



March 24, 2016

The History, Uses, and Abuses of Title IX

The following draft report is released for comment. Send your comments by April 15 to the AAUP's national office: titleIX@aaup.org. The drafting committee will review all comments received and issue a final version of the report later this spring.

As a result of committed student and faculty activism, the topic of sexual harassment and assault within universities¹ has entered the national spotlight. Renewed attention to these problems has been met by a federal push to establish universities' compliance with Title IX of the Education Amendments of 1972.² Yet Title IX's track record has proven to be uneven. Success stories about compelling universities to address problems of sexual assault, such as those recounted by student campus groups,³ are matched by reported cases in which university administrators fail to punish gross and repeated sexual harassment, or where Title IX administrators from the Department of Education and within the university overreach and seek to punish protected academic speech. These cases have compromised the realization of meaningful educational goals that enable the creation of sexually safe campuses; they also have upended due process rights and shared governance in unprecedented ways.

In response to these cases (discussed below in Section II.C), Committee A on Academic Freedom and Tenure and the Committee on Women in the Academic Profession created a joint subcommittee to

¹ The term "university" is used in this report to encompass all post-secondary educational institutions.

² 20 U. S. C. § 1681(a).

³ Turn of the century sexual-assault advocacy groups such as Students Active for Ending Rape (SAFER [2000]), <http://safercampus.org>, have been joined in recent years by organizations that more specifically invoke Title IX as instrumental to asserting victims' rights. These groups include, among others: SurvJustice (2011), <http://survjustice.org/>, UltraViolet (2012), <http://www.weareultraviolet.org/>, End Rape on Campus (EROC [2013]), <http://endrapeoncampus.org/>, and KnowYourIX (2013), <http://knowyourix.org/>. In support of such advocacy efforts, the Obama administration respectively launched affirmative consent and victims' rights campaigns, It's on Us (2014), <http://itsonus.org/>, and Not Alone (2014), <https://www.notalone.gov/>.

report on Title IX, its history and current uses. Although AAUP has issued a number of reports on sexual harassment (as early as 1984 and most recently in 2014),⁴ it seemed useful to delve into Title IX itself in a more sustained way, examining its history, the case law connected to it, and the various and changing ways sexual harassment has been dealt with as a matter of federal policy. In light of its increasing prominence, the uses and abuses of Title IX warrant an examination of their own.

In what follows we look first at the legislation’s history and the expanding definitions of sexual harassment under Title IX. Currently, sexual harassment consists not only of sexual misconduct, but also of speech taken to create a “hostile environment.” When speech and conduct are taken to be the same thing, however, the constitutional and academic freedom protections normally afforded speech are endangered. We do not argue that speech can never create a hostile environment, nor that all speech is protected, only that matters of speech are difficult to negotiate and always require attention to First Amendment guarantees and to academic freedom. We do argue that questions of free speech and academic freedom have been ignored in recent positions taken by the Office of Civil Rights (OCR) of the Department of Education (DOE), which is charged with implementing the law, and by university administrators who are expected to oversee compliance measures. We offer a critique of the failure to attend to free speech and academic freedom, as well as the resulting negative effects on teaching, research, shared governance, and extra-mural speech. Further, because OCR and university actions have compromised established practices of due process and faculty governance, we also present some reflections on how abuses of Title IX have developed in the context of the corporate university, and we review relevant AAUP policy on these questions. Finally, we offer recommendations—based on AAUP policies—for the OCR, university administrators, and faculty. These include the need for all Title IX policies to be developed through shared governance; the importance of protecting free speech and academic freedom; and the need to provide due process for both complainants and accused, whether or not in coordination with the criminal justice system. We

⁴ See AAUP 1994 Statement, “Due Process in Sexual Harassment Complaints.” <http://www.aaup.org/report/due-process-sexual-harassment-complaints>; AAUP 2012 Statement, “Campus Sexual Assault: Suggested Policies and Procedures.” <http://aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures>; and AAUP 2014 Report, “Sexual Harassment: Suggested Policy and Procedures for Handling Complaints” (initially adopted in 1984, revised in 1990 and 2014, endorsed at the AAUP 81st annual meeting), <http://www.aaup.org/report/sexual-harassment-suggested-policy-and-procedures-handling-complaints>.

stress the importance, as well, of supporting courses that address issues of discrimination and inequality, and that provide the intellectual underpinnings for sexually healthy campus cultures, where equality and non-discrimination can coexist with freedom of speech and academic freedom.

I. History

A. Enactment of the Statute

Passage of Title IX was the result of intense campaigning by feminists who wanted to call attention to discrimination in educational employment—an arena that had been deliberately excluded from earlier anti-discrimination legislation on the grounds that educational institutions were autonomous bodies that ought not to be subjected to government interference.⁵ But as universities expanded exponentially in the 1960s, policy makers identified a need to recruit women teachers and that recruitment elicited a feminist response. Bernice Sandler, a lecturer at the University of Maryland (and soon after appointed the executive director of the Project on the Status and Education of Women for the Association of American Colleges) argued that sex discrimination in higher education employment needed congressional attention. Studies by the Ford and Carnegie Foundations, as well as the US Department of Labor, the US Civil Rights Commission, and the Commissioner of Education⁶ documented the extent of the problem.

Two congresswomen took up the challenge. In 1970, Representative Martha Griffiths (D-Michigan) gave a speech on the floor of the House that pointed to discrimination against women in higher education and, later that year, Representative Edith Green (D-Ohio), chair of the subcommittee on higher education, held hearings to investigate the situation. The hearings produced voluminous documentation.⁷ On its basis, Green called for legislation that would amend Title VII of the Civil Rights

⁵ Prior to the passage of the Education Amendments of 1972, which included Title IX, the Higher Education Act of 1965, Pub. L. No. 89-329, provided in Section 804(a): “Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, or over the selection of library resources by any educational institution.”

⁶ At that time education was included in the Department of Health, Education and Welfare; there were commissioners for each of these areas under the Secretary of HEW.

⁷ Much of it was cited by Senator Bayh in the Senate debates on Title IX.

Act of 1964 to cover employees of educational institutions, amend Title VI to prohibit discrimination based on sex, and amend the Equal Pay Act to cover college and university administrators, professionals and executives. Green's proposal was taken up in the Senate by Birch Bayh (D-Indiana), who argued that "discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community."⁸ In the meetings to reconcile the House and Senate versions, it was agreed that there would be a new document: Title IX of the Education Acts. Title IX amended Titles VI and VII of the Civil Rights Act, addressing not only faculty employment, but student admissions, scholarships and the like.⁹ Bayh noted the connection between education and students' future opportunities: "The field of education is just one of many areas where differential treatment has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women."¹⁰

Most of the congressional debate about Title IX centered on student admissions and on access to gender differentiated vocational programs; in the final version of the law religious institutions, military academies, and single-sex private colleges were exempted from coverage. In the years following its passage, athletic programs became a focus as some senators sought unsuccessfully to exclude revenue producing sports (typically all male) from regulation by Title IX. Indeed, a good deal of the attention to the law in the 1980s and 90s concerned athletics—and the vast increase in opportunities for women to participate in sports is a measure of the law's success.¹¹

Title IX was signed into law in 1972 by President Richard Nixon as part of what was referred to as the Education Amendments. It declared that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance." Under Title IX and Title VI, federal funding is conditioned on the promise that the recipient of funding will not discriminate on the

⁸ 118 Cong. Rec. 5730 1972. Feb 28, 1972, p. 5803.

⁹ As amended, 42 U.S.C. § 2000d et seq. and 2000e.

¹⁰ 118 Cong. Rec. 5703, Feb. 28, 1972, p. 5804

¹¹ There have been recent efforts to water down its impact, most notably in a clarification in 2005 by Title IX administrators that allowed universities to email women students to establish their interest in sports programs and on that basis to decide whether or not to offer them.

basis of sex (Title IX), race, color, and national origin (Title VI). In this way, the two statutes form a contract between the federal government and the recipient of federal funds. It is congressional spending power that provides the pressure for enforcement of Title IX and Title VI.

Title VII is broader, prohibiting employment discrimination in both public and private institutions on the basis of race, color, religion, sex or national origin. Title IX generally follows Title VII's approach to sex-based discrimination in employment leading to cases with significant substantive overlap. The US Court of Appeals for the Eighth Circuit, for example, explains that “. . . when a plaintiff complains of discrimination with regard to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case.”¹²

Because of the close connection among Title IX, Title VI, and Title VII, cases decided under these statutes provide important interpretive guidance for Title IX's application. However, Title IX has a unique place within federal antidiscrimination law. It encompasses ten key areas with regard to women's educational opportunities: access to higher education, athletics, career training and education, education for pregnant and parenting students, employment, the learning environment, math and science education, sexual harassment, standardized testing and technology.

Today Title IX applies to “any education program or activity receiving federal financial assistance,” which includes pre-K through adult education, single sex and coeducational environments, public and private institutions. Traditional educational institutions such as colleges, universities, and elementary and secondary schools have been subject to the Department of Education's Title IX regulations since 1972. And, since 2000, other education programs and activities operated by recipients of federal financial assistance have come under the Title IX umbrella such as police academies, job training

¹² Johnson v. Baptist Med. Ctr., 97 F.3d 1070, 1072 (8th Cir. 1996), <https://casetext.com/case/johnson-v-baptist-medical-center-2>. See also Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996), <https://casetext.com/case/kinman-v-omaha-public-school-district>; Brine v. University of Iowa, 90 F.3d 271, 276 (8th Cir. 1996), cert. denied, 519 U.S. 1149, <https://casetext.com/case/brine-v-district-of-iowa>; Doe v. Oyster River Co-Op Sch. Dist., 992 F.Supp. 467, 474 (D.N.H. 1997) (reference to Title VII provides helpful guidance), <http://law.justia.com/cases/federal/district-courts/FSupp/992/467/1456663/>. But see Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993) (claim of discrimination properly reviewed under the intentional discrimination standard of Title VI rather than the standards under Title VII), <http://law.justia.com/cases/federal/appellate-courts/F2/984/151/356228/>.

programs, vocational training for prison inmates, and other education programs operated by recipients of federal assistance. In addition, Title IX covers all participants of an educational program including students, parents, and employees.

B. Judicial Interpretation of Title IX

Early interpretation and implementation of Title IX bears little resemblance to the version of Title IX currently advanced by the OCR. Sexual *harassment* was not mentioned in the original statute; only recently has it achieved central concern. Instead, it was a broader view of sex *discrimination* that was the focus of early interpretations of the law. Even so, the implementation of Title IX did not follow a linear path. In the late 1970s, there remained the question of whether administrative remedies alone (such as the termination of federal funding) or other remedies (such as reinstatement or individual monetary awards for damages suffered) could be awarded following the determination of an intentional violation of Title IX. At issue as well was the applicable scope of Title IX—was its enforcement limited to the programs and offices that received federal financial assistance or did Title IX apply to all programs throughout the entire institution? Taken together, these shifts in judicial interpretation, detailed below, set the stage for the current tension between academic freedom and Title IX enforcement—tensions that result from the current focus of Title IX on *sexual* violations and the conflation of conduct and speech.

In 1979, the Supreme Court recognized an implied private cause of action under Title IX thereby paving the way for students to sue in a wide array of cases involving gender equity. Implied private rights of action are judicially inferred rights to relief from injuries caused by another’s violation of a federal statute. Although Title IX did not expressly authorize a private right of action for alleged victims of sex discrimination, the court, in *Cannon v. University of Chicago*,¹³ held that a woman could sue the university that denied her admission to medical school. The case was the first to recognize a private remedy available to individuals under Title IX for intentional violations. Recognition of an implied private right of action is significant because it suggests that administrative remedies alone may be insufficient to correct for the discrimination suffered by the affected party. Instead,

¹³ 441 U.S. 677 (1979)

individuals may avail themselves of additional remedies against discriminatory practices.¹⁴ In this way, *Cannon* is also noteworthy for opening the door to monetary damages for those who believe they have been discriminated against in violation of Title IX. Unfortunately, in the context of the contemporary, corporate university, individual monetary damages can stand in for gender justice at the expense of the kind of broad, systemic transformation originally envisioned by Title IX.

Five years later, the Supreme Court's decision in *Grove City v. Bell*¹⁵ further shifted the legal landscape, narrowing Title IX's parameters by limiting its enforcement to programs or offices within universities that receive federal financial assistance. In other words, *Grove City v. Bell* did not require universities that received some federal financial assistance to enforce Title IX throughout the entire institution. *The New York Times* described the case as involving "a clash of values: the American tradition of valuing diversity and autonomy, especially in colleges, where academic freedom could be stifled by pervasive regulation, versus Washington's commitment to bar the use of Federal funds to subsidize discrimination."¹⁶ Grove City College, a small, private coeducational college in Western Pennsylvania had refused all federal funding in order to preserve its independence from "the expensive and burdensome regulation which invariably follows Government funding." However, a large number of its students received direct federal aid through a program of the Department of Education. Title IX regulations required all educational institutions to sign an "Assurance of Compliance" with Title IX. Arguing that it was not covered by Title IX because it did not accept any federal funds, Grove City College refused to sign the assurance. As a result of its refusal, the federal government cut off federal financial aid to Grove City College students.

In the case that followed, the U.S. Supreme Court held that notwithstanding its refusal to take federal funds, Grove City College was covered by Title IX as an indirect recipient of federal financial assistance through student financial aid. Though the Court's decision brought Grove City College within the reach

¹⁴ Goldstein, Donna L. "Implied Private Rights of Action under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication." *Fordham L. Rev.* 50 (1981): 611.

