

## **Supporting Diversity Subverted to Administrative Weapon**

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Declining legislative financial support, tuition increases, Covid-19 and resulting drop in student enrollment have contributed to budget challenges at many educational institutions. The collective effort specifically in higher education has been to reduce payroll by cutting staff, untenured faculty and now, tenured and tenure-track faculty. How are university administrators making these faculty and staff reductions without legal repercussions? They are using Title IX, a Federal Civil Rights law, that states there can be no discrimination against individuals on the basis of sex in educational programs and activities that receive financial assistance from the federal government. This law was interpreted under the Obama administration to include LGBTQ, racial and transgender individuals. It is a part of the Civil Rights Act, which according to Supreme Court Justice Sandra Day O'Connor, has no termination date. This means its interpretations are valid today and into perpetuity. How can faculty avoid having their careers damaged or even terminated using Title IX in the current educational environment? This research provides three published case studies to demonstrate examples of unexpected actions that faculty employed all levels of education should recognize.

### **Background of Title IX**

Title IX was very personal to me. I got my first job at the University of North Texas then known as North Texas State when my dissertation chair called the best man in his wedding and recommended me. Apparently, there were no women in the Secondary Education Department and the Equal Opportunity Commission had questioned the College's hiring processes in its accreditation visit. They had to hire a woman. The other candidate for the position was the wife of a minister in town. Luckily, one of the hiring committee saw that I played golf and he pushed for me to get hired. Dr. Boger and I shared an office in the Secondary Education Department for the five years. One day we realized that we were the only African American and the only woman in the department and we were the only faculty also sharing an office in the seventeen-member all male department. The year I was hired, five other women were also hired: one each in the department of elementary, secondary, counseling, special-education and early childhood. In five years, only two of us remained and I left that year to accept a Fulbright Senior Lectureship to Egypt. In short, discrimination was prevalent in educational hiring in education before the Title IX Act was signed by President Nixon in 1972.

My first year at Arizona State University was as a graduate student without enough money to have coffee with friends. When the Vice President of Student Affairs offered me the job as the Dean of Women (quickly changed to Assistant Dean of Students), I accepted. I found myself authorizing bake sales for the female athletes to earn the money for our nationally ranked swim, track and golf teams to pay for competition in national meets. The males had their trips fully funded. Some of us who were working in universities at that time remember the struggle it was to get women's athletics funded even for teams that qualified for national competitions.

As a graduate assistant, I was physically attacked by male student. The next day I told a sympathetic male faculty member. He told me to not to report it to avoid jeopardizing my career. I took his advice. Pappas (1) reports on the percentage of students reporting sexual harassment in three large institutions.

Notably, female graduate students tend to experience sexual harassment and stalking by faculty members at higher rates than undergraduates (6.6% versus 3.6% for stalking and 22.4% versus 12% for harassment), although this varies widely by institution.

For example, in a 2015 Harvard University survey, almost half of female graduate and professional school students reported experiencing sexual harassment, with 21.8% reporting a faculty member was responsible for the sexual harassment. In comparison, an Indiana University Survey from 2015 found 3.8% of graduate school women reported experiencing sexual misconduct by a professor or instructor.

A detailed Penn State survey of a random sample of graduate students asked specifically about harassing or offensive acts committed by faculty or staff, and 32.9% of graduate/professional students indicated experiencing one of nineteen offensive or harassing behaviors. In terms of physicality, 3.8% of graduate or professional female students reporting being touched by faculty or staff in uncomfortable ways, and 4% of graduate or professional students reporting intimate partner violence or domestic violence perpetrated by faculty or staff. The available data demonstrate sexual harassment is the most common form of misconduct perpetuated by faculty (p 2).

