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GENDER DISCRIMINATION AND TITLE IX IMPLEMENTATION:
LESSONS FROM THE OFFICE FOR CIVIL RIGHTS RESOLUTION LETTERS
1997-2011

DISSERTATION

A dissertation submitted in partial fulfillment of the requirements for the degree of
Doctor of Philosophy in the College of Education at the University of Kentucky

By

Laura Suzanne Johnson

Georgetown, Kentucky

Director: Dr. Jane Jensen, Professor of Educational Policy Studies and Evaluation

Lexington, Kentucky

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ABSTRACT OF DISSERTATION

GENDER DISCRIMINATION AND TITLE IX IMPLEMENTATION: LESSONS FROM THE OFFICE FOR CIVIL RIGHTS RESOLUTION LETTERS 1997-2011

Gender discrimination, such as sexual harassment, sexual assault and inequitable treatment has long been considered a prominent issue on higher education campuses and is regulated under the Patsy Takemoto Mink Equal Opportunity in Education Act, commonly known as Title IX. Title IX is enforced by the Department of Education's Office for Civil Rights (OCR) who responds to gender discrimination complaints on campus through investigations resulting in what are called OCR Resolution Letters. These letters define numerous policies and procedures Institutions of Higher Education (IHE) must put in place pertaining to the prevention of gender discrimination. This qualitative study looks specifically at the ways that gender discrimination on campuses of higher education was defined by the OCR from 1997-2011. The study explores the research questions (1) How have the types of conduct determined to be gender discrimination changed over time? (2) How have expectations of IHE responsibilities for gender discrimination issues changed over time? and (3) What gender discrimination issues have surfaced as priorities in the implementation of Title IX, as reflected in OCR resolution letters?

Analysis of the letters using a social construction framework demonstrates that while the definitions of specific types of gender discrimination remained constant, the context in which they occur and the types of behaviors determined to be gender discrimination have both expanded in response to societal attitudes. The OCR tends to take the stance of being an ally vs. a punishing body when aiding IHEs in implementing Title IX; however IHE's required investment in addressing the problem in both response and preventive measures has grown. Finally, OCR Resolution letters demonstrate that student on student interactions have been less common than faculty on student interactions. Implications for IHE practices and future research are discussed.

KEYWORDS: Gender Discrimination, OCR, Office for Civil Rights, Sexual Assault, Sexual Harassment, Title IX

Laura Suzanne Johnson

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3/20/2015

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Chapter One: Introduction

Introduction

Gender discrimination occurs when a person is treated in an unfair way and that person's sex or gender is the basis for the inequitable treatment. Gender discrimination can take on many forms including sexual misconduct, sexual harassment, sexual assault and/or applying policies or benefits in gender-biased ways. Issues of gender discrimination have long been problems on college campuses. One of the forms of gender discrimination that has received the most attention is sexual misconduct. Sexual misconduct is the behavior of obtaining sexual gratification at the expense of another or without consent. It includes any conduct of a sexual nature along a continuum of possibilities. Ascertaining the extent of incidents of sexual misconduct at Institutions of Higher Education (IHE) is challenging. Barriers around reporting have led many professionals to speculate that sexual assault is the most under-reported violent crime in the United States (Karjane, Fisher & Cullen 2005; McMahon, 2008; Sable et al. 2006).

According to some estimates at least one in five women will experience some form of sexual assault during their time in college, with some estimates as high as one in four (Carmody et al, 2009; McMahon, 2008; Kress, Anderson, Petuch & Thiemeke, 2006; Lee, Caruso, Goins& Sutherland, 2003; Rothman & Silverman, 2007). If one were to include incidents of non-completed assaults and unwanted sexual contact, the percentage of college women who experience some form of sexual misconduct likely goes much higher (Kress, et al, 2006). Women who attend IHEs may actually be at higher risk for sexual misconduct than those who do not attend an IHE (Carmody et al., 2009; Kress et al., 2006; McMahon, 2008). The IHE campus creates a unique

environment in relation to sexual misconduct as it concentrates a high number of people at the age most prone to sexual misconduct in a culture where dating, alcohol and drug use are more prevalent than the norm (Carmody et al., 2009). In fact, IHE women may be three times more likely to be a victim of sexual misconduct compared to women generally (Kress et al., 2006). Despite increased education, awareness, legislation and reporting mandates, the prevalence of sexual misconduct on college campuses has remained relatively stable for decades (Carmody et al., 2009). It is an issue IHEs have been facing for some time now and will likely continue to face.

Numerous policies and legislation have been enacted to address the issues of gender discrimination and sexual misconduct on IHE campuses. One of the most prominent and impactful of these policies is Title IX of the Education Amendments of 1972. When most people think of Title IX, athletics come to mind. However, Title IX encompasses far more. Title IX is an equity law that focuses on issues of gender discrimination. Gender discrimination encompasses all forms of sexual misconduct, which is the focus of this study. The U.S. Department of Education defines sexual harassment as “unwelcome conduct of a sexual nature”, which means everything from unwanted touching to sexual assault fall under the purview of Title IX. IHEs face numerous, complex requirements they must follow under Title IX in responding to issues of sexual misconduct. Failure to do so results in violation of a federal law and may carry with it very serious sanctions.