<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4557&context=flr>;

¹⁵ 465 U.S. 555 (1984)

¹⁶ See Stuart Taylor Jr., "Court Case Yanks on the Whole Ball of Federal-Aid Strings," *N.Y. Times*, Sept. 23, 1983, § 4, at 5. <http://www.nytimes.com/1983/09/25/weekinreview/court-case-yanks-on-the-whole-ball-of-federal-aid-strings.html>

of Title IX, its decision was limited to the financial aid/admissions office, the only program that received federal financial assistance, not the entire institution. The decision left women's sports programs across the country with few substantive legal protections under Title IX, since these programs often received no federal financial funding. In fact, in the immediate aftermath of the decision, the DOE curbed or suspended forty Title IX investigations and twenty more investigations under the other affected statutes, including Title VI. Citing economic pressures, several institutions dropped nonrevenue -generating athletic programs, which disproportionately affected women's sports teams. The *Grove City* decision was limited, however, to educational institutions that received federal funding. It did not have an impact on noneducational institutions that were covered by other civil rights laws prohibiting discrimination by programs receiving federal funding. Nor did *Grove City* affect enforcement of Title VII, which was not enacted under Congress's spending power.

Since all the civil rights statutes relating to federal funds use the same language to describe their coverage, however, *Grove City* also had the effect of narrowing the scope of laws prohibiting discrimination based on race, disability, and age. Concerned with the Court's interpretation of Title IX in *Grove City*, and recognizing the broad impact the decision had on other important federal antidiscrimination statutes, Congress enacted the Civil Rights Restoration Act (1988), defeating a veto by President Ronald Reagan.¹⁷ Sponsored by Senator Edward Kennedy, the Act makes clear that discrimination is prohibited throughout entire agencies or institutions if any part receives federal financial assistance. A Senate Report stated that the Act was intended "to overturn Supreme Court's 1984 decision in *Grove City College v. Bell* . . . and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs." Section 2 of the Act states that "[c]ertain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of

¹⁷Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). In addition to Title IX, the Act covers Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d, *et seq.* (Title VI) (prohibiting discrimination on the basis of race, color, and national origin in all programs or activities that receive Federal financial assistance); Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (Section 504) (prohibiting discrimination on the basis of disability in all programs or activities that receive Federal financial assistance); and the Age Discrimination Act of 1975, 42 U.S.C. 6101, *et seq.* (Age Discrimination Act) (prohibiting discrimination on the basis of age in all programs or activities that receive Federal financial assistance).

1972 . . .; and that [l]egislative action is necessary to restore the prior consistent and long-standing executive branch interpretation of broad, institution-wide application of those laws as previously administered.”

Beginning in the 1980s, application of Title IX has been expanded to cover not only discrimination in employment and educational facilities, but a wide range of unacceptable sexual conduct. The early development of these expanded interpretations by the courts and OCR are discussed in Section I.C, below. While increased attention to eliminating sexual misconduct is warranted, the OCR’s recent interpretations of Title IX have broadly defined sexual harassment in ways that undermine academic freedom and due process. As discussed in Section II, below, these OCR interpretations conflate speech and conduct – particularly with regard to hostile environment – with little, if any, attention to rights of free speech and academic freedom. Further, OCR has mandated that educational institutions, including universities, reduce the level of due process protections provided in sexual harassment hearings. These problems are compounded by the lack of faculty governance participation in university policy-making and implementation.

C. Defining Sexual Harassment

Sexual harassment is not mentioned in the Title IX legislation itself, nor in Titles VI and VII. The first judicial recognition that sexual harassment constituted a form of sex discrimination came in 1977, when the D.C. Circuit Court of Appeals held that Title VII applied to a claim alleging that a supervisor sought sexual favors from an employee seeking promotion.¹⁸ That same year in *Alexander v. Yale University*, the federal Second Circuit Court of Appeals allowed a case to be heard in which sexual harassment was claimed as a violation of Title IX. The court ultimately found that the plaintiffs failed to prove their case, but the recognition of sexual harassment as a form of sex discrimination remained in place. In 1980, the Equal Employment Opportunity Commission (EEOC)—the administrative agency charged with enforcing Title VII—provided guidelines that included the two aspects of what was to become the standard definition of sexual harassment: the demand for sex in exchange for favorable

¹⁸ Monica L. Sherer, “No Longer Just Child’s Play: School Liability under Title IX for Peer Sexual Harassment,” *University of Pennsylvania Law Review*, vol. 141, No. 5 (May 1993), pp. 2119-2168, citation, p. 2123.
http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3670&context=penn_law_review

treatment (the quid pro quo demand) and the creation of an environment “so infused with hostility” that it unreasonably interfered with an individual’s ability to work. Sexual harassment was defined as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature...when (1) submission to such conduct is made either explicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.¹⁹

In 1980, the National Advisory Council on Women’s Educational Programs reviewed Title IX and concluded that the explicit addition of sexual harassment to Title IX prohibitions was needed. They were particularly concerned about students, since Title VII already protected academic employees, and they provided extensive documentation of student experience. The Council defined academic sexual harassment as “the use of authority to emphasize the sexuality or sexual identity of a student in a manner which prevents or impairs that student’s full enjoyment of educational benefits.”²⁰ The presumption here was that faculty abuse of its position—in an unequal power relationship—was the source of the problem. Kimberly Mango (in an extensive and informative review of the issue in the *Connecticut Law Review* in 1990-91) explains that “the argument for protecting students was strongest because these students purchased an education, by virtue of their payment of tuition, and as such were entitled to an environment free from sexual harassment.”²¹ The justification for concern about students has a familiar ring in our era of the corporate university concerned about its clients. In 1981, the Office of Civil Rights (charged with overseeing Title IX) followed through on the Council’s recommendation. In a policy memorandum the OCR declared that: “sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex,

¹⁹ Ibid, p. 2125.

²⁰ Kimberly Mango, “Students versus Professors: Combatting Sexual Harassment under Title IX of the Education Amendments of 1972,” 23 *Conn. L. Rev.* 355 (1990-91), p. 380.

²¹ Ibid. p. 381.

by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.”²² Here the presumption is that the law applies to individual actions (by an employee or agent) of a recipient of federal funds in relation to individual students; hostile environment isn’t yet an explicit consideration.

There followed a series of lawsuits in which the courts either rejected or recognized the validity of a claim of hostile environment sexual harassment under Title IX, but found that there was no basis for the claim. In *Alexander v. Yale*, for example, a federal district court ruled that “no judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong” so “the claims are untenable on their face.”²³ In *Lipsett v. Rive-Mora* (1987), where female interns complained of gender-based mistreatment by supervising male doctors, the court found the behavior “so trivial and isolated that they cannot lend any support for an actionable constitutional wrong.” And, it concluded that one doctor’s “flattering remarks [...] were neither indecent nor obscene. They portray a treatment based on romantic attraction rather than on a desire to discriminate because of gender.”²⁴ In 1989, in *Bougher v. University of Pittsburgh*, a student claimed that the failure of the university to respond to her complaints about sexual abuse from a professor constituted a hostile environment; the federal district court explicitly rejected the idea that Title IX covered “environmental harassment,” saying that the concept only pertained to workplace situations and not to university campuses.²⁵ We cite these instances to indicate how difficult it was to establish the validity of claims of sexual harassment in the wake of the passage of Title IX. What was the difference between romance and sex and how did power figure in the difference? How many incidents did it take to create a hostile environment? Beyond concrete demonstration of individual injury, how should one measure the individual and collective effects of “vicariously experienced wrong?”

Things changed after 1991 when the Clarence Thomas hearings and then the Tailhook scandal provoked a widespread national debate on sexual harassment. The Supreme Court ruled in 1992 (in *Franklin v.*

²² Ibid.

²³ 459 F.Supp. 1, 5 (D. Conn. 1977), *aff’d*, 631 F.2d 178 (2d Cir. 1980).

²⁴ Mango, p. 405.

²⁵ Ibid. p. 410. 713 F. Supp. 139 (W.D. Pa. 1989), *aff’d on other grounds*, 882 F.2d 74 (3d Cir. 1989).

Gwinnett County Public Schools) that monetary damages could be awarded to individual victims of sexual harassment under Title IX. In that case, the school district could be held financially liable for a coach's predatory behavior towards a student athlete. Citing its 1986 precedent finding that sexual harassment is a form of sex discrimination under Title VII,²⁶ the Court held that Title IX's prohibition of sexual harassment in educational institutions by supervisors towards employees also applies to teachers' conduct toward students, with a remedy of damages available in both situations. In the wake of *Franklin*, a series of cases applied the standards of Title VII to students bringing harassment claims under Title IX.²⁷ In *Doe v. Petaluma City School District* (1996), for example, the court concluded that "in Title IX [there is] no intent to provide a lesser degree of protection to students than to employees."²⁸ These cases also included student-on-student misconduct under Title IX jurisdiction.

In 1999, in *Davis v. Monroe County Board of Education*,²⁹ the Supreme Court held that schools may be found liable in private damage suits for student-to-student sexual harassment where the behavior is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."³⁰ In 2001, the OCR stated that despite some differences in wording, the Court's hostile environment definition is consistent with OCR's definition used in administrative enforcement of Title IX; it asserted that hostile environment sexual harassment is "conduct of a sexual nature [that] is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment."³¹

²⁶ Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

²⁷ *Murray v. NYU College of Dentistry* (1995) (educational institution may be held liable for gender discrimination based on sexual harassment) <http://caselaw.findlaw.com/us-2nd-circuit/1225390.html> ; *Doe v. Petaluma City School District* (1995) (school officials who tolerated student peer sexual harassment may be liable) <http://caselaw.findlaw.com/us-9th-circuit/1086239.html> ; *Seamons v. Snow* (1996) (male football player harassment by his teammates in a hostile environment argument for which university may be responsible) <http://caselaw.findlaw.com/us-10th-circuit/1451821.html> . In none of these cases did the plaintiffs prevail, but the fact that their claims were recognized as potentially legitimate made the hostile environment standard part of the Title IX standard.

²⁸ Verna L. Williams and Deborah L. Brake, "When a Kiss isn't just a Kiss: Title IX and Student-to-Student Harassment," 30 *Creighton L. Rev.* 423 (1996-97), p. 445. http://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1193&context=fac_pubs

²⁹ 526 U.S. 629 (1999).

³⁰ *Ibid.* p. 650.

³¹ Preamble, *OCR Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), pp. v-vi. <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

By the end of the century, the claim of a hostile environment was firmly established under Title IX, although university administrators and the courts that reviewed their actions, continued to find it hard to assess exactly what counted as a hostile environment. It seems clear that hostile environment was less about things like syllabi and fraternities, than it was about how administrators handled one-on-one situations of sexual harassment, usually male faculty abuse of female students particularly in relation to unwelcome sexual advances or requests for sexual favors. In these rulings, the sexual abuse was the misconduct, which became a hostile environment when the university refused to punish an offending faculty member, or (less often) a student. Although under Title VII environmental harassment is generally concerned with *multiple* instances of offensive conduct (not always by the same person), under Title IX, these rulings suggested that a hostile environment existed when the university failed to act to protect an individual who was subjected to one or more instances of sexual abuse.

II. Problems with Interpretation and Enforcement of Title IX

A. Overly Broad Definitions of “Hostile Environment” Increasingly Undermine Academic Freedom

The issue of what constitutes a hostile environment has been contentious under both Title VII and Title IX, but the university context raises distinctive issues, particularly when speech rather than conduct is in question. To what extent can speech be subject to the same regulations as assault, as has been increasingly the case in recent years? What are the consequences of such an equation in a university setting where there must be a careful balance between an interest in preventing or punishing hostile environment sexual harassment and an interest in academic freedom, including free speech, shared governance, and due process? How can care be exercised to protect students’ and employees’ equal rights and safety without violating rights of academic freedom or free speech? These questions were considered central to Title IX enforcement in the last decades of the 20th century; this has not been the case at least since 2011.

Under Title IX (as under Title VII), hostile environment claims are to be analyzed based on objective factors (whether a reasonable person in the complainant’s position would find the conduct offensive)

and subjective factors (whether the complainant found the conduct offensive). But under Title IX, determination of the weight of these factors and of balance between them has become skewed in recent years to the detriment of objective measures and of free speech.

In the 1980s and 1990s, courts invoked the principles of free speech and academic freedom to protect public university professors' and students' constitutional rights to free speech against encroachments by overly broad anti-harassment policies. For example, a federal court found the University of Michigan's harassment policy was unconstitutionally vague and overbroad, in a case brought by a biopsychology graduate student who was concerned that theories he wished to explore could be labeled "racist" or "sexist" under the policy.³² A federal court found the University of Wisconsin's harassment code unconstitutionally overbroad, including prohibitions on "discriminatory comments, epithets or other expressive behavior directed at an individual... [that] intentionally...[d]emean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual . . . and [c]reate an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity."³³ And three years later, a federal district court held that a professor, who had been suspended under the university's sexual harassment policy, was constitutionally protected in drawing an analogy during class between sex and writing, as the comments were part of his academic freedom to teach about writing.³⁴

OCR's 2001 Revised Guidance took such rulings into account. In its Guidance documents and Dear Colleague Letters (letters sent to university and other educational institutions' administrators to explain OCR policy), OCR stated that Title IX should not be interpreted in ways that would interfere with academic freedom or free speech. OCR's 2001 Sexual Harassment Guidance states:

³² Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989)

http://www.bc.edu/bc_org/avp/cas/comm/free_speech/doe.html; See, Benjamin Dower, "The Scylla of Sexual Harassment and the Charybdis of Free Speech: How Public Universities Can Craft Policies to Avoid Liability," 31 *Review of Litigation* 703, 718-24 (2012), <http://connection.ebscohost.com/c/articles/77559833/scylla-sexual-harassment-charybdis-free-speech-how-public-universities-can-craft-policies-avoid-liability>.