Furthermore, in his research interviewing twenty-seven Title IX coordinators and ombudsmen between 2011 and 2014, Pappas found faculty and staff misconduct dominated the early narratives, with student misconduct becoming more prevalent as the data collection entered 2014. My attack was by another student in 1973 predating the increase of student sexual aggression toward faculty and staff. Having experienced multiple examples of gender discrimination and a sexual assault in college, I was relieved when Title IX was enacted June 23, 1972. It forbade discrimination on the basis of sex in any federally funded program. Sexual harassment, gender discrimination and sexual abuse in education was now investigated and hopefully reduced through assigned staff in Title IX offices and personnel accountable to the Department of Justice. All complaints were to be investigated and follow specific protocol with decisions supported by clear and creditable evidence (2). The question to be answered was whether sexual abuse and discrimination against females had taken place or not. Unfortunately, with situations of two people, the accuser and the accused, it was often difficult to obtain clear and credible evidence as indicated in the following case.

### **Case #1 Investigation of False External Sexual Harassment Complaints**

"We knew the sexual-harassment allegations against my wife were lies. But how could we prove it?" This statement was made by Sarah Viren in an article in the New York Times Magazine, March 22, 2020. (3) This case demonstrated how two tenure-track faculty members found their careers threatened by false Title IX sexual abuse charges. Sarah, a creative non-fiction writing faculty at Arizona State University, was a finalist for her dream job at the University of Michigan. Marta, a Spanish linguistic professor, also held a tenure-track position at ASU. A person posted on the university's subreddit, a request that students who had been sexually harassed by Dr. Marta contact the anonymous email line with the Title IX Office. Within ten minutes, another posting went up claiming another student also had been harassed. As described in the article, the University of Michigan learned that Marta was under Title IX investigation even before she knew about the two student complaints. Although Sarah had been offered the job, four months later Marta was not offered the spousal position. Sarah then decided not to take her dream Michigan job.

Melanie, the investigating Title IX officer, stated: her investigation would end with what is called a determination letter. And that letter could offer only two story lines: either Marta had violated a policy....and then there would be consequence for her job, including possible dismissal --or there was insufficient evidence that Marta had violated a policy and we could presumably go back to the way things were before. ...according to Melanie, 'For us, this is purely administrative.' (p.38).

The summary of this investigation is that when the accusation is false, filed by a person external to the university seeking the same position as Sarah at the University of Michigan, its validity or veracity is not considered in the investigation. The question is whether Marta violated the sexual harassment procedures. In this case, the accused faculty member hired a lawyer. Marta had to determine who had filed the two complaints when the women could not be found as registered students. Marta and the author eventually had to determine if they would go to court to learn who had made false charges which would cost them tens of thousands of dollars more. They had already paid \$10,000 to defend themselves. In short, these victims decided to not pursue the case further trusting that their tenure track positions had not been jeopardized by the lengthy Title IX investigations. Their case exemplifies why research on Title IX court cases are not readily found. To quote another faculty member at another institution, "I know I would win a court case but it would cost me \$150,000 and I couldn't take that money from my family."

According to the American Associations of University Professor's (AAUP) Report "The History, Uses and Abuses of Title IX" the original intent of the mandate was to stop sexual harassment and gender discrimination in educational hiring. The report states that the intent has been distorted and refocused by administrative fear of federal funds being withheld from universities. Another concern is that most college administrators are now working in a risk-adverse environment "in which student satisfaction as educational consumers is paramount" (4). Laura Kipnis, a Northwestern faculty member, has published two articles in the *Chronicle of Higher Education* on the weaponization of Title IX against faculty: "Sexual Paranoia Strikes Academe" (2015) and "My Title IX Inquisition" (2016)(5). Her "intellectual disagreement" was cause for investigation by the Title IX office which then cleared her of "retaliation" charges stating that her response was that of a reasonable person.

The AAUP report also charges that the standards for judging Title IX violations have changed from 2011's "clear and convincing evidence of violation" to a "preponderance of evidence." A preponderance of evidence means that anything over half of the evidence supports the claim. The five faculty authors of the AAUP report state that initially IX was to address gender or racial discrimination in academic hiring. Then it focused upon cases of discrimination against school and college athletes. Now it evaluates complaints of sexual assault and harassment with talk equating as action (6). The following case is one in which racial discrimination of questionable merit investigated.

