Dear Members,

As you’ve seen in the media coverage this morning, the AAUP has released a report on Title IX. It is attached now that the embargo has been lifted. This report is well worth reading, and it sounds in concerns for due process and free speech that you have heard consistently are also concerns of ATIXA. However, I think this report is both significantly disingenuous and intellectually dishonest. Some of my critical comments are here:


To give a brief summary of my critique of this report:

1. The report argues that the OCR impermissibly “lowered” the standard of proof to preponderance of evidence in 2011. To lower the standard, it must have previously been set higher, right? As we all know, the OCR clarified the correct standard, but there were only a handful of campuses using a different standard at the time, so no real lowering occurred. More than 80% of campuses were already using the preponderance standard in 2011. Further, and this is where the intellectual dishonesty kicks in, AAUP asserts that a higher standard is an element of due process despite the fact that no court has stated that Constitutional Due Process requires a higher standard than preponderance in a campus proceeding. Further, because the OCR is permitted to issue regulatory guidance, the clarification of the proper
standard is well within OCR’s purview to interpret the meaning of equity within the regulations without resort to negotiated rule making;

2. The report in no way, except a casual dismissal of campus “romances,” addresses consensual relationships between faculty and students. Every other line of the report, it seems, seeks to insert faculty into Title IX decision-making on campus. It mentions shared governance twenty-one times, but never once offers that faculty may have shared responsibility to help their employers manage the financial and reputational loses related to their peccadilloes. The AAUP vision of shared governance is something imposed by, but not upon, faculty.

3. The report then goes on to state that OCR has changed the definition of hostile environment from that of "severe and pervasive" to "severe OR pervasive", thus watering down the definition. This is just sophistry, and one of the most disingenuous aspects of the report. The footnote AAUP cites is to the Davis case, so please read it. I have. Dozens of times. Nowhere in the opinion does the Supreme Court ever state that the definition of hostile environment is "severe and pervasive." You would think that the law professor who wrote the AAUP report would have bothered to read Davis. Look it up for yourselves. Oh, and in the footnotes, Justice O’Connor writes that a single incident may be severe enough to create a hostile environment without being pervasive. So, perhaps the standard has been "severe or pervasive" all along? Admittedly, the Supreme Court’s formulation of "severe, pervasive and objectively offensive” from the Davis decision implies a conjunction, but it’s more grammatical sloppiness by the Court than an intentional decision to imply an “and” between the words severe and pervasive, as the later footnote clearly clarifies. Reading the whole opinion in context is necessary. It’s right here: https://www.law.cornell.edu/supct/pdf/97-843P.ZO

4. Perhaps my main gripe with the report is that it confuses university overreach with OCR overreach, and blames the OCR for university misapplication of OCR standards. The report is rife with account after account of administrative misdeeds in applying Title IX, some of which ATIXA has written about as well, especially the case involving Professor Laura Kipnis at Northwestern. There is no question that some universities misunderstand the OCR standards, and some misapply them, whether through misfeasance or malfeasance. But, to blame the OCR for the failing of universities to correctly apply the standards is to misplace the blame. Universities were obligated to protect due process and uphold free speech before Title IX was ever a gleam in Richard Nixon’s eye (he signed the law into effect). Now, university misapplication of Title IX has provoked not only this panicked reaction from the AAUP, but nearly touched off a new era of due process litigation by those accused, which is poised to potentially and dramatically expand due process in higher education for the first time in a generation. If it does, we’ll have done this to ourselves. Blame the OCR if you must for being opaque and failing to clarify its mandates better, but OCR isn’t making any college violate anyone’s Constitutional rights.

5. To continue the theme of point #4, above, the report also suggests that the OCR’s enforcement of Title IX is over broad in chilling speech on campuses. But, the report can point to no OCR investigation finding a hostile environment on the basis of sex that requires the institution to compromise academic freedom or the First Amendment. So, again, is the OCR trampling free speech in its enforcement of Title IX, or are institutions doing so in their
interpretation and application of OCR’s standards? The report blames OCR for the sins of colleges again and again. We’re not going to make much progress on reconciling Title IX, due process and free speech until we own where the problem is, and this report repeatedly shoots the OCR as the messenger. The report then seeks to cite a 2003 OCR Dear Colleague Letter for the proposition that OCR has commanded private colleges to uphold free speech rights. A reading of that actual letter will reveal that all OCR said was that its precepts would in no way bar a private college from protecting free speech commensurate to a public university, if it wished to. Free speech is a great thing on private college campuses, but the AAUP engages in wishful thinking to assert that the OCR somehow requires it.

6. The report goes on to challenge the OCR’s position on mandated reporting as contrary to the academic freedom necessary to engage in human subjects research. Unfortunately, the AAUP makes an assumption that mandated reporting would be applicable to disclosures made in the course of human subjects research, and that assumption is both wrong and revelatory of a lack of intellectual curiosity by the authors. Disclosures made in the course of human subjects research are not considered notice of discrimination by OCR. That didn’t stop the AAUP from dedicating more than a page of its report to a problem that doesn’t exist, except again in the way universities interpret the OCR guidance to include requirements that don’t appear in the actual OCR guidance and which do hamper academic freedom problematically.

Perhaps one of the goals listed at the end of the report should have been for AAUP to have engaged with OCR in a more iterative process of trying to understand Title IX. Sitting back and shooting arrows from afar is never as useful as getting up close and personal with the ins and outs of how Title IX truly works.

I could go on with my dissection of the AAUP report, but you get the flavor by now. And, I think further critique might blur the most important point of all. The OCR isn’t getting Title IX wrong, but colleges and universities are getting it wrong all the time. The litany of faculty cases cited by the AAUP is real, as are the 110 cases filed by accused students alleging Title IX, due process and 1st Amendment violations. And, they are worrying me. For too many campuses, Title IX is amateur hour or a path to expedient, but corrupt, results.

I know many of you are trying so very hard to do Title IX well, and I don’t mean to take away from the hard work of Title IX Coordinators, whom the AAUP barely mentions. Instead, I see these decisions being corrupted by senior administrators and legal counsel who often usurp the role of the Title IX Coordinator, or take the decision out of their hands because of campus politics. This is at the root of the majority of the cases gone awry. The only solution it to continue to diligently build capacity and competence within the Coordinator role so that senior administrators are invested in that competence and as a result more frequently vest the Coordinator with the authority to make things right. ATIXA will continue to help guide the field and assist our members in navigating these waters as the politics surrounding Title IX become more and more intense.

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