³³ *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991), <http://www.mit.edu/activities/safe/legal/uwm-post-v-u-of-wisconsin>; Dower, p. 723-24.

³⁴ *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 330 (D.N.H. 1994), discussed in Dower, pp. 718-19, <http://law.justia.com/cases/federal/district-courts/FSupp/888/293/1644470/>.

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX. In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program.

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.

In this 2001 Guidance, OCR stated that "all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment."

OCR's July 28, 2003 Dear Colleague Letter repeats these points and further explains OCR's position that free speech principles apply to public *and* private educational institutions:

There has been some confusion arising from the fact that OCR's regulations are enforced against private institutions that receive federal-funds. Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR's regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public

educational institutions does so on its own accord and not based on requirements imposed by OCR.³⁵

Since 2011, however, the emphasis has changed. OCR now conflates conduct and speech cases. The OCR's 2011 Dear Colleague Letter (DCL) broadly defines sexual harassment under Title IX as ranging from the most serious conduct of "sexual violence" (including rape, sexual assault, sexual battery, and sexual coercion) to speech-based hostile environment. Further, while the 2011 DCL focuses on student-on-student sexual violence, it adds that the same principles of enforcement will apply to all types of sexual harassment cases, which include speech or conduct of a sexual or non-sexual (but gender-based) nature. At the same time, the language of the 2011 DCL recognizes that sexual violence and sexual harassment are distinctive concepts, referring throughout the document to "sexual harassment and violence," "sexual harassment and sexual violence," or "sexual harassment or violence." Yet, the DCL does not include any statements or warnings about the need to protect academic freedom and free speech in sexual harassment cases, including hostile environment allegations. With this conflation of sexual violence (which is also criminal conduct) and sexual harassment (including hostile environment based on speech), protections of academic freedom and free speech seem to have been relegated to the background or ignored completely.³⁶

Further, in carrying out compliance reviews, OCR has broadened its description of sexual harassment in ways that limit the scope of permissible speech. In its 2013 findings that University of Montana-Missoula violated Title IX, OCR stated, "Sexual harassment is unwelcome conduct of a sexual nature and 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."³⁷ OCR charged the University of Montana-Missoula with failing to distinguish the definition of "sexual

³⁵ <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>

³⁶ Jon Krakauer's "Missoula: Rape and the Justice System in a College Town" (Doubleday, 2015), pp. 384, notes that Diane Barz, the Missoula Supreme Court justice who investigated the University of Montana rapes, said in her report to UM President Royce Engstrom, "the [2011 Dear Colleague Letter] Guidelines are not clear on what constitutes 'prompt and effective steps'" for investigating a sexual assault (132). Such due process uncertainties have contributed to climates dismissive of a need to protect academic freedom and free speech.

³⁷ <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>

harassment” from “hostile environment.” OCR explained, “Sexual harassment is unwelcome conduct of a sexual nature. When sexual harassment is sufficiently severe or pervasive to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex, it creates a hostile environment.” This broadening of the definition of sexual harassment to encompass any “unwelcome conduct” (including speech) creates a seemingly limitless definition of harassment. Although OCR continues to consider objective factors in defining a hostile environment, its broadened definition of sexual harassment overemphasizes a complainant’s subjective responses in determining which conduct and speech constitute sexual harassment.³⁸ Additionally, OCR’s compliance letter to University of Montana-Missoula explicitly stated that it defined hostile environment as being “severe or pervasive” rather than the “severe and pervasive” definition used by the Supreme Court interpreting Title IX in *Davis v. Monroe County Bd. of Education*.³⁹ As discussed in Section II.C, below, OCR’s expanded definitions of hostile environment have had a negative impact on academic freedom. As discussed in Section IV, AAUP policies have long emphasized that there is no necessary contradiction between universities’ obligation to effectively address problems of sexual harassment and their duty to fully protect academic freedom. Similarly, OCR’s interpretation of Title IX should require universities to adopt policies and procedures designed to respond to and prevent sexual harassment, while fully respecting academic freedom.

B. Enforcement Inadequately Protects Due Process and Academic Governance

In its policy documents and compliance investigation reports, OCR has given only limited attention to the due process rights of those accused of misconduct. OCR’s 2001 Sexual Harassment Guidance states that “[p]rocedures that ensure the Title IX rights of the complainant, while at the same time

³⁸ See, Joan Bertin, Public Comments to U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice, June 11, 2015, p. 4, <http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-20150602-SD003.pdf>; Greg Lukianoff, Written Testimony before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice, June 2, 2015, pp. 10-11, <http://judiciary.house.gov/cache/files/cb2a2b82-2c21-4fa3-8a94-896c108c6b47/06022015-lukianoff-testimony.pdf>. Conor Friedersdorf, “How Sexual-Harassment Policies Are Diminishing Academic Freedom,” *The Atlantic*, Oct. 20, 2015, <http://www.theatlantic.com/politics/archive/2015/10/sexual-harassment-academic-freedom/411427/>

³⁹ 526 U.S. 629 (1999). <https://www.law.cornell.edu/supct/html/97-843.ZS.html>; Unlike its use of a “severe and pervasive” standard in interpreting Title IX, the Supreme Court has applied a “severe or pervasive” standard in defining hostile environment harassment under Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

according due process to both parties involved, will lead to sound and supportable decisions,” followed immediately by that caveat that “[o]f course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.” In this way OCR described due process rights of the accused as being potentially in conflict with protecting complainants under Title IX, which then opened the door to restrictions on due process.

OCR’s 2011 Dear Colleague Letter (DCL) went further, mandating an evidentiary standard that conflicts with due process protections of faculty and students. In a shift of enormous significance the DCL prohibited the use of the standard calling for “clear and convincing” evidence (highly probable or reasonably certain), and replaced it with a lower standard: that there need be no more than a “preponderance of evidence” (more likely than not) to assess sexual violence claims and *all* sexual harassment claims. The DCL explicitly noted that university procedures using a “clear and convincing” evidentiary standard were “not equitable under Title IX.” Although it marked a substantial change in procedures, OCR did not engage in the federal administration rulemaking public notice and comment process prior to issuing this 2011 DCL. The “preponderance of evidence” standard is a new mandate, however, even though the OCR describes the DCL only as a clarification of its 1997 and 2001 Guidances, which had followed federal rulemaking requirements.

This clarification, which was in fact a substantive change, has produced significant and worrisome effects on the enforcement of Title IX. The AAUP quickly responded to the 2011 DCL, expressing concern that the “preponderance of evidence” standard threatens to erode due process protections for academic freedom.⁴⁰ Harvard University’s adoption of these OCR standards led a group of law school professors there to protest the arbitrary nature of the new rules which substituted “preponderance of evidence” as a ground for punishment rather than “clear and convincing evidence.” The law school professors objected to the university’s apparent capitulation to new interpretations by government officials, instead of having faculty collaborate in crafting standards that would make sense in the academic context: “Harvard apparently decided to simply defer to the

⁴⁰ <http://aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightsletter.pdf>

demands of certain federal administrative officials, rather than exercise independent judgment about the kind of sexual harassment policy that would be consistent with law and with the needs of our students and the larger University community.”⁴¹

Jeannie Suk, one of the Harvard professors, wrote of the racial implications of granting immediate credibility to accusers without due process for the accused:

Sexual assault is a serious and insidious problem that occurs with intolerable frequency on college campuses and elsewhere. Fighting it entails, among other things, dismantling the historical bias against victims, particularly black victims—and not simply replacing it with the tenet that an accuser must always and unthinkingly be fully believed. It is as important and logically necessary to acknowledge the possibility of wrongful accusations of sexual assault as it is to recognize that most rape claims are true. And if we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against black men in rape accusations. The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track, despite all the campus-climate surveys....The ‘always believe’ credo will aggravate and hide this context, aided by campus confidentiality norms that make any racial pattern difficult to study and expose. Let’s challenge it. Particularly in this time of student activism around structural and implicit racial bias pervading campuses, examination of the racial impact of Title IX bureaucracy is overdue. We are all fallible—professors, students, and administrators—and disagreement and competing narratives will abound. But equating critique with a hostile environment is neither safe nor helpful for

⁴¹ Opinion piece signed by 28 Harvard Law Faculty: “Rethink Harvard’s Sexual Harassment Policy,” *The Boston Globe*, October 15, 2014. <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>. An Open Letter from 16 Penn Law Professors distributed on February 18, 2015, raised similar concerns: see “Title IX and Sexual Assault Complaints: Protecting Complainants and The Accused Students at Universities,” <http://media.philly.com/documents/OpenLetter.pdf>

victims. We should be attentive to our history and context, and be open to believing, disbelieving, agreeing, or disagreeing, in individual instances, based on evidence.⁴²

Recent student activism protesting institutionalized racial biases in universities reveals the need to ensure that Title IX enforcement initiatives do not, even unwittingly, perpetuate race-based biases in the criminal justice system, which disproportionately affect men who are racial minorities.

In May 2014, the OCR announced investigations of 55 universities for possible violations of Title IX in their handling of sexual violence and harassment complaints.⁴³ By September 2015, OCR was carrying out such investigations at 130 colleges and universities and by March 2016, that number had grown to 169 colleges and universities⁴⁴ OCR's investigations have resulted in findings set forth in long, detailed letters to universities including University of Montana-Missoula, Michigan State University, Tufts University, University of Virginia, Harvard University, and Yale University. From these letters emerges a pattern of university conduct that OCR identifies as violating Title IX: failure to provide adequate information to the university community about Title IX; failure to respond to allegations of sexual assaults until a formal complaint is filed; failure to act promptly in response to sexual assault complaints; failure to take adequate interim measures to protect complainants; and failure to consider whether there "was the need for a broad response...to address the issue of sexual harassment and violence in the campus community," even after complainants requested

⁴² Jeannie Suk, "Shutting Down Conversations About Rape at Harvard Law," *The New Yorker*, December 11, 2015. <http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>

⁴³ Nick DeSantis, "Education Dept. Names 55 Institutions Facing Sex-Assault Investigations," *The Chronicle of Higher Education*, May 1, 2014. <http://chronicle.com/blogs/ticker/education-dept-names-55-institutions-facing-sex-assault-investigations/76849>

⁴⁴ See Andy Thomason, "U.S Finds Michigan State's Sexual-Assault Policies Created 'Hostile Environment'," *The Chronicle of Higher Education*, September 1, 2015. <http://chronicle.com/blogs/ticker/u-s-finds-michigan-states-sex-assault-policies-created-hostile-environment/103967>; Sara Lipka, "An Arc of Outrage," *The Chronicle of Higher Education*, April 13, 2015. http://chronicle.com/interactives/assault_main; Robin Wilson, "What It Took to Resolve a Federal Sexual-Assault Investigation at UVA," *The Chronicle of Higher Education*, March 4, 2016. http://chronicle.com/article/What-It-Took-to-Resolve-a/235586/?key=qSZQboiAOPfbE1LoPIPkVxo6w54llgC3zGYyOSp6WJnQ2RCREc0RmFQWkNVSF9yNUJsbjRrTFktMUxremQtUDhBbmE5dXBrOEZv#st_refDomain=mail.aaup.org&st_refQuery=/owa/redir.aspx?C=e2d1514251fd4a3988087e4a2a969fc9&URL=https://shar.es/1Cwo4F

confidentiality or chose not to proceed with a formal or informal resolution process.⁴⁵ *There are no warnings in these letters about the need to protect academic freedom and almost no concerns expressed about due process for the accused.*

The OCR investigations consider, as well, whether a university's flawed procedures, including insufficiently prompt responses to any individual complaints, contribute to the continuation of a hostile environment. The OCR will make this determination about a hostile environment even where there is insufficient evidence to support the underlying complaint. For example, although the OCR concurred in Michigan State University's conclusion that there was insufficient evidence that "Student A" was sexually assaulted, OCR went on to consider whether Michigan State's failure to respond promptly to the complaint subjected Student A to a sexually hostile environment. Ultimately it found that it had not.

The OCR letters commonly conclude with a description of an agreement entered into by the university to reform its policies and procedures to conform to OCR's requirements under Title IX. The similarity among these agreements may be partially attributable to using the Department of Justice and OCR's 2013 agreements with University of Montana-Missoula as "a blueprint [for] colleges and universities across the country to take effective steps to prevent and address sexual assault and harassment on their campuses."⁴⁶ Among the provisions commonly included in OCR-university agreements are requirements that a university effectively disseminate information about Title IX; revise its policies and practices to ensure prompt and equitable resolution of sexual harassment and sexual assault allegations; report such proposed revisions to OCR; expand training and education for staff and students; conduct annual "climate assessments"; improve tracking and review of its handling of sexual

⁴⁵ For details on resolved cases and ongoing tracking of investigations, see Sara Lipka, "How 46 Title IX Cases Were Resolved," *The Chronicle of Higher Education*, January 15, 2016. http://chronicle.com/article/How-46-Title-IX-Cases-Were/234912?cid=at&utm_source=at&utm_medium=en&elq=8d42a8ae182340b09c37a4084b3656e1&elqCampaignId=2233&elqaid=7549&elqat=1&elqTrackId=55fe8a2c43ab413e9321cb10e0e93e09

⁴⁶ Jocelyn Samuels, Principal Assistant Attorney General for the Civil Rights Division of the Department of Justice, quoted in "Departments of Justice and Education Reach Settlement to Address and Prevent Sexual Assault and Harassment of Students at the University of Montana at Missoula," Department of Justice, Office of Public Affairs, May 9, 2013. <http://www.justice.gov/opa/pr/departments-justice-and-education-reach-settlement-address-and-prevent-sexual-assault-and>

harassment allegations; and assess how the university handled prior sexual harassment complaints and remedy any concerns identified.

