

CHAPTER 13

Title IX and State Court Proceedings

I. Introduction

This Chapter provides a brief overview of Title IX of the Education Amendments of 1972, including its origins and interpretation, as well as other relevant Federal statutes. Also included are definitions, discussions of the different types of proceedings that may stem from an alleged sexual assault within the jurisdiction of Title IX, and examples of how these processes may interact with State Court proceedings and State Law.¹

Title IX of the Education Amendments of 1972 is a Federal law that prohibits sex discrimination in all educational institutions, educational programs, or educational activities that receive Federal financial assistance.² Title IX scope includes both state and local educational agencies. The law also prohibits retaliation against any person who has participated in any complaint action under Title IX.³ Title IX is enforced by the Office of Civil Rights (OCR) to ensure that educational programs and institutions under its jurisdiction comply with the Law.

Under Title IX, sex discrimination includes sexual harassment. This chapter will present the definition of and a brief history of the Department of Education's guidance on sexual harassment. The Department of Education's Office of Civil Rights provides broad guidance to schools and programs on how to implement policy and respond to Title IX complaints through adjudication process and remedies.^{4 5} Procedural elements of adjudication processes often vary from civil and legal proceedings, which may occur simultaneously. By understanding the intricacies of jurisdictional issues, simultaneous proceedings, and overlapping interactions, judges can better address the needs of all parties involved.

II. A Brief History and Scope of Title IX

Title IX is part of the United States Education Amendments of 1972. The substantive text of the law itself is brief; it reads: "No person in the United States shall, on the basis of sex, be

¹ 34 U.S.C § 106.6 (a), (b), (c) (Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

² 20 U.S.C § 1681(a) <https://www.law.cornell.edu/uscode/text/20/1681>

³ 34 U.S.C § 106 <https://www.law.cornell.edu/cfr/text/34/106.6>

⁴ Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) <https://www.govinfo.gov/content/pkg/FR-2007-01-25/pdf/E7-1066.pdf>

⁵ *Questions and answers on Title IX and sexual violence*, (April 29th, 2014). United States, United States Department of Education, Office of Civil Rights <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Id. at footnote 1: "The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations."

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁶

While Title IX most frequently enters the public discourse in relation to postsecondary institutions such as colleges and universities, the law applies to any vocational rehabilitation program, school district, charter school, for-profit school, library or museum that accepts federal funding for educational activities. Though perhaps best known for its impact on students engaged in college athletics,⁷ Title IX’s scope is wide; it aims to protect all students, employees, parents and guardians at many levels of educational programming— elementary, middle school, high school, undergraduate and graduate level— from discrimination based on sex.⁸ Schools that do not receive federal assistance are not covered by Title IX nor are those who can demonstrate that their membership or religious practices qualify for an authorized exemption from Title IX.⁹

Sex discrimination can be expressed in many forms with a spectrum that encompasses sex disparity in admissions procedures^{10 11} to sexual harassment or sexual violence. As per the Office of Civil Rights, “sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.”^{12 13} Under Title IX, an educational institution or program is obligated to take immediate steps to prevent, address, and remedy all incidents of sex discrimination.

A. Oversight and Interpretation

1. The Office of Civil Rights (OCR)

Since Title IX’s enactment in 1972, the Department of Education’s Office of Civil Rights (OCR) has been charged with enforcing the federal law. The law has been officially interpreted by the OCR via a number of administrative issuances. Through the decades, the Office of Civil Rights has developed and released grievance procedure manuals¹⁴, resource guides¹⁵, and

⁶ 20 U.S.C § 1681(a) <https://www.law.cornell.edu/uscode/text/20/1681>

⁷ Steve Wulf, *Title IX: 37 Words That Changed Everything*, ESPN W, (April 29, 2012), <http://www.espn.com/espnw/title-ix/article/7722632/37-words-changed-everything> (“The number of women playing varsity sports in college rose from 29,972 in 1971-72 to 186,460 in 2009-10, a 622 percent increase.”)

⁸ *Title IX and Sex Discrimination*, U.S. Department of Education, Office of Civil Rights, (April 2015) https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html

⁹ 20 U.S.C. § 1681 (a) (3)-(9))

¹⁰ Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV. 473, 474 (2007)

¹¹ Secs. 901, 902, 86 Stat. 373, 374 <https://www.law.cornell.edu/cfr/text/34/106.33>; 20 U.S.C § 1681, 1682

¹² Russlynn Ali, *Dear Colleague Letter*, U.S. Department of Education, (April 4, 2011) <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html>

¹³ Id. at “Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature.”