### **Case #2 Racial Discrimination Complaint**

"I didn't even know which one of my forty students was offended when I received an e-mail to meet as soon as possible with my department head about a serious student complaint." When I arrived on October 15th, a human resource staff was also in attendance. The department head had written a letter removing me from teaching my classes by October 11, 2019 prior to our meeting. She summarized the racial discrimination complaint made three weeks earlier, on September 26, 2019, from one undergraduate in the class *Reading in the Content Area for Adolescents*. I asked to have time to respond to the charges which she summarized in an e-mail. I still did not know who had made the charge. She gave me five days to do so. My defense did not change her mind and my teaching ended on October 23rd. I didn't know who was taking over my classes, if they were using my syllabus or how they would use the four grades I already had for the students. I had to assume the new faculty would not be able to achieve class satisfaction which appeared to be true. She was not asked to teach my two classes the subsequent semester as the Title IX investigation dragged on into the second semester. During that time, I was not allowed to teach any classes.

The student's Title IX complaint consisted of the following:

The instructor asked a student of Asian descent if he could speak in another language before the student had spoken in class.

The instructor asked a Hispanic student if she was going to give her presentation in Spanish. (an error in the complaint)

The instructor asked why Blacks in St. Louis were so friendly.

Each of these statements were taken out of the context of classroom instruction and were not directed to the complainer. The first two were questions related to the instruction of phonics in a secondary reading course for pre-service teachers. Different languages in Vietnamese and Korean use different alphabets and different phonic systems. I was incorporating students into the classroom learning by asking them and then the entire class to talk about different phonic sounds. I later asked the if anyone in the class wrote in another language. One girl said she wrote in Italian and another said Spanish. The statement of why Blacks in St. Louis were so friendly was a discussion question after another student's class presentation on Martin Luther King Day as she demonstrated a new instructional strategy from the textbook. None of these statements were directed to the aggrieved student who was neither Asian, Hispanic, Black or female. (5).

The administrative response to this single complaint by an undergraduate was to have me meet with the department head, the Title IX officer, the Equal Opportunity Office officer, and the Dean twice. The Dean who was the decision maker on the Equal Opportunity report offered me the options resigning or presenting my defense to a faculty panel or the Vice Provost.

The Equal Opportunity Officer reviewed secret documents from files of two previous Dean's including irrelevant letters scheduling faculty appointments and results of the two student grade complaints that had taken place during the previous twenty years. The Dean, in the second meeting where I brought a lawyer, again offered me the option of resigning from my endowed professor position or going before a faculty hearing panel.

I chose the faculty hearing panel. The panel was composed of three Title IX officers. One each appointed from the College of Nursing, the College of Optometry, Student Affairs and a clinical researcher from the College of Liberal Arts. In short, only the researcher had faculty appointment with the potential of any teaching experience. The university Title IX officer, the university legal representative, myself and my lawyer were to attend. I settled with the university one day before the hearing on charges of copyright infringement, defamation of reputation, violations of due process and academic freedom.

In short, this is a case which was investigated from September 26<sup>th</sup>, 2019 to March 11, 2020. Seven university administrators, including legal counsel, spent countless hours reading, writing and discussing whether a Caucasian student, who had missed two out of a total of six classes and failed one quiz, had been racially discriminated by instructional comments made to the entire class by the instructor. The preponderance of evidence had been used as an evidentiary criteria when the current Dean went into files I had never known about and included memos of class assignments and e-mails scheduling appointments in her evidence my ethical violations. Endowed professors with income attractive to administrators and other full professors with equally lengthy records of teaching success have also been removed from teaching by a singular complaint. In this case, a graduate assistant placed a complaint on what he thought might be undergraduate students' lack of comfort. At the University of Colorado, Boulder, Title IX enforcement administrators sat in without previous warning on sociology professor Patty Adler's class, *Deviance in US Society* which had, for over twenty years, enrolled around five hundred students each semester. After faculty members, 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 Professor Adler back to teach without any qualifying conditions, as if the incident never happened(8). Adler said that the incident showed that if a lecture makes anyone uncomfortable, the university will ignore common sense and worry more about "the risk" someone might be offended than whether this is information professors have a right to teach, and students have a right to learn. (9)

