
TITLE IX: ROAD TO COMPLIANCE



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I. INTRODUCTION

Successful and effective implementation of Title IX at any school requires an institution-wide understanding of how the law functions. At its core, Title IX is a protective mechanism meant to ensure women receive equal access to educational opportunities.¹ Title IX has expanded since its original 1972 enactment to encompass and prohibit a range of discriminatory behavior that prevents women from obtaining the equal access they are entitled to under the law.² While this expansion furthers the protective principles upon which Title IX was founded, it has also created a complex regulatory and compliance scheme that can be difficult to navigate. The purpose of this paper is to dissect the regulatory language and legal standards that comprise Title IX compliance. Administrative and judicial enforcement of Title IX will be examined separately, as both enforcement mechanisms provide distinct remedies under Title IX. The final section will assess the current legal standard in light of the merging of the administrative and judicial standards. The goal is to provide clarity and understanding of the law and how it functions so schools view Title IX as a resource to utilize instead of a burden to manage.

¹ 20 U.S.C. §1681

² Emma Chadband, *Nine Ways Title IX Has Helped Girls and Women in Education*, neaToday (June 21, 2012), <http://neatoday.org/2012/06/21/nine-ways-title-ix-has-helped-girls-and-women-in-education-2/> citing how Title IX increased women's access to higher education and scholarships while simultaneously banning pregnancy discrimination and mandatory gendered curriculum like home-economics.

II. TITLE IX AS A STATUTE

Title IX was modeled after the Civil Rights Act,³ as a way to end gender-based discrimination, and was passed by Congress as Title IX to the Higher Education Act under the Education Amendments of 1972.⁴ The 1964 Civil Rights Act was landmark legislation which banned public and private discrimination with the primary goal of eliminating race-based discrimination. Title IX prohibits any school that receives federal funding from discriminating on the basis of sex.⁵ The law specifies that the discrimination prohibition extends to any program or activity operated by the school.⁶

The relationship between administrative oversight of Title IX and the judicial decisions that flow from agency interpretation is complex. While separate and distinct enforcement actions exist under both the administrative and judicial arms of Title IX, the standards are interrelated and inform each other. The timeline of Title IX cannot be fully understood without acknowledging how each branch reacts to the other and therefore narrows and expands the scope of the law over time. The following sections analyze enforcement of Title IX within each branch, with reference to the reactive reason for the change in policy or law.

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³ Olivia B. Waxman, *She Exposed the Discrimination in College Sports Before Title IX. Now She's a Women's History Month Honoree*, TIME.com (Mar. 1, 2018), <http://time.com/5175812/title-ix-sports-womens-history/>

⁴ Pub. L. No. 92-318, 86 Stat. 235

⁵ 20 U.S.C. §1681

⁶ Id.

III. ADMINISTRATIVE ENFORCEMENT

The Department of Education's Office for Civil Rights (OCR) is the federal agency responsible for enforcing Title IX.⁷ An alleged violation of Title IX can be submitted directly to OCR in the form of a complaint, which OCR then has the authority to investigate, mediate, or dismiss.⁸ If OCR determines a school has violated Title IX the agency will structure an agreement outlining compliance benchmarks the school must meet moving forward.⁹ OCR's main enforcement mechanism is the loss of federal funding for a school that continually violates Title IX, though this measure has not ever been levied against a school.¹⁰

Following Title IX's enactment, OCR has periodically issued policy documents, in the form of Dear Colleague letters or best practices guidelines, to clarify schools' legal obligations under the law.¹¹ These guidelines are often responsive to court cases that have been decided under Title IX and sometimes reflect current events and media attention on the issue of sexual assault on college campuses. They also mirror the political leanings of the administration they are released under. Deconstructing the policies each of these documents established better contextualizes current Title IX requirements.