¹⁴ First issued in 1987, see *The Living Law*, The Margaret Fund of the NWLC, <http://www.titleix.info/History/The-Living-Law/Living-Law-in-the-80s.aspx>, but now included in Office of Civil Rights resource guides

¹⁵ See e.g. U.S. Department of Education, Office of Civil Rights, *Title IX Resource Guide* (Apr. 2015)

guidance to support implementation of Title IX. The United States Government Accountability Office (GAO) explains this about guidance:

“Guidance documents, sometimes referred to as sub-regulatory guidance, set forth policy on or interpret statutory, regulatory, or technical issues and come in a variety of formats and names. Agencies rely on guidance documents- which are not legally binding—to clarify statutes or regulatory text and to inform the public about complex policy implementation topics.”¹⁶

A number of guidance documents have been released in the history of Title IX:

In 1997, OCR released a document entitled “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.”¹⁷ This document is significant as the first guidance document in which the OCR explains an institution’s responsibility under Title IX to address sexual assault. This document affirms that Title IX covers quid pro quo sexual harassment of a student by an employee, that which conditions a student’s participation in or admission into an educational program on submitting to “unwelcome sexual advances, requests, favors, or verbal, nonverbal, or physical conduct of a sexual nature”.¹⁸ An institution is liable for quid pro quo sexual harassment whether they were aware of the incident(s) or not. The OCR explains that peer-to-peer or third-party sexual harassment holds a different standard for liability. This is when the OCR first defines the standard of “hostile environment sexual harassment.”¹⁹ A hostile environment may transpire when a sexually harassing behavior occurred that was sufficiently severe enough to limit a student’s ability to benefit from or participate in an educational program. A hostile environment can be found to exist for the victim(s) as well as witnesses. For a Title IX institution to be found liable of hostile environment sexual harassment, the school must have or should have known that a hostile environment existed and then subsequently failed to take immediate and/or appropriate action.

In 2001 the OCR released revised guidance on sexual harassment in response to two Supreme Court cases that occurred after the 1997 guidance document was issued.^{20 21} The revised guidance explains by highlighting the outcomes of the Supreme Court cases, how schools may be liable for monetary damages based on the handling of sexual harassment complaints. It clarifies that OCR investigations do not have the authority to request nor redeem payment of

¹⁶ *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368: Published: Apr 16, 2015. Publicly Released: May 18, 2015

¹⁷ “*Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*” (62 Fed. Reg. 12034, March 13, 1997) <https://www.govinfo.gov/app/details/FR-1997-03-13/97-6373>

¹⁸ Alexander, 459 F.Supp. at 4 (a claim that academic advancement was conditioned upon submission to sexual demands constitutes a claim of sex discrimination in education); Kadiki, 892 F.Supp. at 752 (reexamination in a course conditioned on college student's agreeing to be spanked should she not attain a certain grade may constitute quid pro quo harassment); see also *Karibian v. Columbia University*, 14 F.3d 773, 777-79 (2nd Cir. 1994) (Title VII case). Cited in Id. at footnote 5

¹⁹ “*Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*” (62 Fed. Reg. 12034 (March 13, 1997), Id. at 1, 2

²⁰ Office for Civil Rights, *Revised Sexual Harassment Guidance*, (66 Fed. Reg. 5512, Jan. 19, 2001) <https://www.govinfo.gov/app/details/FR-2001-01-19/01-1606>

²¹ *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

monetary damages, though private suits against an institution do possess that authority. Also revealed is the understanding that the investigation process itself may create a hostile environment for a victim. Importantly, this revision expands the quid pro quo and hostile environment harassment section to emphasize institutional obligation to prevent, address, eliminate and remedy incidents of sexual harassment.²²

On April 4th, 2011, in response to national statistics that reported alarming rates of campus-based sexual assault,²³ as well as campus requests for additional guidance from the OCR, the Assistant Secretary of Education issued a “Dear Colleague Letter.”²⁴ This guidance was crafted to clarify Title IX obligations while also providing examples of proactive prevention efforts and remedies. The Letter clearly defined “sexual violence” for the recipients:

Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion.²⁵

The new guidance states that if schools become “reasonably knowledgeable”²⁶ of an incident of sexual violence, they must conduct an investigation, regardless of whether a complaint is made by the alleged victim. Schools were informed that they must adopt and publish grievance procedures that are effective and timely in addressing sexual violence. A school is obligated to take prompt steps to ensure that a hostile environment does not exist, end the harassment if it does exist, prevent its recurrence, and explore manners by which to remedy its effects. In all of this the confidentiality and privacy concerns of the victim must be honored by the institution.

