Title IX as a Threat to Academic Freedom
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The Education Department’s Office for Civil Rights brought needed attention to the problem of sexual assault and harassment on college campuses with its 2011 letter telling institutions to enforce the law. But in so doing, the office has created a slew of new problems with implications for free speech and academic freedom. That’s the premise of a lengthy new report from the American Association of University Professors.

Drawing on the history of Title IX of the Education Amendments of 1972, which prohibits gender discrimination in education, the report argues for a more judicious application of the law across academe. The report is an attempt to reshape discussion of Title IX -- to put substantially more emphasis on due process.

Predictably for so controversial a topic, “The History, Uses and Abuses of Title IX” is earning praise and criticism from those on all sides of the argument.

“Success stories about compelling universities to address problems of sexual assault, such as those recounted by student campus groups, are matched by reported cases in which university administrators fail to punish gross and repeated sexual harassment, or where Title IX administrators from the [Education Department] and within the university overreach and seek to punish protected academic speech,” reads “Uses and Abuses.”

Such cases, it continues, “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.”

“Uses and Abuses” was written by members of AAUP’s Committee on Academic Freedom and Tenure and its Committee on Women in the Profession. It at no point suggests that Title IX hasn’t done good, or even more harm than good. But it argues that the law has endangered free speech, academic freedom and due process since at least 2011, with the publication of the Education Department’s Dear Colleague letter.

While the line between potentially offensive speech and conduct had been blurring for years under various legal interpretations of Title IX, the paper says, the 2011 directive “conflates conduct and speech cases” by “broadly” defining 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.”

AAUP also accuses OCR of granting Title IX more tentacles by saying that enforcement will focus not only on student-on-student sexual violence but all types of harassment cases -- including speech or conduct of a sexual or nonsexual but gender-based nature.

The association notes that it in its letter, the department didn’t include any statement or warning about the “need to protect academic freedom and free speech in sexual harassment cases, including hostile environment allegations.” With that “conflation of sexual violence (which is also criminal conduct) and
sexual harassment (including hostile environment based on speech), protections of academic freedom seem to have been relegated to the background or ignored completely."

“Uses and Abuses” also accuses the Education Department of mandating a new evidentiary standard in that 2011 letter, telling universities to use a “preponderance of evidence” (more likely than not) assessment of Title IX cases instead of a higher, “clear and convincing” standard. The shift, “which was in fact a substantive change, has produced significant and worrisome effects on the enforcement of Title IX,” AAUP says.

The association also expresses concern over a separate OCR statement from 2001 that seems to favor the due process rights of the complainant over the respondent. The statement says, in part, that “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.”

Approximately 169 colleges and universities are now being investigated by the civil rights office for possible violations of Title IX. Documents from completed investigations reveal a “pattern” of offenses, from failing to respond to allegations of sexual assault until a formal complaint is filed to failure to consider whether there was a need for a broad response, even after complainants requested confidentiality or chose not to proceed with formal or informal resolution processes. In other words, the office may make a determination about a hostile environment even when there is insufficient evidence to support the underlying complaint.

A ‘Frenzy of Cases’
The AAUP report cites a “frenzy of cases in which administrators’ apparent fears of being targeted by [the office] have overridden faculty academic freedom and student free speech rights.” It indicts the “corporate university” for succumbing to worries of getting sued or failing to please the “client,” or student, at the expense of faculty rights.

“Uses and Abuses” reviews a number of cases in which Title IX has had an arguably negative impact on faculty members. They include that of Patricia Adler, a professor of sociology at the University of Colorado at Boulder, who in 2013 said she was pressured to resign after Title IX administrators sat in unannounced on a course. They said students had complained about a class she’d long taught on sexual deviance, which involved teaching assistants dressing up as prostitutes to talk about their characters. The university ultimately rescinded its ultimatum that Adler retire early or stop teaching the class, according to the report, but academic freedom already had been chilled.

In another example, Louisiana State University last year terminated Teresa Buchanan, an associate professor of education, for using “salty language” in her classroom -- even though she had been approved by fellow faculty members and her dean for promotion to full professor. She was found by university human resources personnel to have violated sexual harassment policies and the Americans With Disabilities Act. Buchanan is suing the university.

Echoing previous AAUP statements on trigger warnings, the report cites increasing calls that they be invoked prior to in-class references to sex or gender -- and slams subsequent institutional requirements that they be included in syllabi or elsewhere. “The chilling effect such requirements pose constitutes a serious threat to academic freedom in the classroom,” the report says. (Also criticizing interpretations of federal law that faculty members are mandated reporters of sexual assault, AAUP says, “How can scholars share their knowledge and research with students if unable to assure privacy when a disclosure by a student to a teacher might happen as part of the student’s learning process?”)
Saying that Title IX overreach impacts not only classroom activity but also extramural speech and research, AAUP questions Northwestern University for investigating Laura Kipnis, a professor of media studies there, under Title IX for her public comments about generational shifts in attitudes about what constitutes sexual assault or harassment. Because Kipnis alluded to a separate, ongoing Title IX case on her campus involving another professor in an op-ed in *The Chronicle of Higher Education*, she was accused by of creating a hostile environment for the students involved. Kipnis eventually was cleared of wrongdoing, but her institution faced backlash for even entertaining the charges against her. Universities maintain, meanwhile, that they must investigate such claims to comply with the law.

Asked what latitude universities have to dismiss claims that appear to infringe upon academic freedom, Risa Lieberwitz, a professor of law at Cornell University and chair of the report committee, said Northwestern and other institutions err in pursuing some cases beyond an initial review. To subject professors and others involved to extensive interviews when academic freedom is clearly at play can only chill it for all, she said.