Enacted under Congress' spending power, Title IX's enforcement by the DOE comes from its right to initiate proceedings to terminate federal funding, although the DOE has not used this power since *Grove City*. Further, the DOE must notify the educational institution "of its failure to comply" with Title IX and to seek voluntary compliance by the educational institution before taking any action to terminate federal funding. Thus, the OCR compliance process opens the possibility for OCR to work with universities to develop policies and procedures for receiving and addressing complaints in ways that remedy problems, while also providing due process for all parties. OCR could also assist universities to develop educational programs that address underlying problems of gender inequality, including sexual assault and sexual harassment, on campus. But these possibilities have not typically been realized.

Instead OCR's approach to compliance has become increasingly punitive. These punitive measures belie the insistence of OCR administrators that their recommendations do not have the force of law.⁴⁷ OCR's recent or current investigations of more than 130 colleges and universities have taken on an adversarial character, accompanied by an increasing fear that OCR may wield its power to initiate proceedings to withdraw federal funding. The threatening nature of OCR's actions is fueled by the ever-broadening scope of its investigations, both in terms of the number of universities under investigation and the breadth of the OCR's investigation at each school. OCR's recommendation that colleges and universities use as a "blueprint" the compliance agreement resulting from its investigation at University of Montana-Missoula further undermines the potential for OCR to facilitate measures to address gender inequality in ways that best fit particular colleges and institutions (see Section III, below). Universities' increased corporate and consumer-based approaches and their hiring of risk management consultants fuels their fear of possible OCR scrutiny and encourages university administrators to act precipitously in response to potential or actual OCR investigations. Such actions by OCR and university administrations have negative effects on academic freedom, including

⁴⁷ Jake New, "Colleges Frustrated with Lack of Title IX Guidance," *Inside Higher Education*, February 25, 2016. <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>

restrictions of individual rights of academic freedom and collective faculty governance (see, Section II.C, *infra*).

The sharp increase in the number and scope of OCR's investigations and findings that universities have violated Title IX has brought greater public attention to OCR's heightened scrutiny, not only of sexual assault on campuses, but also of speech that includes sexual references of any kind. This has led to a frenzy of cases in which administrators' apparent fears of being targeted by OCR have overridden faculty academic freedom and student free speech rights. In the next section, we list only some of the cases reported since 2013. They involve teaching, research, extramural speech and governance.

C. Cases

1. Teaching

In December, 2013, Title IX enforcement administrators at the University of Colorado-Boulder sat in unannounced on Sociology Professor Patty Adler's class, "Deviance in US Society," which had for more than twenty years enrolled each semester around five hundred students. They were following up on complaints from students that Adler's class constituted sexual harassment. At the conclusion of the term, undergraduate teaching assistants participated in and witnessed role-playing exercises featuring subjects relevant to course material involving the global sex trade: these performances animated character types, such as an "Eastern European 'slave whore,' a pimp, a 'bar whore,' and a high-end escort."⁴⁸ Adler's Dean offered her a buyout for early retirement and indicated if she did not accept the offer, she could incur penalties up to and including forfeiture of her retirement benefits, because her pedagogical approach entailed too much risk in a "post-Sandusky" climate; alternatively, she could

⁴⁸ Michelle Goldberg, "This Professor Was Fired for Saying 'Fuck No' in Class," *The Nation*, July 2, 2015. <http://www.thenation.com/article/this-professor-was-fired-for-saying-fuck-no-in-class/>; also see Scott Jaschik, "Too Risky for Boulder," *Inside Higher Education*, December 16, 2013. <https://www.insidehighered.com/news/2013/12/16/tenured-professor-boulder-says-she-being-forced-out-over-lecture-prostitution>. The Colorado AAUP Conference Condemned the Administration in a report released December 18, 2013, <http://www.aaup.org/news/aaup-colorado-conference-condemns-university>. The National AAUP released on December 20, 2013, "AAUP Statement on the University of Colorado's Treatment of Professor Patricia Adler." <http://www.aaup.org/file/ColoradoStatement.pdf>.

return to the classroom, understanding she was no longer allowed to teach the course. After faculty, students and numerous academic freedom advocacy groups objected to this unilateral action as a violation of necessary governance procedures, the university without apology rescinded its ultimatum and invited Adler back to teach, without any qualifying conditions, as if the incident had never happened.⁴⁹ Adler returned for a semester before deciding to retire, deeply affected by the chilling academic freedom climate that lingered in the wake of the reversed decision.⁵⁰

Similarly, Louisiana State University (LSU) faculty continue to grapple with blatant violations of due process and shared governance rights, in the aftermath of the termination of early childhood education associate professor Teresa Buchanan. Over a two-week period in December, 2013, Buchanan went from a candidate approved at every stage of the full professor promotion process, to receiving an email with subject heading “Unacceptable Performance,” from the same Dean who had already corroborated the favorable reviews by noting “very good scholar, strong funding.”⁵¹ Buchanan found herself suspended immediately so that the Human Resource Management (HRM) office could commence an investigation into allegations of her use of “salty language” by some students and administrators in her field of elementary education. Meantime, Buchanan learned the Provost would not be recommending her for promotion because of the unfolding investigation, even though the university-level faculty committee had. LSU’s HRM office eventually found in May, 2014, Buchanan guilty of sexual harassment and violating the Americans with Disabilities Act (ADA), the latter of which was the first time she was made aware of such a concern being part of the proceedings. The administration shortly thereafter moved to convene a faculty hearing committee to consider her dismissal for cause. Though this committee unanimously concluded in spring, 2015, that Buchanan should not be terminated, the President recommended to the board of supervisors that she should be, on the grounds that she had violated university sexual harassment policies and the ADA. Faculty

⁴⁹ For a comprehensive examination, see “Report of the Boulder Faculty Assembly (BFA) Ad Hoc Committee to Investigate the Patricia Adler Case,” Submitted to the Boulder Faculty Assembly, May 1, 2014.

<http://www.colorado.edu/bfa/sites/default/files/attached-files/ReportBFAAdlerFinalReport05.2014.pdf>

⁵⁰ Matt Ferner, *The Huffington Post*, “Patricia Adler, C-U, Boulder Professor, Allegedly Forced Out Over Prostitution Lecture” [Update]; Dec. 16, 2014; Jan. 25, 2015. http://www.huffingtonpost.com/2013/12/16/patricia-adler-deviance_n_4454652.html

⁵¹ AAUP Supplementary Report on a Censured Administration, “Academic Freedom and Tenure: Louisiana State University, Baton Rouge,” September, 2015. http://www.aaup.org/file/aaupBulletin_LSU_final.pdf

protests, including a vote of no-confidence, and AAUP sanction have not reversed the administration's actions.⁵² Buchanan has sued the university, specifically objecting to OCR language as used by the university administration.⁵³

Recent calls for trigger warnings to flag curricular content that might unsettle students have sometimes fed into Title IX concerns about "sexual harassment" or a "hostile environment"; indeed, in some cases, such disclaimers literally turn into controversies about how to teach the Constitution and the law.⁵⁴ A memo from the Title IX administrator at Eastern Kentucky University in July, 2014, reminded faculty that "Some courses may require students to deal with content that is especially sensitive or disturbing and may cause distress to students who have experienced past trauma." She then lists the Title IX Office recommendations "regarding classroom materials containing instances of violence related to power, control or intimidation that may be comparable to students' traumatic experiences." The memo goes on to note that there are no federal regulations requiring trigger warnings, but cautions nonetheless that the issue may require attention. The link between Title IX and trigger warnings is here made explicit. But it is implicit in the objections by students who are offended or discomfited by sexually specific texts on the syllabus. Alison Bechdel's lesbian coming-of-age story (*Fun Home*) raised not only calls for trigger warnings about its "pornographic" content (by students at Crafton Hills College and Duke [both in 2015] and University of Utah [2008]), it also inspired the South Carolina state legislature in 2014 to target the College of Charleston and the University of South Carolina-Upstate (USC-Upstate) for a budget cut equaling the annual amount of The College Reads program, which had included *Fun Home* as a recommended selection on voluntary reading lists for incoming freshman. Ironically, the compromise eventually drawn involved reallocating the funds to support books teaching about the Constitution and other documents relating to "American ideals."⁵⁵

⁵² Elizabeth Crisp, "LSU Faculty Senate Takes Up Professor's Termination," *TheAdvocate.com*, September 2, 2015. <http://theadvocate.com/news/13339319-123/l-su-faculty-senate-to-take>

⁵³ Hank Reichman « Lawsuit Filed in the Teresa Buchanan Case » *Academe Blog*, January 26, 2016. <https://academeblog.org/2016/01/26/lawsuit-filed-in-teresa-buchanan-case>

⁵⁴ For a discussion of pedagogical issues posed by this trend, see the AAUP Report "On Trigger Warnings," <http://www.aaup.org/report/trigger-warnings>.

⁵⁵ Trudy Ring, "S.C. Colleges in LGBT Controversy May Get Funding Back, With Strings Attached," *Advocate*, May 2014. <http://www.advocate.com/education/2014/05/14/sc-colleges-lgbt-controversy-may-get-funding-back-strings-attached>

At USC Upstate, this additionally coincided with the closure of the Center for Women’s and Gender Studies. The transfer of funds underscores the fact that the serious study of sex and sexuality are becoming increasingly vulnerable fields of inquiry. This state of affairs extends to areas such as criminal law, where faculty increasingly decide to omit rape and sexual assault law units from their courses, fearing some students may experience the content as too emotionally distressing. Harvard Law School professor Jeannie Suk contends that, ironically, after long feminist campaigns to include rape law in the law school curriculum, the topic of rape has once again become difficult to teach. Not only is discussion of rape sometimes thought to be “triggering,” but arguments about how consent or non-consent may be communicated in a sexual encounter or how social inequalities (tied to class, race or sexual preferences) might bias assessment of whether or not a situation becomes labeled a crime, risk lines of questioning that could be perceived as disrespectful of victims. As a result, some students view such necessary debates about the law and sexual violence to be fostering a hostile environment.⁵⁶

Efforts to clarify Title IX’s application and juridical reach continue to develop in ways that highlight a need for more nuanced understandings of gender-identity dynamics, as well as the expression of sexualities, across a diverse spectrum of higher education institutions. In December, 2014, for example, the DOE offered additional guidance on transgender considerations in a learning environment: “All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.” This has had the positive result in same-sex institutions such as Mills, Mt. Holyoke, Simmons, Wellesley, and most recently, Smith College, of making more explicit in university policies how a student’s gender identity factors in admissions and student life.⁵⁷ Such clarifications, however, coincided in 2014 with the granting of Title

⁵⁶ Jeannie Suk, “The Trouble with Teaching Rape Law,” *The New Yorker*, December 15, 2014.

<http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law>

⁵⁷ Paul G. Lannon, “Transgender Student Admissions: The Challenge of Defining Gender in a Gender Fluid World,” *Boston Bar Journal*, April 22, 2015. <http://bostonbarjournal.com/2015/04/22/transgender-student-admissions-the-challenge-of-defining-gender-in-a-gender-fluid-world/>; also see Scott Jaschik’s “Tipping Point for Trans-Admissions?” *Inside Higher*

IX religious exemptions to discriminate with respect to LGBTQ issues at several institutions (Georgia Fox University, Spring Arbor University, and Simpson University).⁵⁸ While Title IX enforcement should be sensitive to differences in university contexts, this contradictory treatment of LGBTQ rights results in excluding a class of individuals from Title IX protection when interpreted as irreconcilable with religious creeds. Such results may be more likely when there is no faculty consultation in the process of implementing Title IX requirements.

The disjuncture between OCR mandates and institutional realities has pushed overzealous administrators to implement policies that are not required by Title IX and have harmful effects on the educational mission. This is evident in the issue of mandatory faculty reporting. University administrations often designate all faculty to be mandated reporters, although Title IX does not require such a broad sweep. Such action by universities, though, is encouraged by OCR; its compliance agreement with University Montana-Missoula obligates “*all employees* who are aware of sex-based harassment, except health-care professionals and any other individuals who are statutorily prohibited from reporting,” to report cases to the “Title IX coordinator regardless of whether a formal complaint was filed.” As noted above, OCR has stated that the Montana-Missoula agreement will serve as a “blueprint” for other universities. However, this overly broad definition of faculty as mandatory reporters, adopted by universities without consulting with faculty, disregards compelling educational reasons to respect student confidentiality when seeking faculty advice or counsel.⁵⁹

Some institutions have made it policy to include on course syllabi sexual harassment and discrimination statements that inform students of faculty reporting obligations. The chilling effect such requirements pose constitutes a serious threat to academic freedom in the classroom. How can scholars share their knowledge and research with students if unable to assure privacy when a

Education, May 4, 2015. <https://www.insidehighered.com/news/2015/05/04/smith-college-will-accept-transgender-applicants-who-identify-women>

⁵⁸ Amanda Bryk, “Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates The Protection Afforded Transgender Students Under Title IX,” *Cardozo Law Review*, Volume 37:751-791, Issue 2, December, 2015, <http://www.cardozolawreview.com/content/37-2/BRYK.37.2.pdf>

⁵⁹ Colleen Flaherty, “Endangering a Trust,” *Inside Higher Education*, February 4, 2015.

<https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual>

disclosure by a student to a teacher might happen as part of the student's learning process? If many students experience faculty as "first responders" in their advising and pedagogical capacities, they should be explicitly classified as "confidential" rather than "mandatory" reporters. In addition, reporting mandates perpetuate sex-based double standards that disproportionately burden female and LGBTQ faculty; students may experience these professors as more responsive to these issues, without realizing how bureaucratic and legalistic dynamics may hamstring those faculty most affected by, and most invested in, advancing Title IX's educational objectives.