In 2016, the OCR released the “Dear Colleague Letter on Transgender Students.”²⁷ This letter, signed by both the Department of Education and the Department of Justice, explains that gender identity is covered under Title IX. The letter states that for the purpose of Title IX, gender identity will be interpreted as “sex” in rules and regulations. The letter explains that the measure of an individual’s gender identity is self-affirmation. This is understood to mean that a person protected under Title IX need not possess nor be required to show any document attesting to their gender identity if it differs from their sex assigned at birth. The letter advises that a school or educational program that requests such documentation or demands that an individual “prove”

²² United States Department of Education. (2001). *Revised sexual harassment guidance: Harassment of students by school employees, other students, or third parties Title IX.* (sec V.)

²³ Christopher P. Krebs et. al., *The Campus Sexual Assault Study: Final Report* (Nat’l Criminal Justice Reference Serv., Oct. 2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol.

²⁴ Russlynn Ali, (April 4, 2011), *Dear Colleague Letter: Sexual Violence*, U.S. Department of Education

²⁵ *Id.* at 1, 2

²⁶ *Id.* at 4

²⁷ Lhamon, C. E., & Gupta, V. (2016, May 13). *Dear Colleague Letter on Transgender Students*, U.S Department of Education and U.S Department of Justice

their gender identity may be in violation of Title IX. Detailed guidance related to implementing non-discriminatory gender identity practices are included in the letter. The OCR explains that complaints, concerns, or objections of other members of the community are not sufficient to justify any policy that would disadvantage a group of students based upon identity.²⁸

On February 22, 2017, the Department of Education and the Department of Justice issued a Dear Colleague Letter²⁹ rescinding the “2016 Dear Colleague Letter on Transgender Students.”³⁰ The 2017 letter describes concerns about litigation following the 2016 guidance as it was interpreted to “require access to sex-segregated facilities based on gender identity,”³¹ under Title IX. The letter explains that the Departments have elected to rescind “the above-referenced guidance documents in order to further and more completely consider the legal issues involved.”³² The OCR website Laws and Guidance page, “Resources for LGBTQ Students,” states:

Every school and every school leader has a responsibility to protect all students and ensure every child is respected and can learn in an accepting environment. Title IX protects all students, including LGBTQ students, from sex discrimination. Title IX encompasses discrimination based on a student’s failure to conform to stereotyped notions of masculinity and femininity. Schools should also be aware of their obligation under Title IX and the Family Educational Rights and Privacy Act (FERPA) to protect the privacy of their students when maintaining education records.³³

2. The Washington State Human Rights Commission

The Washington State Human Rights Commission (WSHRC) is the state agency charged with administering, applying, and enforcing the Washington State Law Against Discrimination (WLAD).³⁴

²⁸ 34 C.F.R. § 106.31(b)(4); see G.G., 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981,984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman “merely [to be] present in the women’s faculty restroom” created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant’s proffered justification that “other women might object to [the plaintiff]’s restroom use” was “wholly irrelevant”). See also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that “mere negative attitudes, or fear . . . are not permissible bases for” government action). Quoted in Lhamon, C. E., & Gupta, V. (2016, May 13). *Dear Colleague Letter on Transgender Students*, U.S Department of Education and U.S Department of Justice.