In response to a 1980 sexual assault court case that was tried under Title IX,¹² OCR released its first policy memo recognizing sexual harassment as a form of discrimination covered

⁷ U.S. Dept. of Educ., *Title IX and Sex Discrimination* (Revised April 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html

⁸ ACLU, *Know Your Rights: Title IX and Sexual Assault*, <https://www.aclu.org/know-your-rights/title-ix-and-sexual-assault>

⁹ *Id.*

¹⁰ *Id.*

¹¹ U.S. Dept. of Educ., Office for Civil Rights, *Sex Discrimination Policy Guidance*, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html>

¹² *Alexander v. Yale Univ.*, 631 F.2d 178, 184 (1980). The court evaluated the sexual harassment claim under Title IX, though ultimately found in favor of Yale.

by Title IX in 1981.¹³ OCR compiled and released a lengthy guidance handbook in 1997 which detailed school liability for harassing behavior of a school employee or peer-to-peer harassment, and outlined the “hostile environment” and “actual notice” standards that courts had been using in Title VII employment discrimination cases for years.¹⁴ This guidance marked a shift in OCR’s Title IX interpretation; as it was the first time the agency reviewed court rulings and applied those legal standards to the Title IX framework.¹⁵ The guidance document itself acknowledged that Title IX case law in one circuit diverged from OCR policy and recognized agency implementation would need to account for the new legal precedent, though schools were still encouraged to follow the guidance as well.¹⁶

Following two landmark Title IX Supreme Court cases in 1998 and 1999, OCR released revised sexual harassment guidance in 2001.¹⁷ The updated guidance remained largely unchanged from the 1997 version, but was updated to explicitly recognize the monetary damages remedy in private Title IX actions as a separate option from agency enforcement requirements which might not amount to a civil claim.¹⁸ At this point, OCR standards and legal precedent still mirrored each other, but civil action under Title IX allowed for monetary damages while OCR was limited to the compliance process. OCR’s enforcement mechanism remained the complete withdrawal of federal funding, but that consequence was never utilized.

¹³ American Association of University Professors, *The History, Uses, and Abuses of Title IX* (June 2016) at 74, <https://www.aaup.org/file/TitleIXreport.pdf>

¹⁴ Office for Civil Rights, *Sexual Harassment Guidance 1997*, <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>

¹⁵ *Id.* nn.3-20 & 29-39.

¹⁶ *Id.* n.27 (citing *Rowinsky v. Bryan Independent School Dist.*, 80 F.3d 1006 (5th Cir. 1996) (finding no school district Title IX liability for peer harassment)).

¹⁷ Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

¹⁸ *Id.* at ii.

The 2011 Letter marked a turning point in the interplay between court decisions and OCR enforcement.

The 2011 Dear Colleague Letter, released under the Obama administration, was a controversial clarification and renunciation of the 2001 guidelines.¹⁹ The Letter expanded the 2001 guidelines by requiring that schools use a “preponderance of the evidence” standard when evaluating a Title IX complaint.²⁰ Previously, OCR had not mandated any specific evidentiary standard, and schools could use the “clear and convincing” standard, a higher evidentiary burden for complainants to meet, without violating Title IX.²¹ The Letter also mandated that when “a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevents its recurrence, and address its effects.”²² OCR also noted that the “knows or reasonably should know” language is different from the judicial test for knowledge in private suits which required “actual knowledge”, a higher requirement for complainants to meet because they must prove a school knew about the harassment.²³ The 2011 Letter marked a turning point in the interplay between court decisions and OCR enforcement. Instead of issuing guidelines that clarified how OCR would implement Title IX in light of court decisions, the Letter established new standards and burdens of proof that were completely separate, and sometimes opposite, from judicial rulings. This divergence also created confusion and frustration across

¹⁹ Office for Civil Rights, *Dear Colleague Letter*, U.S. Dept. of Educ. (April 4, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; see also <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html>

²⁰ *Id.* at 10

²¹ *Id.* 10-11

²² *Id.* at 4

²³ *Id.* n12

university campuses because administrators’ seemingly had to navigate two different compliance structures; Title IX under OCR and Title IX as interpreted by courts.²⁴