In assessing cases such as Kipnis’s, Buchanan’s and others, Lieberwitz said, “We found that there was a pattern of overly broad use of Title IX, particularly with regard to speech that should be protected by academic freedom, and in some instances at public institutions where you also have First Amendment concerns.”

The investigation also found related violations of or at least disregard for shared governance or developing policies around Title IX with the input of professors themselves. She noted that AAUP has since 2011 objected to the “preponderance of evidence” standard, for example.

Room for Improvement
To make up for that lack of input, AAUP’s report proposes a series of recommendations targeted at different groups. The Education Department is urged to:

- Interpret Title IX as protecting students from sex discrimination, while also protecting academic freedom and free speech in public and private educational institutions.
- Increase its attention to protecting due process in all stages of Title IX investigations and proceedings.
- Refine its compliance process to develop the potential to work with universities to create policies and procedures for receiving and addressing Title IX complaints in ways that address problems of sexual discrimination while also protecting academic freedom and free speech and providing due process for all parties.

In another set of recommendations, AAUP says college and university administrators should:

- Strengthen policies to protect academic freedom against incursions from overly broad harassment policies and other regulatory university protocols.
- Distinguish speech that fits the definition of hostile environment from speech that individuals may find hurtful or offensive but is protected by academic freedom.
- Include faculty in all stages of development, implementation and enforcement of sexual harassment policies.
- Clarify their relationship to the criminal justice system and work in coordination with it.
- Consider adopting restorative justice practices for some forms of misconduct.
- Be aware of potential bias on the basis of race, gender inequity, class and sexual orientation in the claims and enforcement process to further secure the rights of complainants and the accused.
- Encourage and improve the conditions of interdisciplinary learning on campus by funding gender, feminist and sexuality studies, as well as allied disciplines, to meaningfully address inequality.
Additionally, faculty members should participate through shared governance to develop policies and practices that address problems of sex discrimination, while also protecting academic freedom, free speech and due process, and act in solidarity with student attempts to alleviate campus inequalities, according to the report.

Many of the recommendations and the report overall pleased the Foundation for Individual Rights in Education, which has for years flagged what it viewed to be Title IX overreach in regard to speech.

Samantha Harris, a lawyer at the organization, said in an interview that “the fact that a major academic freedom organization is coming out in support of academic freedom rights in the classroom [vis-à-vis Title IX] is huge. … I hope that this strengthens the resolve of faculty members to keep addressing challenging topics with their students and not alter their classroom work due to a fear of censorship.”

Harris also applauded the report’s emphasis on due process for not only the complainant but also the respondent. Since 2011, FIRE has heard from a number of students complaining that they’ve been denied due process or expelled from campus “without a meaningful opportunity to see the evidence against them.” But colleges and universities often act precipitously, she said, because falling out of compliance with the civil rights office risks the withdrawal of public funding.

Is Title IX 'Overreach' Part of Something Bigger?
Brett Sokolow, president and CEO of the National Center for Higher Education Risk Management and an expert in Title IX proceedings, was less complimentary of the report. He said that while there’s no doubt many colleges and universities are misinterpreting and misapplying Title IX, AAUP unfairly places too much blame on the federal civil rights office. For example, he said, the report accuses the office of mandating a new evidentiary standard that the vast majority of colleges and universities already were using. More than that, he said, the paper doesn’t address the major societal shift toward new expectations for speech and behavior related to sex and gender and a host of other topics.

“Members of the campus community are becoming much more intolerant of minor to midlevel misconduct by faculty members,” Sokolow said, referencing recent cases at the University of California at Berkeley, for example, in which male employees accused of harassment had received some form of university punishment but were pressured to resign by students and colleagues who said the university hadn’t done enough.

“There is a public sentiment rather than rules-based approach that this report doesn’t recognize,” Sokolow said. “Being that creepy guy has suddenly become not OK.”

Jennifer Freyd, a professor of psychology at the University of Oregon whose investigations of sexual assault on her campus have led to clashes with administrators, said she applauded the report for highlighting the need for more, interdisciplinary education about what constitutes a positive learning environment, and for endorsing the idea that institutional equity should be assessed through a variety of lenses -- in addition to sex and gender.

But she said AAUP probably downplayed the extent to which sexually hostile words alone can impact students’ sense of safety and educational access. A recent study of 525 graduate students conducted by Freyd and two colleagues now in press suggested that 38 percent of female and 23 percent of male participants had experienced sexual harassment from faculty or staff, and that such exposure was significantly correlated with negative outcomes for these students, for example.

Like Sokolow, Freyd said many of the AAUP’s concerns seemed to be based on “interpretations of interpretations” of Title IX, not the law itself.
“Title IX was sitting there for years, not being particularly applied in this way at all,” she said. “Up until recently, if you said, ‘Title IX,’ most people would think of [equal access in] sports. But now it’s brought so much attention and publicity to assault and harassment -- so it’s important to keep in mind that this is a relatively new development, and overall it’s a great development.”

Of course, with new developments come “growth pains,” and protecting faculty members’ academic freedom is paramount, Freyd said. “But in fact women can’t have access to equal education if they’re harmed by sexual harassment and violence. This is a potentially powerful tool to ensure civil rights.”

Asked if the problems associated with Title IX may be more linked to what some have called the student censorship movement, or student demands to be protected from offensive speech, than the law itself, Lieberwitz said AAUP is concerned about the broader issue. But it’s still time to pause and assess the impact of Title IX on faculty rights.

“This is an area where very real concerns about sexual assault and harassment have been conflated with issues of speech that may fall within the purview of academic freedom and protected speech,” she said. “AAUP policy has long recognized the need to seriously address problems of assault and harassment, and the ability to deal with those problems can and should co-exist with the ability to protect academic freedom and due process.”