²⁹ Battle, S., & Wheeler II, T.E., (2017, February 22nd). *Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students*, U.S Department of Education and U.S Department of Justice

³⁰ Lhamon, C. E., & Gupta, V. (2016, May 13). *Dear Colleague Letter on Transgender Students*, U.S Department of Education and U.S Department of Justice

³¹ Battle, S., & Wheeler II, T.E., (2017, February 22nd). *Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students*, U.S Department of Education and U.S Department of Justice; *Id.* at 1

³² *Id.*

³³ “LGBTQ Resources,” (11/17/2017). In *OCR, Laws & Guidance*.
<https://www2.ed.gov/about/offices/list/ocr/lgbt.html>

Similar to the Title IX requirement that school districts and colleges appoint a Title IX coordinator/equity officer, Washington state law requires school districts to appoint at least one employee to monitor and coordinate the district's compliance with state nondiscrimination laws³⁵ This employee is often known as the Civil Rights Compliance Coordinator.³⁶ This employee may dually be the Title IX equity officer, though if these positions are held by two individuals then collaboration is expected.

The WLAD and the Washington Administrative Code³⁷ both explicitly prohibit sex discrimination including sexual harassment. WLAD prohibits sex discrimination in all places of public accommodation, which includes schools, while the WAC governs public schools, districts, colleges, and public charter schools. Neither of these diminish nor modify a harmed individual's right to bring action under state or federal law.³⁸

Students, their families, and employees may file a discrimination complaint with the WSHRC if they believe they have experienced sex discrimination, including sexual harassment and sexual assault in a place of public accommodation. The WSHRC defines discrimination as occurring, "whenever someone is treated differently or denied equal treatment or access because of their membership in a Protected Class."³⁹ Both sex (including pregnancy status) and gender identity are protected classes under WLAD.⁴⁰

Due to the differences in guidance related to Title IX protections for transgender students, as issued by the Department of Education and the Department of Justice,⁴¹ Washington State judges may seek to study how the Washington Law Against Discrimination⁴² interacts with Title IX and its capacity to protect a Washington State student from sex discrimination, including sexual harassment, on the basis of gender identity or gender expression.⁴³ The WLAD defines "gender identity or gender expression" as "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."⁴⁴ The WLAD protects transgender individuals from discrimination based on their transgender status. Further, the Washington Administrative Code has established procedures to meet the requirements for implementing Equal Opportunity/Title

³⁴ Chapter 49.60 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=49.60>

³⁵ Chapter 28A.640 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=28A.640>; Chapter 28A.642 RCW <https://apps.leg.wa.gov/rcw/default.aspx?cite=28A.642>; Chapter 392-190 WAC <https://apps.leg.wa.gov/WAC/default.aspx?cite=392-190>

³⁶ Title IV of the Civil Rights Act of 1964, also prohibits public school districts from discriminating against students on the basis of sex. Sexual harassment in schools may also be found to violate Title IV of the Civil Rights Act.

³⁷ WAC 392-190-0555 <https://app.leg.wa.gov/WAC/default.aspx?cite=392-190-0555>

³⁸ Id. (3)

³⁹ Washington State, Human Rights Commission., *File a Complaint*. <https://www.hum.wa.gov/discrimination-complaint>

⁴⁰ Id.

⁴¹ See footnotes 29 and 30

⁴² RCW 49.60.040 <https://apps.leg.wa.gov/RCW/default.aspx?cite=49.60.040>

⁴³ WAC 162-32-010 <https://apps.leg.wa.gov/wac/default.aspx?cite=162-32-010>

⁴⁴ RCW 49.60.040(26)

IX policy.⁴⁵ In these procedures, gender identity and gender expression are both included as protected classes when defining harassment.⁴⁶

3. Courts

In addition to the Office of Civil Rights and the Washington State Human Rights Commission, Courts have also played a crucial part in interpreting Title IX. The cases highlighted and summarized below are only some of the many cases that have impacted Title IX and shaped its legal interpretation.

- In 1979, the Supreme Court ruled that an implied private right of action exists to enforce Title IX;⁴⁷
- In 1982, the Supreme Court held that Title IX regulations prohibit sex discrimination for employees as well as students;⁴⁸
- In 1999, the Supreme Court held that Title IX allows students to sue schools for monetary damages should student-on-student sexual harassment be severe and pervasive enough that it both interferes with the victims' educational environment, and the school knew about the harassment but responded unreasonably to it;⁴⁹
- In 2005, the Supreme Court held that Title IX allows for retaliation lawsuits when victims face adverse action for reporting sex discrimination.⁵⁰ The Opinion of the Court held that as retaliation is an intentional act, it constitutes a form of discrimination because the complainant is subjected to differential treatment. The retaliation was in violation of Title IX specifically because it was in response to a complaint of sex discrimination.⁵¹
- In 2008 the Washington State Court of Appeals held that under Title IX, a single act of rape committed upon a victim is sufficient to support a claim against an institution for damages based on injury done after the reported the rape;⁵²
- In 2017 the Third Circuit held that a medical residency is an educational program or activity within the meaning of Title IX and that the capacity of a party to bring a Title VII claim against an institution obligated to Title IX, does not preclude the party from also bringing a claim for the same conduct under Title IX.⁵³