This confusion prompted OCR to release a Q&A style guidance in 2014.²⁵ While this document offered no new guidelines or standards, it simplified and clarified the obligations established by Title IX and enforced by OCR. The forty-five-page document offered detailed compliance requirements specifying: who is covered by Title IX; the situations in which Title IX will apply, including certain off-campus events; the standards used for each step of a Title IX investigation; best practices for the Title IX coordinator; mandatory reporting procedures, including which employees would be considered a mandatory reporter; the parameters and limits of confidentiality in the Title IX compliant process; and proactive strategies schools can utilize to prevent sexual assault on campus.²⁶

In 2017, under the Trump administration, OCR released a Dear Colleague Letter and revised Q&A that rescinded the guidance and requirements established by the 2011 Letter and the 2014 Q&A.²⁷ These documents clarify that OCR will rely on the 2001 guidelines moving forward.²⁸ The mandatory “preponderance of the evidence” standard was explicitly withdrawn in these new guidelines, allowing schools to use the less rigorous “clear and convincing” standard.²⁹

²⁴Jake New, *Must vs. Should*, Inside Higher Ed (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>; see also Jake New, *Guidance or Rule Making?*, Inside Higher Ed (Jan. 7, 2016), <http://www.insidehighered.com/news/2016/01/07/senators-challenge-legality-us-guidance-campus-sexual-assault> (clarifying OCR’s Dear Colleague Letters and guidance materials “do not carry the force of law.”)

²⁵ Office for Civil Rights, *Questions and Answers about Title IX and Sexual Violence*, U.S. Dept. of Educ. (April 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

²⁶ Id.

²⁷ Office for Civil Rights, *Dear Colleague Letter*, U.S. Dept. of Educ. (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>; Office for Civil Rights, *Q&A on Campus Sexual Misconduct*, U.S. Dept. of Educ. (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>. Hereinafter “2017 Q&A”

²⁸ Id.

²⁹ Id. at 5

While the 2017 Letter attempts to create clarity in the Title IX compliance process by reverting back to the 2001 guidelines, the 2011 and 2014 documents clarified the 2001 guidelines as well. Although the Obama-era policies expanded the scope of Title IX, the fundamental principle was to provide insight and transparency to OCR's implantation requirements. Instead of simply removing the controversial new provisions OCR has created renewed confusion by rescinding guidance documents that clarified policies the agency kept in place.

IV. JUDICIAL ENFORCEMENT

Any individual covered by Title IX has the option of pursuing a private lawsuit against an institution that is responsible for complying with Title IX.³⁰ Suing a school for violating Title IX creates a parallel route to filing an OCR complaint, providing students two avenues to hold their school accountable. The biggest difference between filing an OCR complaint versus a Title IX lawsuit is that a lawsuit allows for money damages while there is no mechanism for obtaining damages via the administrative process.³¹

As noted in the previous section, two major Supreme Court decisions in the late 1990's established the framework and created the legal standard for sexual assault cases under Title IX.

The first case, *Gebser v. Lago Vista Independent School District*, considered whether a school district could be held liable for a teacher's sexual contact with a student under Title IX.³² The *Gebser* ruling established the "actual knowledge" and "deliberate indifference" legal standards a complainant must prove in order to recover damages under Title IX in a civil case.

³⁰ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979)

³¹ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 76 (1992) (recognizing damages as remedy for Title IX violation).