2. Research

Even before reaching the publication stage, scholars may find their research processes stymied, as Institutional Review Board (IRB) protocols that previously protected the confidentiality of study participants as an ethical right, may be overruled by Title IX reporting requirements.⁶⁰ This is especially troubling since IRBs raise academic concerns of their own.⁶¹ In relation to Title IX, the Oregon State University Office of Research Integrity website indicates that in the scenario of a study addressing sexual harassment and sexual violence, the Principal Investigator (PI) and any collaborators or research assistants should recognize a need to file a form reporting an "anticipated adverse event" within thirty days of the disclosure.. For scenarios in which the study does not pertain to such topics, but a disclosure transpires that requires consultation with the Office of Equity and Inclusion, the researcher must regard this as a reportable event and the PI must submit an "unanticipated problem" form within three days of learning of the information. For researchers who study topics connected to sexual harassment and violence, or for that matter sex and sexuality on campus, this can have a chilling effect. Without the ability to guarantee confidentiality for study participants, researchers may not be able to acquire the necessary data to research these social issues. Furthermore, the three-day turn around for reporting short circuits any possibility to assess the situation. The research subject has little control over whatever pending procedural matters lie ahead as a result of the disclosure. Fittingly, the need for institutional IRB approval of survey questions disseminated by Title IX coordinators to a campus

⁶⁰ Jake New, "Who Must Report?" *Inside Higher Education*, December 4, 2015.

<https://www.insidehighered.com/news/2015/12/04/researchers-fraternity-volunteers-argue-exemption-sexual-assault-reporting>

⁶¹ See AAUP Report, "Regulation of Research on Human Subjects: Academic Freedom and the Institutional Review Board," March, 2013. <http://www.aaup.org/file/IRB-Final-Report.pdf>

community – for assessing campus climate on the issues and for training student peer counselors – has in turn become an ethical consideration for survey and training participants.⁶²

The increased attention of Title IX administrators to the potential risks of any discussions of sex and the climate of fear this has engendered may also have influenced the censorship of an on-line academic journal, *Atrium*, at the Northwestern University Feinberg School of Medicine. In that case, an article by William Peace about his experiences with one of his caregivers who consensually performed oral sex on him as he was adjusting to life as a paraplegic, was blocked access on the grounds that it conflicted with the university's branding agreement with the hospital and medical school. As a result, the guest editor of the journal, Alice Dreger, an untenured, decade-long member of the faculty, resigned to protest her and Peace's loss of academic freedom. She held that even though the university eventually reversed its course in this instance, it would continue to prevent the publication of articles such as Peace's.⁶³

3. Extramural Speech

At Northwestern University, Professor Laura Kipnis found herself the target of a Title IX investigation that student activists petitioned the administration to pursue, claiming her *Chronicle of Higher Education* piece, "Sexual Paranoia Strikes Academe," to be retaliatory for making passing allusion to other sexual assault and harassment cases on the campus. Kipnis' controversial essay outlined some key generational and perspectival shifts on agency in gender dynamics and sexual relationships, how "[s]tudents' sense of vulnerability is skyrocketing," casting them as "trauma cases waiting to happen."⁶⁴

Additional Title IX complaints ensued, targeting the Faculty Senate President who accompanied Kipnis to sessions with investigators and spoke of the proceedings in general terms at a senate meeting; the University President, who authored a *Wall Street Journal* op-ed piece expressing his

⁶² See Oregon State University, Research at OSU-Office of Research Integrity website:

<http://research.oregonstate.edu/irb/frequently-asked-questions/what-do-i-do-if-research-participant-tells-me-about-experience-sexual>

⁶³ Tom Bartlett, "Star Scholar Resigns from Northwestern, Saying It Doesn't Respect Academic Freedom," *The Chronicle of Higher Education*, August 25, 2015. <http://chronicle.com/article/Star-Scholar-Resigns-From/232601/>

⁶⁴ Laura Kipnis, "Sexual Paranoia Strikes Academe," *The Chronicle of Higher Education*, February, 27, 2015. <http://chronicle.com/article/Sexual-Paranoia-Strikes/190351>

support for academic freedom and free speech; and ultimately, one of the lawyers who spoke publicly on the matter on behalf of the external law firm contracted by the university to pursue the investigation, which necessitated appointing a new team of lawyers from the same firm. Shortly before being exonerated, Kipnis published a piece in the *Chronicle* called, “My Title IX Inquisition,” which detailed at length the harrowing bureaucratic ordeal, concluding in defense of her ongoing forays into extramural forums: “for the record ... this isn’t retaliation. It’s intellectual disagreement ... what’s the good of having a freedom you’re afraid to use?”⁶⁵ It’s clear from this case that university administrators understood OCR rules to mean that once a complaint (however questionable) had been filed, an investigation had to be pursued.

Such institutional monitoring of extramural expression and utterances extends to students as well, particularly with respect to their use of social media (Facebook, Twitter, Yik Yak,) and web technologies (blogs, texting, video cams). For example, the Kansas Court of Appeals in September, 2015, overruled University of Kansas’ decision to expel Navid Yeasin, after he made tweets on a private account, from which he removed his former partner as a follower, allegedly referencing his ex- (as among other things) “psycho bitch” and “#psycho.” The university claimed he infringed upon her Title IX rights by creating a hostile environment for her on the campus, in light of a “no contact” order he had been given over a prior criminal restraint and battery and deprivation of property incident when he confiscated her smart phone and refused to let her leave the car, after discovering Facebook exchanges between her and another man. The court’s decision narrowly focused on the university student conduct code language, ruling it did not cover the tweets because there was no evidence the postings happened on campus.⁶⁶ Although the ruling limited the university’s power in this case, the court’s narrow holding avoided discussing the more important substantive issue of university administrators’ failure to distinguish between punishable conduct and protected speech.

⁶⁵ Laura Kipnis, “My Title IX Inquisition,” *The Chronicle Review, The Chronicle of Higher Education*, May 29, 2015. <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>

⁶⁶ Scott Jaschik, *Inside Higher Education*, “Appeals Court Reverses Twitter-Based Expulsion,” September 28, 2015. <https://www.insidehighered.com/news/2015/09/28/court-rules-u-kansas-cant-expel-students-over-remarks-twitter-made-campus>

Additionally in October, 2015, the OCR initiated an investigation of the University of Mary Washington (a public institution in Virginia), following a civil-rights complaint by a campus feminist group that the administration violated Title IX by deeming harassment on the anonymous app, Yik Yak, to be protected by the First Amendment. When the president issued a letter asserting, among other things, that the university does not have legal authority to track threats made on social media using off-campus networks, the complainants amended the charges to include illegal retaliation for the “disparaging” response. Ultimately, seventy-two women’s and civil rights groups urged the DOE to pressure colleges to protect faculty and students from sexually harassing anonymous posts made on social media. A lawyer representing the groups asserted anonymous apps like Yik Yak to be “the new frontier of unlawful conduct under Title IX.” This assertion reveals the expanding reach of DOE OCR’s approach of eliding conduct and speech distinctions in defining sexual harassment in a university setting.⁶⁷

At Michigan Technological University in November, 2015, a student publication was placed on probation for two years and denied part of its funding after publishing a satirical article about a fictional sexually harassed man. The university stated that even though it was clear the article was a satire, it might be construed as “advocating sexual violence.” If such an interpretation were possible, administrators maintained, then Title IX required the action it had taken. The Vice President for Student Affairs insisted that the Constitution did not “supersede” it. “Title IX is a federal compliance policy. Those policies supersede anything else.”⁶⁸ This comment exemplifies the power OCR regulation can exercise over university officials, who tend to interpret Title IX in the most restrictive ways possible -- even if it means contradicting common sense as well as constitutional law.

⁶⁷ Josh Logue’s “Who Should Prevent Social Media Harassment,” *Inside Higher Education*, October, 22, 2015, <https://www.insidehighered.com/news/2015/10/22/colleges-face-new-pressure-monitor-social-media-site-yik-yak>; Peter Schmidt, “Women’s Groups Urge Colleges and Government to Rein in Yik Yak,” *The Chronicle of Higher Education*, October 21, 2015. <http://chronicle.com/article/Women-s-Groups-Urge-Colleges/233864>

⁶⁸ Madeline Will, “Student Satire Publication Lost Funding, Put on Probation After Article on Sexual Harassment,” The Student Press Law Center (SPLC), December 15, 2015. <http://www.splc.org/article/2015/12/student-satire-publication-lost-funding-put-on-probation-after-article-on-sexual-harassment>

Such *ad hoc* disciplinary actions against students over extramural speech controversies demonstrate the way that overly broad definitions of hostile environment harassment work at cross-purposes with the academic freedom and free speech rights necessary to promote learning in an educational setting. Learning can be best advanced by more speech that encourages discussion of controversial issues, rather than by using punitive administrative and legal fiat to prevent such discussions from happening at all.

4. Governance

In 2013, a lab assistant at Bard College filed a Title IX complaint with the administration against Chemistry Professor Craig Anderson, apparently alleging that he had used aggressive and vulgar language. (The details of the charge, and of the subsequent investigatory report, were kept secret.) Bard hired a law firm to investigate; then, without disclosing the investigator's report to the professor, the college imposed sanctions by stripping him of his position as director of the chemistry program, barring him from certain meetings, and requiring him to hire a professional to coach him on job performance. The college's AAUP chapter, on behalf of the professor, filed a grievance pursuant to a collective bargaining contract. The college president denied that the contract's grievance procedure applied, maintaining that it was superseded by Title IX. No due process was afforded to the professor, nor did the allegations, even if true, meet any legal definition of sexual harassment. The AAUP chapter sued in federal court, seeking an order enforcing the collective bargaining contract, but the college ultimately reached a settlement with the professor, and the lawsuit was dropped.⁶⁹ Thus, the question of whether institutions can circumvent grievance procedures, conduct secret Title IX investigations, and impose sanctions based on a Star Chamber-like process, remains unanswered at Bard and elsewhere.

The cases involving teaching, research and extra-mural speech, as well as the Bard College case, attest to a severe crisis in governance. Rather than using shared governance to carefully construct institutional measures to address problems of sexual harassment and sexual misconduct, university

⁶⁹ Conor Skelding, "Union Sues Bard College Over Title IX Investigation," *POLITICO New York*, April 10, 2015. <http://www.capitalnewyork.com/article/albany/2015/04/8565830/union-sues-bard-college-over-title-ix-investigation>; http://www.capitalnewyork.com/sites/default/files/AAUP_Bard.pdf

administrations have implemented hastily created procedures in an effort to conform to the OCR's interpretation of Title IX requirements. University Title IX administrators, who often lack faculty standing, usually operate out of a human resource department or some version of an office of equity and inclusion, insulated from faculty, students and existing shared governance mechanisms. Faculty largely do not participate in the formulation of sexual assault and sexual harassment policies, instead encountering them as information items on a senate agenda or on a university policy website. As a result, the process of adopting and implementing Title IX procedures has been carried out in parallel with — but independent of — the policies and practices of academic freedom, due process, and shared governance, all of which are crucial to the work of faculty and students at all stages of their academic careers as well as to sustaining the university's educational mission.

The AAUP 1994 statement, *On the Relationship of Faculty Governance to Academic Freedom*, recognizes that “sound governance practice and the exercise of academic freedom are closely connected, arguably inextricably linked.”⁷⁰ Faculty participation in shared governance is essential to creating policies and procedures that protect academic freedom in teaching, research, and extramural speech and that require due process in investigating and adjudicating allegations of misconduct. As discussed in Section IV below, AAUP statements and reports on sexual misconduct and sexual harassment provide sources for creating policies and procedures that are responsive to the laudable goals of Title IX, yet sensitive to academic freedom, free speech and due process rights of faculty and students alike. Through shared governance, faculty would play a key role in creating sexual harassment policies that define proscribed conduct and speech, while protecting academic freedom and free expression. Faculty participation in policy creation and implementation could ensure that due process and peer review are central to investigating and adjudicating allegations of sexual misconduct or harassment. Participation of faculty in disciplines related to gender and sexuality can be particularly important as they are vulnerable to the chilling effect of potential hostile environment charges and are disproportionately affected in their teaching and research due to universities' adoption of overly broad definitions of all faculty as mandatory reporters.

⁷⁰ AAUP 1994 statement *On the Relationship of Faculty Governance to Academic Freedom*.
<http://www.aaup.org/report/relationship-faculty-governance-academic-freedom>

Infringements of academic freedom, such as the cases described above, are often carried out through procedures that violate due process and override faculty peer review. Administrators have taken unilateral action against faculty under adjudicatory protocols that impose tight procedural timelines in the name of complying with Title IX. For example, Patricia Adler’s dizzying reversal of fortunes with respect to sexual harassment allegations happened during a winter break intersession. Teresa Buchanan’s positive promotion status became an “unacceptable performance” in roughly a fortnight, leading an HR investigation to conclude that she was guilty of the charges she had yet to hear. The LSU administration gave priority to this precipitous action to preempt consideration of a faculty hearing committee’s contrary findings that were reached after many months of sifting evidence. It was as if her dismissal for cause had been a foregone conclusion, ignoring faculty input and shuttering shared governance at LSU. Laura Kipnis’ Title IX “inquisition” similarly turned into a referendum on shared governance, when the Senate Chair who accompanied her to some meetings was deemed by the complainants a conspiratorial harasser, merely for alluding to the case in general terms before the faculty senate. Bard College failed to provide due process to Professor Anderson, maintaining secrecy in its Title IX investigation, refusing to follow the grievance procedure in the collective bargaining agreement, and pursuing a Title IX investigation based on charges that, apparently, only involved vulgar language.