⁴⁵ WAC 132E-120-385

⁴⁶ Id. at (f)(i)(A)

⁴⁷ *Cannon v. University of Chicago*, 441 U.S. 677 (1979)

⁴⁸ *North Haven Bd. Of Educ. v. Bell*, 456 U.S. 512 (1982)

⁴⁹ *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 628 (1999)

⁵⁰ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)

⁵¹ *Jackson v. Birmingham Bd. of Educ.*, (02-1672) 544 U.S. 167 (2005) 309 F.3d 1333, reversed and remanded

⁵² *SS. v. Alexander*, 148 Wn. App. 75, 113, 177 P.3d 724, 743 (2008)

⁵³ *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017)

III. Other Federal Statutes

Since Title IX's enactment, a number of related federal statutes have been passed that inform how courts may interpret and assess Title IX claims.

A. Clery Act

Passed in 1999, the Clery Act requires that all colleges and universities receiving federal funding document and disclose accurate and complete crime statistics of crimes committed on or near campuses as reported to Campus Security Authorities (CSA's) and Local Law Enforcement. This report is called an Annual Security Report (ASR). The Clery Act aims to ensure that campus members and members of the broader community, including potential students, staff and faculty, are informed of the campus climate in a transparent and accessible manner. K-12 schools do not fall within the scope of the Clery Act.

There are four general crime categories included in Clery reporting requirements. These are: Criminal Offenses, Hate Crimes, Arrests and Referrals for Disciplinary Action, and Violence Against Women Act (VAWA) Offenses. The Clery Act and VAWA are related to Title IX because the 2013 reauthorization of the VAWA (Campus SAVE Act), amended the Clery Act to require institutions to disclose statistics related to any incidents of domestic violence, dating violence, and stalking. These disclosures overlap with Title IX compliance requirements, though while sexual assault is also a VAWA offense it is included in the Criminal Offenses category for Clery Act reporting purposes.⁵⁴ What must be included in the report are statistics based on reports of alleged criminal incidents, it is not necessary for an investigation or finding to be made to be included in the crime statistics. Additionally, it is not the job of a Clery reporter (CSA) to investigate a report nor insist that a victim report to law enforcement if they do not wish to.

While institutions designate mandated Clery reporters (CSAs), professional and pastoral counselors are exempt from the reporting requirement. In light of this important protection of the counselor-client relationship, institutions are strongly encouraged to establish a voluntary, confidential reporting process so that crimes reported to those who are not Clery-mandated can still be counted. The Clery Act also mandates "timely reporting," in instances where crimes reported represent a serious and immediate threat to campus safety. "To date, the Department of Education has not identified any specific conflicts between Title IX and the Clery Act."⁵⁵

B. Family Education Rights and Privacy Act (FERPA)

The Family Education Rights and Privacy Act (FERPA)⁵⁶ passed in 1974 "generally forbids disclosure of information from a student's education record without the consent of the student," (or their parents if the student is a minor). While schools cannot disclose records that

⁵⁴ U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting, 2016 Edition*, Washington, D.C., 2016

⁵⁵ White House Task Force to Protect Students from Sexual Assault, *Intersection of Title IX and the Clery Act*, Department of Justice, (April 2014), <https://www.justice.gov/ovw/page/file/910306/download>

⁵⁶ 20 U.S.C. §1232(g); 34 C.F.R. 99

have personally identifiable information without appropriate consent, FERPA does not eliminate a school's duty to prevent, address, and remedy sex discrimination under Title IX. Likewise, FERPA also does not compromise a school's capacity to report accurate campus safety statistics required by the Clery Act, as this can be done without the inclusion of identifying information.