³² *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 278-79 (1998)

The Court evaluated the liability claim using Title VII principles, which allows a complainant to recover damages from an employer when they experience sexual harassment in the workplace.³³ Title VII operates on the theory of *respondeat superior*, where an employer is responsible for the actions of employees regardless of whether or not the employer had actual knowledge of the employee's actions.³⁴ The Court ruled that this implied liability theory did not conform to the purposes of Title IX because schools must have actual notice of the incident before they are subject to enforcement action under the statute.³⁵ The Court refused to expand the notice requirement to "constructive notice" in the Title IX context because it would create more rigorous standards for schools to adhere to in court than what a school would face under an agency enforcement action.³⁶ The Court found that a school will not be liable for damages under Title IX "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond."³⁷ The Court contextualized this by establishing the "deliberate indifference" standard, where an institution's response to an incident they have actual knowledge of will not amount to a Title IX violation unless the institution makes an "official decision...not to remedy the violation."³⁸

The following year the Court considered a school district's liability under Title IX for peer-to-peer sexual harassment in *Davis Next Friend LaShonda D. v. Monroe County Board of Education*.³⁹ In this case, a student's alleged sexual harassment of another student was reported

³³ Id. 281-82

³⁴ Id. 282

³⁵ Id. 289

³⁶ Id. 289-90

³⁷ Id. 290

³⁸ Id.

³⁹ *Davis Next Friend LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 632-33 (1999)

to multiple teachers and school administrators by both the victim and her parents, and no disciplinary or remedial action was taken.⁴⁰ Using the *Gebser* “deliberate indifference” standard, the Court found that a school will be held liable for Title IX damages when their response to peer-to-peer sexual harassment is “clearly unreasonable in light of the known circumstances.”⁴¹ This means that the “deliberate indifference” standard is met when a school’s response to reported sexual harassment is unreasonable, though the Court never defines what amounts to an unreasonable response. The Court further found that an institution is subject to Title IX liability when the institution “exercises substantial control over both the harasser and the context in which the known harassment occurs.”⁴² The Court ruled that because the harassment took place during school hours and on school grounds, and because the school had authority over the harasser, the school met the “substantial control” standard.⁴³ Finally, the Court ruled that when a student is exposed to harassment that is “severe, pervasive and objectively offensive” the school is liable for discrimination under Title IX because the student is unable to access the educational opportunities available to all students.⁴⁴

The *Davis* and *Gebser* decisions established a legal framework under which a school can be held liable for monetary damages for Title IX violations. First, the school must have *actual* knowledge of the harassment; a school will not be liable for incidents’ they had no idea occurred simply because an incident happened at school. Second, a school will be liable only if they act with deliberate indifference in response to the harassment; if a school knows about an incident and actively decides to do nothing about it, they have responded with deliberate indifference.

⁴⁰ Id. 634-35

⁴¹ Id. 648

⁴² Id. 645

⁴³ Id. 646

⁴⁴ Id. 650

An understanding of the framework can help schools in crafting their policies and guiding their reactions so their actions do not amount to a Title IX violation.

Third, a school will be found to meet the deliberate indifference requirement if their response is clearly unreasonable. Fourth, a school is subject to liability when they have substantial control over both the harasser and the situation in which the harassment occurred. This means that if a school has authority and responsibility for the harasser and the harassment happens in a situation the school has oversight of, the school will be liable under Title IX. Lastly, a school subjects a student to discrimination if a student is exposed to harassment that is so severe, pervasive, and objectively offensive that the student is effectively denied access to the educational opportunities they are entitled to under Title IX.

These two cases have not been overruled by the Supreme Court, and therefore set precedence for lower courts when interpreting Title IX cases. For instance, a Tenth Circuit case found Title IX liability when a University's official sexual harassment policy was so inadequate and unresponsive to incidents on campus that it amounted to deliberate indifference.⁴⁵ This is important because the complex legal standards established by these two decisions operate in the background of every Title IX case. An understanding of the framework can help schools in crafting their policies and guiding their reactions so their actions do not amount to a Title IX violation. Because the Court did not list factors to be considered when evaluating a Title IX claim under the *Gebser* and *Davis* legal standards, schools will be subject to a lower court's

⁴⁵ *Simpson v. University of Colorado Boulder*, 500 F.3d 1170, 1184-85 (10th Cir. 2007)

interpretation of those standards. Unfortunately, case-by-case review is the reality of our justice system, but it leaves schools operating within the vague confines of these standards when crafting a workable Title IX policy.