The role of faculty governance in creating and applying procedural due process is essential to safeguarding the interests of all parties, including victims, in fair adjudication, apart from the outcome of a hearing. For example, an investigation of astronomer Geoffrey Marcy at UC-Berkeley, who was alleged to have repeatedly harassed female students without significant consequences, became public not as a result of a faculty hearing, but because *BuzzFeed* broke the story, much to the surprise of colleagues and students on the campus, whose expression of collective outrage at the allegations ultimately forced his resignation.⁷¹ As their explanation for forestalling disciplinary action in the situation, administrators cited “lengthy and uncertain” hearing guidelines with differing evidentiary

⁷¹ Azeen Ghorayshi, “Famous Berkeley Astronomer Violated Sexual Harassment Policies Over Many Years,” *BuzzFeed News*, October 9, 2015, <http://www.buzzfeed.com/azeenghorayshi/famous-astronomer-allegedly-sexually-harassed-students> .

standards and a three-year limitations period that could not be reconciled with how Title IX investigations work. But this actually allowed the administration to avoid addressing a case of alleged sexual misconduct by a “celebrity” faculty member. In the process, established governance procedures were bypassed in the name of Title IX requirements.⁷²

While Title IX claims to assure all students equal access to educational opportunities by protecting them from discriminatory practices on the basis of gender-identity and sex, the ultimate irony may be that this offer of “equal opportunity” does *not* apply for faculty employed as contingent labor (many of whom are female and/or from underrepresented groups). Denied due process protections of tenured faculty, they are also largely excluded from participating in the shared governance dynamics that make a difference to how and whether sex can be discussed, taught, and researched at all. Notably, Alice Dreger and William Peace both occupied faculty appointments of uncertain terms (she as contingent clinical faculty, he as a visiting professor at Syracuse University), which made it easier for the Northwestern administration to trammel upon their academic freedom rights. Indeed, Dreger acknowledged that her resignation was possible only because of her own financial circumstances.

In the Marcy case, University of California system President Janet Napolitano called for a reassessment of procedures for investigating misconduct complaints against tenured faculty. Her suggestions might instead be redirected to protecting due process rights for tenured, tenure-track and nontenure-track faculty, while also improving the fairness of reporting and investigative procedures for faculty and students who have experienced harassment or other sexual misconduct.

Unfortunately, Title IX enforcement processes do not now do this work.

In interpreting Title IX, Harvard University law professor Janet Halley has suggested that a feminist model of governance could create fair and transparent adjudicative procedures, particularly in light of the fragility surrounding sensitive topics like sex. Halley calls on “governance feminist decision-makers” to acknowledge the dangers posed by over-zealous applications of Title IX, pointing out “the

⁷² Berkeley had been placed on a list of institutions being investigated for Title IX violations the previous year; see Sahil Chinoy, “UC Berkeley on New List of Schools Under Investigation for Handling of Sexual Violence,” *The Daily Californian*, May 5, 2014, <http://www.dailycal.org/2014/05/01/uc-berkeley-new-list-schools-investigation-handling-sexual-violence/>.

rights they invade: rights to privacy, to autonomy, to due process.”⁷³ She urges vigilance in opposing procedural frameworks that may disadvantage an accuser or an accused, based on factors of class, LGBTQ identities, or racial difference, depending on the nature of hostile environment or sexual harassment claims.

Halley’s critique contrasts faculty governance interests in due process with university administrative interests in risk-avoidance and institutional control. As Halley contends: “Increasingly, schools are being required to institutionalize *prevention*, to control the *risk* of harm, and to make regulatory action to protect the *environment*. Academic administrators are welcoming these incentives, which harmonize with their risk-averse, compliance-driven, and rights-indifferent worldviews and justify large expansions of the powers and size of the administration generally.”⁷⁴ Such administrative excess frustrates meaningful recognition of the goals of Title IX by prioritizing liability risks over the realities of sex and other inequalities on campus. This administrative overreliance also erodes faculty governance and academic freedom—the very preconditions necessary to address such inequality on campus and beyond.

III. Title IX in the Context of the “Corporate” University

Proponents of Title IX’s broad interpretation and robust enforcement often suggest equivalence between bringing a sex discrimination claim, its successful resolution, and the delivery of gender justice. Recent developments in the interpretation and enforcement of Title IX, however, risk fostering conditions that facilitate or encourage constraints on faculty and student academic freedom. Further, when Title IX’s legal mandate to end sex discrimination is not institutionally accompanied by corresponding commitments to ending racial or other forms of inequity on campus, its enforcement, however well-intentioned, may exacerbate gender, racial, and other injustices.

⁷³ Janet Halley “Trading the Megaphone for the Gavel in Title IX Enforcement,” *Harvard Law Review Forum*, 103, February 2015, pp. 103-117, p.117.

https://dash.harvard.edu/bitstream/handle/1/16073958/vol128_Halley_REVISED_2.17.pdf?sequence=1

⁷⁴ *Ibid.*

A serious assessment of Title IX's current implementation must account for how its enforcement affects and is affected by the social contexts in which it is applied and in which it operates. To start, the merits of Title IX as a principal instrument in the fight to end sex discrimination on campus must be evaluated in light of the increasing "corporatization of the university." That phrase refers to a new organizational model of university management and governance that is entrepreneurial at its core. In part a result of reductions in state and federal support for higher education, the new model also reflects a vast cultural change in thinking about the value and function of higher education, one that is more oriented to vocational training than to humanistic learning. The entrepreneurial model privileges administrative managerial methods and interests; evaluates and eliminates departments and disciplines according to borrowed business metrics of economic efficiency; and promotes a commercial model of universities, in which student satisfaction as "education consumers" is paramount.⁷⁵

Critics have noted that Title IX-based efforts to end sex discrimination on campus effectively view the university as a universe unto itself. Sex discrimination on campus is figured as a discrete issue, one capable of being parsed from the large cultural problem of sexual violence and harassment.⁷⁶ This perspective carries particular assumptions about how sexual assault and harassment on campus might be best addressed and who might best address it. In this view, the university is the author of its own solutions: careful policy drafting and the judicious application of Title IX will eradicate the problem. Not coincidentally, this approach positions university administrators as the definitive source of such policies, enlisting them as the first-line enforcers of Title IX.

As a result, university efforts to comply with Title IX have followed the trail blazed by human resource departments, where the establishment of reporting protocols and internal processes can take precedence over holistic challenges to prevailing gender and sexual norms. Harvard University, for

⁷⁵ AAUP amicus brief to NLRB, Pacific Lutheran case.

<http://www.aaup.org/sites/default/files/files/IFINAL%20%26%20FILED%20-%20AAUP%20Pacific%20Lutheran%20Amicus%20Brief.pdf>

⁷⁶ See Francine Banner, "Institutional Sexual Assault and the Rights/Trust Dilemma," *Cardozo Journal of Public Law and Policy Ethics*, Volume 13, pp. 97-172, August, 2015. <http://www.cplpej.org/wp-content/uploads/2015/08/Banner-Francine.pdf>

example, has created a single-purpose Title IX office, specializing exclusively in the adjudication of sexual and gender-based harassment claims, and many universities have implemented mandatory training that instruct students, faculty, and staff on what behaviors run afoul of Title IX. In attempts at educational outreach, many universities recruit their own students to attend and lead orientation and training on the issue of sexual assault on campus and the importance of obtaining sexual consent. The University of Richmond, Rutgers University, John Hopkins University, American University, and the University of Michigan-Ann Arbor all offer some form of “for student, by student” anti-sexual violence initiatives as evidence of Title IX compliance.⁷⁷

The efficacy of these student-based efforts, however, remains an open question; they pose challenges and limitations that need to be addressed.⁷⁸ Critics charge that isolating sex discrimination as a problem of institutional culture frustrates meaningful change. As law professor Francine Banner notes, this approach pits individuals against public institutions, resulting in a scenario in which the law “overvalues the maintenance of organizational loyalty and undervalues the rights of victims.”⁷⁹ University protocols and procedures can also be at odds with those of the criminal justice system -- not that either approach is particularly noted for the quality of its response. Both systems stand accused of serving neither survivors nor alleged perpetrators with any notable degree of fairness. Additionally, even if a student is found in violation of Title IX, the internal sanctions meted out by universities do little to forestall bad behavior that occurs beyond the bounds of the quad.⁸⁰ Defining sex discrimination on campus as an institutional or individual peculiarity frustrates a more comprehensive examination of social norms and practices that contribute to sex discrimination, while entrenching administrative decision-making and organizational power.

⁷⁷ Sarah Brown, “How One University Uses New-Student Orientation to Talk About Sexual Assault,” *The Chronicle of Higher Education*, August 26, 2015. <http://chronicle.com/article/How-One-University-Uses/232603/>

⁷⁸ See Greg Lukianoff and Jonathan Haidt, “The Coddling of the American Mind,” *The Atlantic*, September, 2015; Samantha Harris and Greg Lukianoff, “Threats to Due Process and Free Speech on Campus,” in *Liberty’s Nemesis: The Unchecked Expansion of the State*, (Encounter Books, 2016), pp. 169-180 (Dean Reuter and John Yoo, eds.).

⁷⁹ Francine Banner, “Institutional Sexual Assault and the Rights/Trust Dilemma,” *Cardozo Journal of Public Law and Policy Ethics*, Volume 13, pp. 97-172, August, 2015, p. 106, <http://www.cplpej.org/wp-content/uploads/2015/08/Banner-Francine.pdf>

⁸⁰ See Zoë Carpenter, “Who Should College Students Really Call When They Are Sexually Assaulted on Campus?” *The Nation*, December, 2014. <http://www.thenation.com/article/who-should-college-students-really-call-when-they-are-sexually-assaulted-campus-0/>

Problems of definition are compounded by the administrative and governance structures of the entrepreneurial university itself—ones that promote Title IX with one hand, while the other adopts priorities that do not favor programs and areas of study that exist to analyze how sex, gender, power, and advantage operate. Emphasis on the importance of external research funding devalues programs such as gender, feminist, and sexuality studies, which are unlikely to have the same kinds of research grant opportunities as social science and science departments. The current focus on measuring the worth of higher education in terms of a path to employment also lowers the perceived value of such programs. Further, seeking to raise more tuition revenue, universities “invest [] in resort-like amenities, even as they cut academic departments and financial aid.”⁸¹ Allied disciplines such as Africana Studies, Latino/a Studies, and other locations for gender and sexuality inquiry, as well as critical race and ethnic studies scholarship across the humanities and social sciences, have faced similar setbacks. One recent example is the drastic—40%--budget cut for Ethnic Studies at San Francisco State University, part of “the structural undercutting of Ethnic Studies across the California State University system.”⁸² At Berkeley, in 2015, the administration proposed “repositioning” the Center for Race and Gender, effectively decreasing its institutional support.⁸³ Similar attacks on such programs have charged them with contributing to divisiveness and stressing collective over individual experience.⁸⁴

⁸¹ Michelle Goldberg, “This Is What Happens When You Slash Funding for Public Universities,” *The Nation*, June 8, 2015. <http://www.thenation.com/article/gentrification-higher-ed/>

⁸² San Francisco State pioneered Ethnic Studies in the 1960’s and 70’s, in response to student strikes and the program flourished there until recently. See, Joanne Barker, “The Beginning and End of Ethnic Studies,” <https://tequilasovereign.wordpress.com/2016/02/22/>; see also, “Remembering the Strike,” *SF STATE Magazine*, Fall,/Winter 2008, http://www.sfu.edu/~sfmag/archive/fall_08

⁸³ Joanne Barker, “The Beginning and End of Ethnic Studies,” <https://tequilasovereign.wordpress.com/2016/02/22/>

⁸⁴ The OCR has granted exemptions to religious schools to restrict speech relating to abortion and LGBTQ issues; it has also permitted punitive action against faculty for transgressing religious prohibitions in their personal lives. See Katha Pollitt, “The Schools Where Free Speech Goes to Die,” *The Nation* January 21, 2016, <http://www.thenation.com/article/the-schools-where-free-speech-goes-to-die/>. In addition, states with laws permitting guns on campus (most recently Texas) have issued warnings to faculty to avoid controversial issues on their syllabi and in classroom discussions—the Second Amendment effectively trumps the First Amendment as well as Title IX. See Patricia Williams, “ISIS is Changing Our Attitudes Towards Free Speech But Not Guns,” *The Nation* February 4, 2016, <http://www.thenation.com/article/ban-guns-not-tongues/>.

The entrepreneurial model of the university offers a single purpose Title IX infrastructure and authorizes training in the name of sex discrimination, while simultaneously promoting a culture of inequality by employing a sizable feminized teaching force of underpaid adjunct and graduate student labor. A study of changes in higher education faculty appointments concludes, “More than half of all female faculty now hold part-time positions and more than 45 percent of full-time female faculty have non-tenure-track appointments.”⁸⁵

While the original aims of Title IX and the legal meaning of “sex discrimination” encompass more than sexual violations, today the claims most readily associated with Title IX involve sexual violence or sexual harassment, whether actual conduct or speech. This is largely due to the efforts of a national student movement against sexual violence on campus, of which Title IX is one part. While students’ commitment to combating sexual violence is admirable and necessary, in the context of the corporate university this activism can result in disturbing outcomes. First, as mentioned above, that very vocal movement has effectively narrowed the popular meaning of sex discrimination to sexual speech and sexual violence, often conflating the two. Further, the singular focus on sexual harassment has overshadowed issues of unequal pay, access, and representation throughout the university system.