Concerns about how FERPA and Title IX interact have been raised in regards to a harassed student's right to information about the outcome of sexual harassment claims against another student, and in regard to the due process rights of individuals accused of sexual harassment (including teachers) to obtain information about the identity of the complainant and the nature of the allegations against them.⁵⁷ The Office of Civil Rights interprets FERPA privacy protections "as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation,"⁵⁸ because the information provided directly affects the victim. Critically, an institution's adherence to an outcome notification plan is essential or they might be found to have violated explicit statutory and regulatory mandates of not only the Clery Act and FERPA, but also OCR guidance.

The Department of Education has issued guidance indicating that when FERPA and Title IX are perceived to conflict, Title IX supersedes FERPA.⁵⁹ The Department also stated "that neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment,"⁶⁰ and 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."⁶¹

IV. Different Types of Proceedings and Remedies

Under Title IX, victims of sexual assault may pursue both on-campus and legal remedies. A campus grievance process is mandated under Title IX; however, a victim may also engage with a private Title IX action, a civil protection order, and/or criminal proceedings. It is not uncommon for some or all of these methods to occur simultaneously. Procedure, jurisdiction, evidentiary standards, and burdens of proof differ from venue to venue. Due to the potential for concurrent processes to be pursued at the same time, developing a Memorandum of Understanding (MOU) with all participating jurisdictions can streamline the investigation and discovery processes for all parties. Understanding the complexities and differences between sexual assault proceedings will allow judges to better address the concerns of the parties involved.

A. Grievance Procedures for Campus Sexual Assault

On-campus grievance procedures vary from school to school, and administrative

⁵⁷ United States Department of Education. (2001). *Revised sexual harassment guidance: Harassment of students by school employees, other students, or third parties Title IX.* (sec V.)

⁵⁸ Id.

⁵⁹ Id., interpreting 20 U.S.C. 1221(d), which provides that "[n]othing in [the General Education Provisions Act] shall be construed to affect the applicability of . . . title IX of the Education Amendments of 1972."

⁶⁰ Id.

⁶¹ Id.

guidance regarding the burden of proof and evidentiary standards for such proceedings is frequently challenged in court.⁶² A school may reach their Title IX investigation findings through the application of either the preponderance of the evidence standard, or a clear and convincing evidence standard. Postsecondary institutions must state which evidentiary standard will be used in any disciplinary procedure that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking in their Annual Security Report.⁶³ While grievance procedures may look different across institutions, every school is obligated to respond to and protect all students from sexual violence regardless of the sex of the complainant or the alleged perpetrator.

Under Title IX, a school's procedure for responding to sexual violence must include prompt, impartial, adequate, and reliable complaint investigations, including equal access to any process of the grievance procedure for complainant and alleged perpetrator.⁶⁴ The procedure must include clear and reasonable time frames for the major stages of the complaint process, as well as written notice to each party involved of the outcome of the complaint.⁶⁵

The OCR guides schools to notify complainants of their right to file a criminal complaint or police report before the conclusion of on-campus investigations, and mandates that schools not wait for criminal or police proceedings to begin before starting their own proceedings.⁶⁶ Campus Title IX investigations focus on whether a school rule or policy has been violated. Each school's definition of sexual misconduct will differ; in some cases, the school's policy may prohibit conduct beyond what is deemed criminal in a court of law.

Title IX investigators typically do not have subpoena or search warrant powers, so the evidence available to them may be different than that available in civil or criminal court. Unlike criminal complaints, Title IX complaints are not discretionary. All Title IX complaints must be investigated and resolved. The evidentiary standard and procedures of a criminal investigation are different and the termination of a related criminal investigation does not relieve the school of their Title IX duty to resolve the campus complaint.⁶⁷ Complainants have the right to confidentiality and schools cannot require a victim participate in a grievance procedure. A school may not use a victim's absence in a Title IX complaint hearing as an excuse to terminate the hearing or investigative process.⁶⁸ Campus Title IX investigations are not to serve as substitutes for criminal proceedings or civil remedies.

