title IX Policy were determined in the outcome of an arbitration hearing.
- An arbitrator could only determine whether or not discrimination or harassment occurred based on the outcome of the hearing and the cases presented by the Union and the University.

Movement of members in and out of HGSU-UAW raises questions about difficulties in administering arbitration:

- Hundreds of unionized student workers go in and out of the bargaining unit depending on whether or not they are providing instructional or research services at a given time, which raises questions about the administration of arbitration.
- For example, if alleged harassment occurs in the fall semester when a teaching fellow is teaching, what happens if the teaching fellow attempts to file a grievance in the spring, when they are no longer teaching and thus not in the bargaining unit? Or, does a student worker who does 10 hours of research in a single month have the right to pursue a grievance over alleged harassment the next month when they are no longer working? What happens if the alleged harassment does not occur in a workplace setting but rather when the student is not working?

HGSU-UAW's proposed dual system creates confusion and would not allow for an appropriate, equitable investigation:

- The speed with which the Union wants to proceed to arbitration (within 30 days) would leave little time to ensure an equitable investigation of allegations of harassment and discrimination.
- HGSU-UAW has not taken the position that the University's current investigation procedures must be utilized first before a matter can go to arbitration, if not satisfied.

- In some statements, HGSU-UAW’s proposal implies that a Union member could choose whether to pursue a claim through the University’s investigation procedures or go immediately to an arbitration hearing.
- Such a choice, available only to HGSU-UAW members, would not meet the “equitable” requirements of federal Title IX regulations. And, even if an HGSU-UAW member were able to choose to take a claim immediately to arbitration, it would not remove the University’s legal obligation to provide an “equitable investigation” of the matter.

HGSU-UAW has stated that no one employed by the University can be unbiased in investigating matters of harassment and discrimination:

- The Union has said it believes no one (including ODR's trained, impartial investigators and the impartial appeals panel) at the University can sit in judgment of such cases in an unbiased fashion since they are all hired by the University. This, they state, is the basis for their call for a third-party arbitrator to resolve these claims.
- The University fundamentally disagrees with this argument. The University’s procedures guarantee an equitable investigation led by a trained, impartial investigator and also an impartial appeals panel process, in which either party can object to a member based on conflict of interest concerns.
- However, to the extent the Union is concerned about such implied bias, the [Massachusetts Commission Against Discrimination](#), as well as the U.S. Department of Education [Office for Civil Rights](#), currently provide neutral avenues for investigating claims of harassment and discrimination that are open to students (which the University has pointed out to HGSU).

Title IX Policy and Procedures do not apply to all forms of harassment and discrimination:

- It is true that the University's Title IX Policy and procedures apply to sexual and gender-based harassment and discrimination.
- In the negotiations with HGSU-UAW, the University has proposed creating two additional committees (which would include HGSU-UAW representatives) to make recommendations on University policies and procedures for addressing other forms of discrimination and misconduct.
- In the meantime, Harvard’s ODR has, at the request of Schools or Units, investigated related allegations that fall outside the scope of the Title IX Policy, such as alleged harassment based on race, color, or national origin.