Additionally, administrators’ corporate service/client relationship to students has obscured the question of how to deal with criminal behavior on campus. The client service model allows administrations to try to have it “both ways.” The University of Colorado at Boulder recently settled a lawsuit, for \$15,000, from a former student who said the university violated Title IX when it suspended him for nonconsensual sexual intercourse. The University’s behavior in this case satisfied the law, and it satisfied the accuser by finding the accused responsible, but mitigated any fallout by settling the accused’s resulting lawsuit.⁸⁶ This is bureaucratic and legal logic at work that does not address the question of whether sex-based inequality is being remedied.

⁸⁵ Ernst Benjamin, “The Eroding Foundations of Academic Freedom and Professional Integrity: Implications of the Diminishing Proportion of Tenured Faculty for Organizational Effectiveness in Higher Education,” *AAUP Journal of Academic Freedom* (2010). p. 6. <http://www.aaup.org/reports-publications/journal-academic-freedom/volume-1> (analyzing data from 1975 through 2007).

⁸⁶ See Robin Wilson, “Should Colleges Be Judging Rape?” *The Chronicle of Higher Education*, April 12, 2015. http://chronicle.com/interactives/assault_judging

Finally, investigations of sexual harassment and violence claims do not necessarily understand those claims as embedded within the broader social dynamics on and off campus. As Janet Halley points out, this segmented approach to sex discrimination promotes partial and legalistic analyses of the nature and scope of the problem, obscuring how racial antagonisms or LGBTQ animosities may play out through calls for gender equality.⁸⁷ This approach takes action that is not responsive to the overarching question: What vision of justice, educational access, and public accountability should the enforcement of Title IX seek to facilitate?

The answer depends in part on what counts as sex discrimination--particularly what conduct or speech (and in what amounts) can support a charge of hostile environment. While financial cuts and program eliminations have threatened entire disciplines and methods of producing knowledge, struggles over the importance and scope of academic freedom v. sex discrimination have also flared across campuses nationwide. From trigger warnings to tweets, the AAUP has documented an increase in potential threats to the academic freedom that protects teaching, research, and extramural speech, and fosters shared governance by university administrations, students, and faculty. When Title IX concerns play out as hostile environment sex panics within the corporate university, academic freedom is threatened across several fronts.⁸⁸ Under such interpretations of Title IX, faculty who teach, research, and otherwise study sexuality are left especially vulnerable to sex harassment charges.⁸⁹ In responding to OCR's 2011 Dear Colleague Letter, the AAUP warned of this danger, emphasizing that "[a]ny training for faculty, staff, and students [about how to identify and report sexual harassment] should explain the differences between educational content, harassment, and 'hostile environments,' and a faculty member's professional judgment must be protected. Women's studies and gender studies programs have long worked to improve campus culture by teaching about

⁸⁷ Janet Halley "Trading the Megaphone for the Gavel in Title IX Enforcement," *Harvard Law Review Forum*, 103, February 2015, pp. 103-117, p.117.

https://dash.harvard.edu/bitstream/handle/1/16073958/vol128_Halley_REVISIED_2.17.pdf?sequence=1

⁸⁸ Sex panics are essentially moral panics, the imposition of state or elite generated morality, to punish exceptions to normative rules about sexuality on the part of women, queer people and people of color. See, Roger N. Lancaster, *Sex Panic and the Punitive State* (U. California Press, 2011).

⁸⁹ Michelle Goldberg, "This Professor Was Fired for Saying 'Fuck No' in Class," *The Nation*, July 2, 2015.

<http://www.thenation.com/article/this-professor-was-fired-for-saying-fuck-no-in-class/>

issues of systemic gender inequity, sex, and sexuality. [OCR] should encourage discussion of topics like sexual harassment both in and outside of the curriculum, but acknowledge that what might be offensive or uncomfortable to some students may also be necessary for their education.”⁹⁰

IV. AAUP Policies on Sexual Harassment and Academic Freedom

There is no necessary contradiction between effectively addressing problems of sexual harassment (assault, inappropriate conduct and unprotected speech) and fully protecting academic freedom. AAUP policies consistently have condemned sexual harassment while emphasizing the need for universities, through shared governance, to adopt clear and fair policies and procedures pertaining to sexual harassment. Such university policies and procedures should respect academic freedom and due process rights and should seek not only to respond appropriately to sexual harassment, but also to prevent it.

The most recent AAUP report in 2014, *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints* (initially adopted in 1984, revised in 1990 and 2014, endorsed at the AAUP 81st annual meeting) states:

Recently, national attention has focused on complaints of sexual harassment in higher education. These particular complaints invoke the Association’s more general commitment to the maintenance of ethical standards and the academic freedom concerns these standards reflect. In its *Statement on Professional Ethics*, the Association reiterates the ethical responsibility of faculty members to avoid “any exploitation of students for . . . private advantage.” The applicability of this general norm to a faculty member’s use of institutional position to seek unwanted sexual relations with students (or anyone else vulnerable to the faculty member’s authority) is clear. Similarly, the Association’s *Statement on Freedom and Responsibility* states that “intimidation and harassment” are inconsistent with the maintenance of academic freedom on campus. This statement is no less germane if one is being made unwelcome because of sex, rather than because of race, religion, politics,

⁹⁰ <http://aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightsletter.pdf>

professional interests or other irrelevant characteristics. The unprofessional treatment of students and colleagues assuredly extends to sexual discrimination and sexual harassment, as well as to other forms of intimidation.

The 2014 AAUP report proposes a policy for colleges and universities desiring a separate statement of policy on sexual harassment. The proposal distinguishes conduct or speech defined as sexual harassment from protected speech:

It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:

1. such advances or requests are made under circumstances implying that one's response might affect educational or personnel decisions that are subject to the influence of the person making the proposal; or
2. such speech or conduct is directed against another and is either abusive or severely humiliating, or persists despite the objection of the person targeted by the speech or conduct; or
3. such speech or conduct is reasonably regarded as offensive and substantially impairs the academic or work opportunity of students, colleagues, or co-workers. If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material.⁹¹

⁹¹ AAUP 2014 report, "Sexual Harassment: Suggested Policy and Procedures for Handling Complaints." <http://www.aaup.org/report/sexual-harassment-suggested-policy-and-procedures-handling-complaints>

AAUP statements and reports have been consistent in upholding the need for due process protections in sexual harassment investigations and hearings. The 1994 statement, *Due Process in Sexual Harassment Complaints* emphasizes that universities should not bow to pressure to sacrifice fair process in handling sexual harassment complaints:

These instances of avoiding or shortcutting recognized safeguards of academic due process in treating complaints of sexual harassment may be motivated partly by fear of negative publicity or of litigation if prompt and decisive action does not appear to be taken, or they may be motivated by a well-meaning desire to cure a wrong. Nonetheless, sexual harassment—which Committee A certainly does not condone, be the offender a faculty member or anyone else—is not somehow so different from other kinds of sanctionable misconduct as to permit the institution to render judgment and to penalize without having afforded due process. In dealing with cases in which sexual harassment is alleged, as in dealing with all other cases in which a faculty member’s fitness is under question, the protections of academic due process are necessary for the individual, for the institution, and for the principles of academic freedom and tenure.⁹²

Endorsing the “clear and convincing” evidence standard as part of due process, the statement of the AAUP’s Committee on Women in the Academic Profession, *Campus Sexual Assault: Suggested Policies and Procedures* (adopted by AAUP Council, 2012), states:

In an effort to improve the likelihood of bringing perpetrators to justice, the Office for Civil Rights... argues in its “Dear Colleague Letter” that replacing the prevailing standard of “clear and convincing evidence” with a “preponderance-of-the-evidence” standard would help level the playing field for victims of sexual violence. The proposal has in general been favorably received by women’s advocacy groups and sexual-assault support agencies but has been opposed by many organizations representing both progressive and conservative values. The

⁹² AAUP 1994 Statement, *Due Process in Sexual Harassment Complaints*. <http://www.aaup.org/report/due-process-sexual-harassment-complaints>

AAUP advocates the continued use of “clear and convincing evidence” in both student and faculty discipline cases as a necessary safeguard of due process and shared governance. The committee believes that greater attention to policy and procedures, incorporating practices we have suggested here, is the more promising direction.⁹³

AAUP Associate Secretary Anita Levy further explained the importance of the “clear and convincing” standard in her written remarks to the US Commission on Civil Rights in its briefing on “Academic Freedom and Sexual Harassment Law Enforcement” in July 2014:

Given the seriousness of accusations of harassment and sexual violence and the potential for accusations, even false ones, to ruin a faculty member’s career, we believe that the “clear and convincing” standard of evidence is more appropriate than the “preponderance of evidence” standard. Since charges of sexual harassment against faculty members often lead to disciplinary sanctions, including dismissal, a preponderance of the evidence standard could result in a faculty member’s being dismissed for cause based on a lower standard of proof than what we consider necessary to protect academic freedom and tenure. We believe that the widespread adoption of the preponderance of evidence standard for dismissal in cases involving charges of sexual harassment would tend to erode the due process protections for academic freedom. While clear policy statements and timely responses are critical for both the complainant and the accused, preserving a higher standard of proof is vital in achieving fair and just treatment for all. We urge both the Departments of Education and Justice to reconsider “the preponderance of evidence” standard.

AAUP statements and reports emphasize that shared governance is essential to creating and implementing programs, policies and procedures to address sexual assault and sexual harassment. As the AAUP’s 2012 statement on campus sexual assault states, “All members of the campus community— faculty members, administrators, staff members, and students—share responsibility for

⁹³ AAUP 2012 Statement, *Campus Sexual Assault: Suggested Policies and Procedures*. <http://aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures>

addressing the problem of campus sexual assault and should be represented in the policy-development process.” The statement discusses, as well, “the special role and responsibility of faculty members, a group often overlooked in campus sexual-assault prevention and training programs.” The 2014 report on sexual harassment proposes procedures for handling sexual harassment complaints against faculty, including a faculty review committee to hold hearings, determine the merits of complaints, and make recommendations of any sanctions that may be appropriate.

AAUP statements and reports should be amended, as needed, to further clarify the distinctions between sexual assault and harassment and between speech and conduct, and to strengthen academic freedom protections. The 2012 statement on *Campus Sexual Assault* uses the term “sexual violence...as a blanket term for sexual harassment, sexual abuse, sexual assault, rape, stalking, domestic violence, and other forms of sexual misconduct.” Using the term “sexual violence” so broadly does not adequately distinguish sexual harassment – particularly where it involves only speech – from other types of sexual misconduct.

The 2014 report on *Sexual Harassment* proposes a policy that distinguishes protected speech from conduct or speech constituting sexual harassment. Further, the policy includes protection of conduct in the teaching context. This could include expressive conduct such as gestures, dance, or other types of actions. To further clarify the protection of speech and expressive conduct, the AAUP proposed policy could be amended to include specific references to academic freedom. The proposed policy could also be amended to clarify that teaching, research, and extramural speech protected by academic freedom are excluded from definitions of sexual harassment.

V. Recommendations

A. For the Office of Civil Rights of the Department Of Education

1. OCR should reiterate its interpretation of Title IX as protecting academic freedom and freedom of speech.

OCR should return to its earlier Guidance and Dear Colleague Letters that interpret Title IX as protecting students from sex discrimination, while also protecting academic freedom and free speech in public and private educational institutions (2001 Sexual Harassment Guidance and 2003 DCL). To adequately protect academic freedom, OCR should distinguish between allegations of sexual harassment based on conduct and allegations based on speech. The OCR should clarify that proof of hostile environment sexual harassment cannot be based only on subjective perceptions that speech is offensive and that “[i]n order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student’s ability to participate in or benefit from the education program.” (2001 Sexual Harassment Guidance)

2. OCR should interpret Title IX as fully protecting due process rights of complainants and accused parties.

OCR should increase its attention to protecting due process in all stages of Title IX investigations and proceedings. Given the seriousness of accusations of sexual harassment and sexual violence and the serious reputational and career consequences that can result from such accusations, even false ones, the “clear and convincing” standard of evidence is more appropriate than the “preponderance of evidence” standard. Indeed, criminal courts require evidence “beyond a reasonable doubt”—and some sexual assault cases are criminal cases. At a minimum, OCR should recognize the freedom of colleges and universities to adopt the “clear and convincing” standard of evidence. Further, OCR should not impose a requirement to use the “preponderance of evidence” standard without first engaging in the federal administrative rulemaking process.

3. OCR should work with colleges and universities in constructive ways to develop policies and procedures for applying and enforcing Title IX.

OCR should refine its compliance process to minimize confrontation and instead develop the potential to work with universities to create policies and procedures for receiving and responding to Title IX complaints in ways that address problems while also protecting academic freedom and free speech and providing due process for all parties. OCR should also assist universities to develop educational programs that address underlying problems of gender inequality, including sexual assault and sexual harassment, on campus. Such measures should not be based on a “blueprint”, but should instead seek

to facilitate measures that address gender inequality in ways that best fit particular colleges and institutions.

4. OCR should interpret Title IX as exempting faculty from serving as mandatory reporters.

Interpreting Title IX to require that all faculty serve as mandatory reporters compels faculty to violate confidentiality in relationships with students. OCR can better facilitate achieving Title IX's commendable goals of remedying sex-based discrimination if it more resolutely focuses on creating educational initiatives and recommending procedural models that involve faculty in more relevant ways. For example, Title IX policy development at the institutional level could support ways for faculty to engage students who are concerned about how to best actualize gender and sex equity on campus. They would work collaboratively to address those issues without violating academic freedom and due process rights. This is not only an issue of shared governance, but of the educational mission of universities.