Campuses have an obligation to inform students of their protections under Title IX, including that it is unlawful for the school to retaliate against an individual for participating in

⁶² Tyler Kingkade, *Another Lawsuit Challenges Feds on Title IX Rules for Sexual Assault*, The Huffington Post, (June 17, 2016), http://www.huffingtonpost.com/entry/uva-grad-title-ix-lawsuit_us_57640874e4b015db1bc8ffe9

⁶³ 34 C.F.R. § 668.46(k)(1)(ii) <https://www.law.cornell.edu/cfr/text/34/668.46>

⁶⁴ *Id.* at (k)(3)(i)(B)(3)

⁶⁵ United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence*. (sec. C-5). <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁶⁶ *Id.*

⁶⁷ United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence*. <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁶⁸ *Id.*

any aspect of a Title IX complaint or OCR investigation. It is also the institution's responsibility to take necessary steps to protect a student involved in a Title IX complaint or OCR investigation from retaliation that may be directed at them by other students for cooperating as a witness or for bringing forth a complaint.⁶⁹

A school's jurisdiction is not limited by geography.⁷⁰ If a school determines that the alleged off-campus sexual misconduct occurred within the context of an education program or activity of the school, the school must investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus⁷¹

Campus Title IX grievance procedures may be challenged in State court; in Washington, Division III of the Court of Appeals recently ruled that schools should use a full adjudicative process, as set out by the Administrative Procedure Act, when deciding cases where a student faces expulsion or is charged with sexual misconduct that would amount to a felony under criminal law.^{72 73}

When a Title IX investigation and grievance process concludes, Title IX requires that both parties be notified of the outcomes of the investigation and, if there had been one, the appeal. It is suggested by the OCR that the notifications to each party happen concurrently and in writing. Like the hearing processes, the post-hearing appeals process also varies by school. Campus Title IX findings of sexual violence must include remedies. Such remedial actions may include but are not limited to disciplinary action against the offender (e.g. sanctions) and additional services/support to the victim (e.g. academic support, relocation of housing, campus escort, and counseling).

B. Title IX Complaints

Discrimination on the basis of sex by a recipient of Federal Department of Education funding is prohibited by Title IX of the Education Amendments of 1972. Any person can file a Title IX complaint with the OCR. The complainant need not be the victim of the alleged discrimination, they may file on behalf of, or pertaining to another person(s). If filing on behalf of another, the complainant is responsible for securing any written consent necessary for the OCR to take action.

A complainant must file the complaint within 180 days of the alleged act; however, waivers for this time restriction may be submitted. There is no requirement that an individual interact with the school or institution's grievance procedure in order to file an official complaint with OCR. A complaint can be filed online, via mail using an OCR form, or in the form of a

⁶⁹ United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence*. <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁷⁰ Paula A. Barran and Jeffrey D. Jones, *Off-Campus Harassment: Identifying the Geographical Reach of Title IX Compliance* (2013)

⁷¹ United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence*. <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁷² *Abdullatif Arishi v. Washington State University*, 196 Wn. App. 878, 385 P.3d 251 (2016)

⁷³ WAC 504-26-401 <https://app.leg.wa.gov/WAC/default.aspx?cite=504-26-401>

letter. The complaint must include the complainants name and contact information, information about the person(s) or class of persons harmed by the alleged discrimination (names not required), the name and location of the institution that committed the alleged discriminatory act(s), and a description of the alleged incident(s) in sufficient detail to enable the OCR to understand when and what occurred, and the basis for the alleged discrimination.⁷⁴ OCR will contact the complainant to acknowledge receipt and to provide information on whether they will proceed with an investigation.

OCR functions as a neutral fact-finder in the investigation of the complaint. OCR uses a number of different methods by which to seek resolution when a Title IX violation has been found to have occurred. Typically, complaints are resolved through a form of settlement with the school or district known as a Voluntary Resolution Agreement (VRA). When OCR cannot obtain voluntary compliance, it refers cases to the Department of Justice for initiation of proceedings before an administrative law judge.⁷⁵

C. Civil Suits

Title IX allows victims a private right of action against schools that fail to adequately protect them from sexual violence on campus⁷⁶ or in an educational program. A lawsuit may be filed by the victim or the victim's parents/legal guardian if the victim is below the age of 18.⁷⁷ To prevail in a Title IX suit, the victim must show by a preponderance of the evidence that the school had actual knowledge of the sexual violence and deliberately ignored it.⁷⁸ Available civil remedies might include injunctive relief, monetary compensation and attorney's fees, and/or a consent decree/compliance plan outlining the steps that the school will take to rectify Title IX violations and ensure a discrimination-free educational environment for all students.

