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Ensuring Impartiality in the Title IX Formal Complaint Process

Eric Ransleben
Cory Rush

Eric Ransleben
301 N. Pine Street
Roanoke, Texas 76262
(817) 491-8687
eransl@theeducationlawyer.com

Cory Rush
KBS Law Group
3700 Buffalo Speedway, Suite 560
Houston, Texas 77098
(713) 993-7066
crush@kbslawgroup.com

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I. The seismic overhaul of Title IX sexual harassment enforcement—how we got here.

Title IX of the Education Amendments of 1972 (Title IX) is the federal statute that prohibits sex discrimination in education, a prohibition that encompasses sexual misconduct perpetrated by students and employees in a school's educational programs and activities.¹ More than two decades ago, the United States Supreme Court held that Title IX includes an implied private right of action for money damages when an educational institution had actual notice of sexual harassment occurring, or was likely to occur, in its educational programs or activities and responded with deliberate indifference in both teacher-on-student² and student-on-student³ contexts. The implied right of action for private litigants in Title IX cases is in addition to the Department of Education's Office for Civil Rights (OCR) own enforcement mechanism, in which OCR can withhold an educational institution's federal funding if the institution fails to voluntarily correct its noncompliant policies and practices.⁴ Federal cases following the Court's *Gebser* and *Davis* decisions, however, make it clear that the deliberate indifference standard attendant to private Title IX lawsuits is a difficult hurdle for a plaintiff to clear,⁵ and OCR has never withdrawn federal funding from an educational institution based on a finding that a school was noncompliant with Title IX.⁶

The first shift in the Title IX landscape relevant to this paper happened when OCR published its April 4, 2011 Dear Colleague Letter.⁷ OCR issued this guidance at the time to explain that the requirements of Title IX covered student-on-student sexual violence and to remind schools of their responsibilities to take immediate and effective steps to respond to sexual violence in accordance with the requirements of Title IX.⁸ OCR provided further guidance in an April 28, 2014 document titled *Questions and Answers on Title IX and Sexual Violence*, in which OCR reinforced school districts' obligations to publish a notice of nondiscrimination, designate a

¹ See 20 U.S.C. §§ 1681-1688 (2018).

² See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998).

³ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

⁴ See 34 C.F.R. § 100.7(c); see also 34 C.F.R. § 106.71 (incorporating 37 C.F.R. §§ 1007, 100.8).

⁵ See Catherine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 Yale L.J. 2038, 2040 n.5 (surveying Title IX cases post-dating *Gebser/Davis* through May 2014 and finding that the plaintiffs' cases were dismissed on summary judgment, or dismissal was affirmed, in 140 instances).

⁶ See Erin E. Buzuvis, *Drawing the Line: Modern Sexual Conflicts and the Law: Title IX and Official Policy Liability Maximizing the Law's Potential to Hold Education Institutions Accountable for their Responses to Sexual Misconduct*, 73 Okla L. Rev. 35, 38 (2020).

⁷ See Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter* (2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (now rescinded).

⁸ See generally *id.*

Title IX Coordinator, and implement procedures for investigating and responding to sexual harassment and sexual violence complaints.⁹

The cultural zeitgeist surrounding allegations of sexual harassment and sexual violence in all facets of society, including schools, from 2011 to the present cannot be overstated.¹⁰ For example, complaints to OCR regarding how schools handled allegations of sexual violence more than tripled during the Obama Administration.¹¹ Several sexual harassment and sexual assault scandals in higher education also garnered significant media attention during this time period.¹² With the #MeToo movement in full-swing, schools and colleges nationwide were, without a doubt, motivated to vigilance in their efforts to comply with Title IX.¹³

While the heightened scrutiny on sexual misconduct claims in academic settings was an advancement for the rights of sexual assault survivors, the increased punishments of respondents in Title IX matters led to much countervailing criticism. OCR and higher education institutions received criticism for rushing into overcompliance with the broadening Title IX requirements¹⁴, with the focus of such criticism from men's rights activists, academics, and civil rights groups centering on the perception that the Title IX investigation process was skewed against respondents in general and minorities in particular.¹⁵

⁹ See Office for Civil Rights, U.S. Dep't of Educ., *Questions and Answers on Title IX and Sexual Violence* (2014) (now rescinded).

¹⁰ See Eilene Zimmerman, *Campus Sexual Assault: A Timeline of Major Events*, N.Y. Times (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/campus-sexual-assault-a-timeline-of-major-events.html>.

¹¹ See Libby Nelson, *Sexual Assault on Campus*, Vox (Oct. 15, 2014), <https://www.vox.com/2014/10/15/1808608/campus-sexual-assault-title-ix>.

¹² See Marina Koren, *Telling the Story of the Stanford Rape Case*, Atlantic (June 6, 2016), <https://www.theatlantic.com/news/archive/2016/06/stanford-assault-letters/485837/>; Scott Cacciola & Victor Mather, *Larry Nassar Sentencing: "I Just Signed Your Death Warrant," The New York Times* (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/sports/larry-nassar-sentencing.html>; Andrew Solomon, *Preventing Recurrences of the Cover-Ups at Penn State & Baylor (and Now Michigan state): Where Does it End?* 28 Marq. Sports L. Rev. 379.

¹³ See, e.g., Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvements in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. Legis. & Pub. Pol'y 49, 58 (2019).

¹⁴ See *Stop Abuse & Violent Env'ts, Lawsuits Against Universities for Alleged Mishandling of Sexual Misconduct Cases* (2016), <http://www.saveservices.org/wp-content/uploads/sexual-misconduct-lawsuits-report2.pdf>.

¹⁵ See, e.g., *Open Letter from Members of the Penn Law Sch. Faculty on Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities* (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf>; Elizabeth Bartholet et al., *Rethink Harvard's Title IX Sexual Harassment Policy*, Boston Globe (October 14, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWmqbM/story.html>; Gordon Finley, *Rescind "Dear Colleague" Letter*, Wash. Times (May 29, 2017), <https://www.washingtontimes.com/news/2017/may/29/letter-to-the-editor-rescind-dear-colleague-letter>; *Campus Due Process Litigation Tracker*, Found. for Ind. Rts. Educ., <https://www.thefire.org/research/campus-due-process-litigation-tracker> (accessed Jan. 5, 2021); Jeannie Suk Gersen, *Shutting Down the Conversations about Rape at Harvard Law*, The New Yorker (Dec. 11, 2015), <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>; Glenn Harlan Reynolds, *Glenn Reynolds: The Unilateral War on College Men*, USA Today (Sept. 30, 2015); Emily Yoffe, *The Question of Race in Campus Sexual Assault Cases*, The Atlantic (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/>; Nanette Asimov, *#MeToo Movement Spurs #HimToo Backlash: "People Don't Want to Believe"*, S.F.

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