B. For University Administrators

1. Universities should reference and incorporate AAUP language on academic freedom in all Title IX policy.

Universities must strengthen policies to protect academic freedom against incursions from overly broad harassment definitions and other excessive regulatory university protocols. University administrations often view academic freedom as an obstacle to policies that have already been promulgated instead of as a foundational tenet of higher education that should shape university policy. Instead, and from their inception, university policies should strive to ensure academic freedom by referencing AAUP policies and actively incorporating their strong protections.⁹⁴

University policies against sexual harassment should distinguish speech that fits the definition of a hostile environment from speech that individuals may find hurtful or offensive but is protected by academic freedom. Title IX policies ought not to be treated as special or separate from other

⁹⁴ See AAUP 1940 *Statement of Principles on Academic Freedom and Tenure*, <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>

university policies that are developed and approved through faculty governance, not imposed by administrative fiat.

2. Universities must include faculty in all stages of Title IX policy development, implementation, and enforcement.

Respect for faculty governance ought to be a tenet of administrative practice.⁹⁵ Crucially, faculty must be included in all stages of sex harassment policy development implementation, and enforcement. As Section V of the AAUP statement on *Campus Sexual Assault* states: “All members of the campus community— faculty members, administrators, staff members, and students—share responsibility for addressing the problem of campus sexual assault and should be represented in the policy-development process.” Because Title IX prohibits non-sexual sex discrimination as well as conduct that does not rise to the legal definition of assault, broad-based campus community participation in the development, implementation, and enforcement of Title IX is especially crucial to fulfilling its expansive vision of equality. Faculty have a key role to play.⁹⁶

Faculty senates can further academic freedom by drafting and enshrining protective language within their policies regarding sex discrimination. Where faculty are unionized, such protections can be included in the collective bargaining agreement. Additionally, in order to ensure adequate due process, shared governance must accompany the creation of any campus adjudication system and drive every stage of its operation. Entrusting a trained, duly appointed faculty body to review all Title IX complaints involving faculty members would offer a timely defense against unprincipled and overly broad interpretations of Title IX that potentially subject speech that provokes feelings of discomfort (as in the Kipnis case) to the same institutional process and censure as sexual assault. Faculty, enmeshed as they are in the quotidian work of campus life, are uniquely situated to help diagnose threats to academic freedom that may accompany sincere attempts to effect equality on campus.

⁹⁵ See AAUP *Statement on Government of Colleges and Universities*, <http://www.aaup.org/report/statement-government-colleges-and-universities>

⁹⁶ *Ibid.*

Precisely because the difference between protected and unprotected speech is not easy to define, faculty are in the best position to help facilitate context-sensitive assessments of the issues at stake. Training on these questions might well be provided by AAUP representatives who can help to clarify the definition of sex harassment, to distinguish between conduct and speech, and to keep crucial issues of academic freedom at the forefront of policy-making.

3. Campuses must coordinate Title IX enforcement with the criminal justice system.

Universities can also improve their handling of Title IX claims by clarifying their relationship to the criminal justice system. Allegations of campus sexual assault currently trigger two parallel institutional responses: those of the criminal justice system and those of the university. Universities have legitimate interests in maintaining safe campus environments and when faculty members are accused of sexual harassment, investigating the allegations while also protecting the labor rights of their employees. Yet as this report suggests, university systems have proven ill-equipped to safeguard the rights of accusers and the accused.

While the criminal justice system is neither the sole nor necessarily the best option for addressing the norms and practices that engender sexual misconduct, universities can pursue Title IX sexual assault claims in ways that mitigate some of the problems of a criminal justice approach. This can include, just as the AAUP 2012 statement on *Sexual Assault* advises, partnering with local police departments early in the process “to determine the rules, definitions, laws, reporting requirements, and penalties that pertain to sexual assault in the local criminal justice system.”⁹⁷ Of equal importance is that minimum professional standards are agreed upon and observed: “[I]t seems clear that closer collaboration with local law enforcement, greater knowledge of what constitutes ‘a crime,’ and better coordination between campus and community service providers would aid many colleges and universities in more effectively addressing the problems of campus sexual assault.”⁹⁸

⁹⁷ See AAUP *Statement on Sexual Assault*, Section IV.

⁹⁸ *Ibid.*

Greater knowledge of what constitutes a crime rather than bad behavior that may breach university policies can help decide when and whether the criminal justice system must be involved in sexual misconduct allegations. Conversely, understanding criminal sexual assault might also forestall university action in order to allow criminal investigations, ideally characterized by a commitment to the due process rights of the accused, to proceed unimpeded. Collaborations of this sort are already occurring between universities and local police.

Southern Oregon University, together with the City of Ashland Police Department, has transformed its approach to sexual assault reports in ways that signal serious concern and care for survivors of sexual assault and still safeguard the rights of alleged perpetrators. Southern Oregon University (SOU) empowers survivors of sexual assault by accepting anonymous reporting until the initiation of criminal proceedings. Further, the police department created a program, “You Have Options,” which allows survivors to halt proceedings at any time; SOU has a companion program, “Campus Choice,” which accommodates possibilities for suspending investigations, so that students can manage other aspects of their lives as the process unfolds. Additionally, both the university employees and Ashland Police Department personnel who work on sexual assault cases receive targeted training in interviewing sexual assault survivors.⁹⁹ Coordinated efforts between campuses and local criminal justice systems can help address due process and definitional concerns that currently plague administrations’ preemptive and precipitous attempts to comply with Title IX at the expense of academic freedom, due process, and meaningful equality on campus.

4. Universities should consider adopting restorative justice practices for some forms of prohibited misconduct.

Universities might also choose to adopt restorative justice practices for some forms of misconduct. In this way, universities can comply with the letter of Title IX without falling victim to the totalizing approach proffered by the OCR and the 2011 Dear Colleague Letter that prompts assessments of liability at the expense of comprehensive analyses of the impact of sex discrimination or wrongdoing

⁹⁹ See, Zoë Carpenter, “Who Should College Students Really Call When They Are Sexually Assaulted on Campus?” *The Nation*, December, 2014. <http://www.thenation.com/article/who-should-college-students-really-call-when-they-are-sexually-assaulted-campus-0/>

on individual campuses. Unlike the criminal justice approach, which traffics in the punishment of the individual wrongdoer, a restorative justice approach focuses on repairing the harm done to the survivor and the community. A restorative justice model, which depends on both the accuser and the accused agreeing to the process, encourages meetings between the two as well as community wide discussion, often led by a facilitator. Restorative justice aims to make amends to the survivor and dissuade the accused from reoffending. As *the New York Times* reports, “the accused might apologize, undergo education, agree to be monitored or take other actions to help the victim and community recover.”¹⁰⁰ Dalhousie University in Halifax, Nova Scotia successfully implemented this approach for university-based sexual harassment claims earlier this year, when women in the dental school reported that male classmates had made inappropriate comments on Facebook.¹⁰¹ While not necessarily applicable in the most severe cases, such as many forms of sexual assault, a restorative justice model may prove useful in transforming other forms of conduct that violate Title IX, as well as conduct that falls between a Title IX violation and legal, if ill advised, bad behavior. A commitment to restorative justice could help limit the scope of hostile environment claims by providing a mechanism for addressing potentially harmful behavior that does not exaggerate the nature of the harm or inappropriately escalate the response to it.¹⁰² The limiting effect of a restorative justice approach might also help safeguard the procedural rights of the accused. Further, restorative justice measures might help mitigate the effects of potential bias on the basis of race, gender identity, and sexual orientation that more litigious sex equality efforts (such as those encouraged by the latest actions of the OCR) can obscure.

5. Universities must address all forms of inequality on campus, including inequalities of race, gender identity, class and sexual orientation.

To further secure the rights of the complainants and the accused, campus initiatives to secure sex equality must be conscious of potential bias on the basis of race, gender identity, class, and sexual

¹⁰⁰ “An Alternative Approach to Campus Justice,” Editorial, *New York Times*, September 9, 2015.

http://www.nytimes.com/2015/09/09/opinion/an-alternative-approach-to-campus-justice.html?_r=0

¹⁰¹ Ibid.

¹⁰² See, for example, Mary P. Koss, Jay K. Wilgus, and Kaaren M. Williamsen, “Campus Sexual Assault: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance,” *Trauma, Violence, and Abuse: A Review Journal*, 2014, Sage Publications, Vol. 15(3) 242-257. <http://tva.sagepub.com/content/15/3/242>

orientation in sex discrimination claims. Following Janet Halley’s suggestion, Title IX offices could take on a compliance-monitoring role and stay out of the business of adjudicating cases. As Halley writes, “[c]ases should go to a body charged with fairness to *all* members of our community, and with particular charges not only to secure sex equality but also to be on the lookout for racial bias and racially disproportionate impact and for discrimination on the basis of sexual orientation and gender identity—not only against complainants but also against the accused.”¹⁰³

6. Universities have an educational mission to support teaching and research on inequality.

While universities seem eager to address the sexual dimensions of sex discrimination, the plain language of Title IX shields those on campus from unequal access to educational resources, wage disparities, and inequitable representation across the university system. To more fully address these conceptual and material inequalities, universities should return to their educational mission. Universities should encourage and improve the conditions of interdisciplinary learning on campus by adequately funding gender, feminist, and sexuality studies as well as allied disciplines. Universities could further signal their commitment to equality of all stripes by asking the faculty governance bodies to consider adopting a requirement that students take one or more of these classes. To this end, universities might formally commit to the development of core curriculum and a required course or coursework dedicated to the analysis of inequality. Promoting such teaching and research will provide students and society at large with the tools for understanding inequality, not as a fact of individual motivation and insult, but as a structural issue whose analysis requires a wide range of approaches across the disciplines. Other programs could include university-wide teach-ins and symposia dedicated to exploring these complex issues.

Campus education is a measure endorsed by the AAUP in its 2012 statement on *Campus Sexual Assault*. It recommends prevention programs focused on education as a critical component of any strategy “proactively to end sexual violence.” In that narrower, resolutely sexual context, campus

¹⁰³ See Janet Halley. “Trading the Megaphone for the Gavel in Title IX Enforcement,” *Harvard Law Review Forum*, 103, February 2015, pp. 103-117, https://dash.harvard.edu/bitstream/handle/1/16073958/vol128_Halley_REVISED_2.17.pdf?sequence=1

education can include workshop and training sessions—some helmed by trained peer educators—that explore what may constitute healthy relationships, the meaning of consent, and strategies for bystander interventions.

In the present climate, however, faculty members who teach and present their research in sexuality studies, gender studies, and related disciplines are in essence being asked to self-censor or risk running afoul of Title IX. To vouchsafe their academic freedom when faculty members stand accused, the AAUP's longstanding recommendations on academic due process standards must be maintained. These include the requirement that complaints against faculty be reviewed by a committee consisting solely of faculty peers, and not by human resources or a Title IX compliance officer. But to safeguard academic freedom in the long run, the educational mission endorsed by the AAUP's statement on *Campus Sexual Assault* must extend to the university programs and curriculum that teach, research, and otherwise promote the study of inequality, broadly defined. Such efforts would guard against a shallow commitment to equality that undermines the very source of its mandate.

C. For Faculty

Above all, faculty must participate in the furtherance of shared governance,¹⁰⁴ academic freedom,¹⁰⁵ and due process.¹⁰⁶ Faculty members have a duty to engage in governance and refuse demands to curtail or eliminate content or speech that is critical to achieving educational objectives. The recognition that some classroom subjects can be intellectually discomfiting should not be confused with the harms engendered by harassment. To these ends, faculty should disseminate these AAUP

¹⁰⁴ See AAUP *Statement on Government of Colleges and Universities*, <http://www.aaup.org/report/statement-government-colleges-and-universities>

¹⁰⁵ See AAUP 1940 *Statement of Principles on Academic Freedom and Tenure*, <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>

¹⁰⁶ See AAUP *Recommended Institutional Regulations on Academic Freedom and Tenure*, <http://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>; AAUP *Statement on Procedural Standards in Faculty Dismissal Proceedings* <http://www.aaup.org/report/statement-procedural-standards-faculty-dismissal-proceedings>; AAUP *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, <http://www.aaup.org/report/statement-procedural-standards-renewal-or-nonrenewal-faculty-appointments>; AAUP 1999 report *Access to Faculty Personnel Files*; AAUP report *The Use and Abuse of Faculty Suspensions*, <http://www.aaup.org/report/use-and-abuse-faculty-suspensions>.

recommendations and consult with their AAUP chapters on how to best address these issues on their home campuses.

At the same time, faculty must recognize that student action—from calls for trigger warnings¹⁰⁷ on syllabi to participation in #blacklivesmatter—is an impassioned response to rampant inequalities on campuses and in society at large. These are issues that deserve a public forum. In fact, decades of feminist research and organizing insist that sexual violence—as well as labor and wage discrimination—are not individual, but rather social problems that in turn require public solutions. Within the current landscape of Title IX interpretation and enforcement, problems arise when public calls for accountability become fused with legal and administrative enforcement efforts that paradoxically reduce the issue to either a problem between individuals best addressed by litigation, or frame it as a question of institutional compliance. These responses are inadequate stand-ins for comprehensive efforts to address the social and material bases of inequality. Both are based on a client-service model of individual, and not necessarily educational, exchange between universities and their students.

As educators and researchers on the frontlines of these debates, faculty must act in solidarity with student attempts to alleviate campus inequalities. This will best be accomplished through robust participation in governance and a dedicated and unwavering defense of academic freedom that exists not in opposition to the concerns that motivate current Title IX actions, but in solidarity with them.

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¹⁰⁷ See AAUP Committee A on Academic Freedom and Tenure report *On Trigger Warnings*, <http://www.aaup.org/report/trigger-warnings>

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