Title IX lacks a universal statute of limitations; therefore, the law of the state where the defendant institution is located applies. In Washington, the statute of limitations for a Title IX suit requires that a suit be filed "within two years after the cause of action shall have accrued."⁷⁹

D. Proceedings in State Court

1. Criminal Proceedings

A criminal case focuses on the guilt of the defendant; any liability on the part of the institution is typically not a factor in evaluating a sexual assault charge. As discussed earlier in

⁷⁴ United States Department of Education, Office for Civil Rights, (2017, October 24), *How to File a Discrimination Complaint with The Office of Civil Rights*.

<https://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt>

⁷⁵ United States Department of Education, Office for Civil Rights, (2015, November 05), *Questions and Answers on OCRs Complaint Process*. <https://www2.ed.gov/about/offices/list/ocr/qa-complaints.html>

⁷⁶ *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

⁷⁷ *Id.*

⁷⁸ For more information and several examples of the interplay between criminal courts, civil courts, and on-campus adjudication in practice, see generally Jon Krakauer, *Missoula: Rape and the Justice System in a College Town* (Reprint edition 2016)

⁷⁹ RCW 4.16.100 <https://apps.leg.wa.gov/RCW/default.aspx?cite=4.16.100>

this chapter, criminal investigations do not relieve schools of their duty to resolve Title IX complaints, and schools should notify complainants of their right to report the crime to law enforcement.⁸⁰ After a report is made to law enforcement, criminal proceedings may be ongoing during the pendency of any on-campus grievance proceedings, Title IX complaints, or lawsuits. A memorandum of understanding agreeing to cooperation among law enforcement organizations can aid concurrent proceedings.

In the discovery phase of criminal proceedings, FERPA and state statutes governing privilege of records may limit evidence to document complaints. The Department of Education has issued guidance for handling conflicts between FERPA and criminal proceedings, stating “neither FERPA nor Title IX override any federally protected due process rights.”⁸¹

2. Civil Protection Orders

A civil protection order proceeding may also co-occur with a Title IX complaint or lawsuit, an on-campus grievance procedure, or a criminal proceeding. Issues that may arise for the court to consider include:

- Should the court order a school transfer (as authorized in Anti-harassment Protection Order and Sexual Assault Protection Order statutes) or defer to the school to implement a safety plan? Remedies in Title IX cases—including but not limited to relocation of students, changes in classes, and transportation accommodation—must be made in a way that mitigates the burden on the victim; however, what is the enforcement mechanism for any on-campus remedy?⁸²
- Should an on-campus grievance procedure that does not result in disciplinary action have any impact on the civil protection order case? Should one be stayed during the pendency of the other? Similarly, does a school’s decision not to implement a safety plan affect the court’s decision to implement a civil protection order? Will one supersede the other?
- Judges must weigh school interests when considering how to interpret a school’s implementation of a safety plan and other remedies. Institutions may protect reputational interests when handling Title IX grievances in on-campus hearings and disciplinary proceedings. The court should consider the possibility of underlying motivations when taking campus procedural outcomes into account during civil hearings.

⁸⁰ United States Department of Education, Office for Civil Rights, (2014, April 29), *Questions and Answers on Title IX and Sexual violence*. <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁸¹ *Revised Sexual Harassment Guidance*, Department of Education Office of Civil Rights, (January 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>, interpreting 20 U.S.C. 1221(d), which provides that “[n]othing in [the General Education Provisions Act] shall be construed to affect the applicability of . . . title IX of the Education Amendments of 1972.”

⁸² *Know Your Rights: Title IX Requires Your School to Address Sexual Violence*, Department of Education Office of Civil Rights, <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf>

V. Conclusion

The Department of Education's efforts to address sex discrimination including sexual assault through Title IX have had mixed outcomes. Though sexual assault statistics are difficult to compare from decade to decade, there have been measured increases in reporting.⁸³ Accordingly, it is crucial that judges understand the interplay between Title IX and state court proceedings.

⁸³ Melissa Korn, *Reports of Sexual Assault Rising Sharply on College Campuses*, The Wall Street Journal, (May 4, 2016), <https://www.wsj.com/articles/reports-of-sexual-assault-rising-sharply-on-college-campuses-1462375421> (“The number of forcible sex crimes reported on U.S. college and university campuses more than doubled to 5,000 between 2001 and 2013, likely due in part to more diligent reporting of such offenses by victims and by institutions.”)