At Louisiana State University, yet another state supported institution, Associate Professor of Early Childhood, Teresa Buchanan, had been approved at every stage of the process for promotion to full professor. She then received an e-mail suspending her immediately so that the Office of Human Resource Management could commence an investigation into allegations by some students and administrators regarding her use of "salty language." She also learned, that even though the Dean had described her as a "very good scholar with strong funding," the Provost would not be recommending her for promotion. Faculty protests including a vote of no confidence and a damning report by American Association of University Professors and subsequent censoring of the university did not reverse the administrations' action. Professor Buchannan has sued the university, specifically objecting to the use of OCR language of the university administration. (10)

As these cases demonstrate, in today's educational climate of student protection and necessary satisfaction, administrators in Colorado, Missouri and Louisiana are removing tenure track, full and endowed professors from teaching using Title IX processes. The expectations of faculty be protected by tenure, to be respected, have freedom of speech and be able to provide engaging instruction are threatened by very universities that hired them for those qualities. Now administrators need to retain students and their tuition in the environment of declining legislative funding. Any event that puts tuition at risk will be removed...including those who have met the stringent requirements to become respected faculty.

### **Recommendations**

Title IX training should be required for all faculty, staff and students in all institutions. Many universities are requiring it along with workshops for students in addition to employees. The first step in the complaint process is to address harassment and discrimination by having the unhappy person speak directly to the perpetrator asking him or her to stop the offensive behavior. If a pattern of the problematic behavior repeats itself, the complainant can submit a letter to the department head. Preferably, the dates of the event and the complainant's response are stated. As in the case of racial discrimination, the student wrote the complaint and then changed the content a month later when he discussed his complaint with the Title IX officer who did not obtain a copy of the original complaint.

In addition, the complainant should demonstrate the behavior of a reasonable person when taking action. Students who complain because they want a "A" rather than a "B" or have poor attendance should first meet with the faculty member before they charge faculty with Title IX violations. This would require a change in the Title IX guidelines to determine the attendance and grades of the student before proceeding with the complaint procedure. This should be the first question asked of the administrators when they begin a faculty investigation. In Dr. Adler's case, no student had complained about her instruction and yet she was told to resign or not to teach the class again. If she had another complaint, she would lose her retirement and health care benefits. (11)

Finally, Title IX administrators must be freed from the restrictions stated by so clearly by ASU's Melanie. She sees herself following the complaint rather than the veracity or common sense of the complainant's charges. She is merely doing her job as well as she can which doesn't give her leeway to reject any complaint. However, she may not know that the two faculty members she is investigating have demonstrated excellent academic and personal qualities which were investigated by the ASU faculty before they were hired and supported by their faculty colleagues once they accepted their positions. Faculty governance and participation in the structuring of the Title IX process needs to be incorporated in its administration. Faculty need to be knowledgeable about the Collected Rules and Regulations for Title IX at their institutions.

Today, faculty can no longer rely on their national reputation, academic expertise, or effective teaching, research and funding to protect them from Title IX investigations. When universities are in economic difficulties, they will quickly attempt to reduce committed payroll. Witness the increased number of adjunct faculty and part-time instructors in all institutions. All should be alert to the unstated economic deprivation at their universities.

And finally, as demonstrated in the cases stated here, female faculty seem to be more vulnerable than males to Title IX violation charges. The original intent of Title IX was to prevent sexual harassment. Now it is weaponized to remove tenured faculty. As numbers tenure track faculty are reduced, they must be exceptionally careful in their instructional presentations and limit their trust that administrators will appreciate their instruction, service and research.