V. CONVERGENCE OF JUDICIAL RULINGS AND AGENCY GUIDELINES

As previously analyzed, OCR often incorporated and responded to court rulings when issuing new guidance documents. As this section will explore, courts also look to OCR's guidance when determining actions that amount to Title IX violations. This has resulted in overlapping agency and judicial actions that schools must understand in order to comprehensively comply with Title IX.

The dissent in *Gebser* specifically quotes OCR's 1997 guidance that indicates a Title IX violation will be found when there is an incident of teach-to-student sexual harassment.⁴⁶ The dissenting Justices suggest deference to the agency interpretation since they are tasked with implementing and enforcing Title IX and are therefore particularly interested in ensuring their interpretation effectuates the law.⁴⁷ While a dissenting opinion does not set precedent, the fact that Supreme Court justices relied on OCR guidance shows that the Court is aware of the agency documents and felt comfortable using them as a basis for their argument.

The Court in *Davis* quoted OCR's 1997 guidance in their majority opinion acknowledging that peer-to-peer sexual harassment would fall under the scope of Title IX discrimination.⁴⁸ The

⁴⁶ *Gebser*, 524 U.S. 274, 300 (1998)

⁴⁷ *Id.*

⁴⁸ *Davis*, 526 U.S. 629, 647-48 (1999)

Court conceded that the 1997 document was published too late to hold the school responsible for its contents, but the opinion used the fact that the guidance specifically highlighted peer-to-peer sexual harassment as proof that that type of conduct is a violation of Title IX.⁴⁹

Importantly, lower courts have also used OCR guidance when reviewing Title IX claims. A Tennessee district court quoted OCR guidelines in a case of teacher-to-student sexual harassment and used the guidelines as “persuasive authority.”⁵⁰ A Michigan district court allowed the findings of an OCR investigation admitted into evidence despite the different standard of review used by the agency.⁵¹ A Connecticut district court used the 2001 OCR guidelines to frame and define a sexual harassment claim based on gender non-conformity as recognized under Title IX.⁵² The court noted that OCR interpretations are not binding, but can be used as guidance in Title IX cases.⁵³ A Michigan district court used OCR guidance to prove that a school’s study abroad program would still fall within the scope of Title IX.⁵⁴

These cases show a pattern of court reliance on OCR interpretation of Title IX. While courts acknowledge that OCR guidance does not carry the weight of law, it has been used to define Title IX violations, examine the scope of Title IX, provide proof of notice in terms of actions which constitute a Title IX violation, and evidence of the enforcement agency’s interpretation of the law. Schools should be aware of this reliance because it informs both agency and judicial decision-making.

⁴⁹ *Id.*

⁵⁰ *T.C. on Behalf of S.C. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 2018 WL 3348728, n3 (M.D. Tenn. 2018)

⁵¹ *Doe v. Forest Hills School District*, 2015 WL 9906260, 7-8 (W.D. MI 2015)

⁵² *Riccio v. New Haven Board of Education*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006)

⁵³ *Id.* n8

⁵⁴ *King v. Board of Control of Eastern Michigan University*, 221 F. Supp. 2d 783, 790 (E.D. Mich. 2002)

The agency and judicial enforcement powers have converged and each branch informs how the other will rule.

VI. CONCLUSION

Schools must understand OCR guidance and judicial court decisions in order to fully and effectively comply with Title IX. The administrative interpretation of Title IX and the legal standards developed by the Court are interrelated despite being separate and distinct methods for enforcing Title IX. Institutions that are looking to develop and implement Title IX on campus need to view both enforcement mechanisms as an overarching structure; compliance with one does not equate to compliance with the other. Title IX compliance is constantly evolving, as new court cases weave their way through the justice system and as new administrations interpret the statute. This means that schools need to mirror this evolution and create a Title IX system that can adapt to the changes easily. While this might be a more complicated process, Title IX was drafted to ensure equality in education, and any process that effectuates that goal is a worthwhile investment.