Obviously, it is imperative that IHEs understand Title IX compliance requirements. This is easier said than done though, as Title IX has been an evolving and shifting law coupled with at times ambiguous compliance guidance provided by the

Office for Civil Rights (the body of the Department of Education responsible for enforcing Title IX). The purpose of this study is to trace the evolution of the definitions of gender discrimination as demonstrated through OCR expectations of IHE practices in implementing Title IX.

Background of the Problem

Near the end of the 20th century, it appeared that IHE policies pertaining to gender discrimination were minimal. They included some protective measures such as escort services, security patrols as well as emergency and phone systems (Lewis, Farris and Green, 1997). Likewise there were some reactionary supports. One-third of campuses had victim's assistance programs with more than 80% having access to rape counseling through a crisis center (some on and some off campus) or a community hotline (Lewis et al., 1997).

Awareness and public concern over gender discrimination on college campuses became increasingly prevalent as the start of the 21st century approached. Pressure for IHEs to respond and address the problem amplified (McMahon, 2008). At the time, no known data existed regarding processes used by IHEs in adjudicating sexual misconduct cases (Penney, Tucker and Lowery, 2000). The Violent Crime Control and Law Enforcement Act of 1995 included a directive that required establishing a baseline study on campus sexual misconduct. Congress charged the Attorney General and Secretary of Education with this task so that the scope of the problem as well as the effectiveness of campus adjudications could be assessed (Penney, et al., 2000). Lack of funding prevented this from taking place, but it got the attention of the Association of Student Judicial Affairs (ASJA). In a 1995 conference they met and started to develop their own study,

the Inter-Association Task Force on the National Baseline Study, with the goal of gathering data about IHE disciplinary proceedings pertaining to sexual misconduct (Penney, et al., 2000). A survey was developed and disseminated to numerous institutions, 172 of which responded.

Similarly, in 1999 Congress asked the National Institute of Justice (NIJ) to study policies used by IHEs in responding to reports of sexual misconduct (McMahon, 2008). Congress asked specifically that the NIJ investigate if institutions have a written sexual misconduct response policy, how they define sexual misconduct, who is trained to respond to and report incidences, how students file reports and campus adjudication procedures. The NIJ surveyed 1,001 schools (all of which were recipients of federal aid) and received 1,015 IHE sexual misconduct policies for review. Results showed substantial confusion and inconsistency in IHE attempts to comply with Federal mandates (McMahon, 2008).

Public concern in addressing the issue of sexual misconduct began to snowball and gain momentum during the past decade to decade and a half as prominent court cases began to impact Title IX implementation. In response, numerous policies, legislation and federal mandates have been instituted to address the problem. Campus policies, preventive efforts, security measures, educational programming and federal mandates such as the Clery Act, Campus Sexual Violence Elimination Act and Title IX have all aimed at addressing the issues of sexual misconduct. However, it would seem these new efforts, policies and legislation had little impact as the prevalence of sexual misconduct on IHE campuses has continued to remain stable for decades (Carmody, et al., 2009).

Perhaps the most prominent effort in addressing sexual misconduct on IHE campuses has been Title IX. The scope and power of this law has substantially expanded, thereby making it a central component in defining all forms of gender discrimination, including sexual misconduct. It is imperative that IHEs understand how gender discrimination is defined in practice under this law for several reasons. The first reason is so IHEs implement the law correctly to ensure its intended outcomes of protecting victims' rights and equity are met. Secondly, a clear understanding of the law and how OCR intends it be implemented is necessary so IHEs stay in compliance and avoid serious sanctions.

Statement of the Problem

A complicating factor in addressing gender discrimination on IHE campuses is that the issue itself is a moving target. The ways in which a problem is defined and society comes to understand it represents a socially constructed phenomenon that changes over time. Gender discrimination is just such a problem. This socially constructed and evolving definition plays a central role in how institutions approach and respond to issues involving gender discrimination. Responses, public concern, policies, political agendas, legislative efforts, federal mandates, legal interpretations and court cases contribute to the creation of the socially constructed definition of gender discrimination on IHE campuses.

The socially constructed definition of gender discrimination on IHE campuses is perhaps most clearly seen through the interpretation and implementation of Title IX. The Office for Civil Rights (OCR) is the federal entity that enforces Title IX, as well as provides interpretive guidance regarding the law. Thus, the OCR represents a key stakeholder and player in holding IHEs accountable for issues involving gender

discrimination. The OCR's definition of gender discrimination is impacted by many elements including political agendas, activists, court cases, prominent historical events, social movements and many other factors. This creates a complex, grey, multi-faceted, subjective and hard to understand definition of gender discrimination by which IHEs will be held closely accountable. IHEs may face serious consequences for incorrectly interpreting and applying the law of Title IX. It becomes imperative that IHEs understand how this definition is applied in policy and practice in implementing Title IX mandates. IHEs must also be aware of and responsive to the reality that this definition and its expression through expectations of practice are evolving. OCR's definition of gender discrimination and IHE practical expectations for addressing the problem have undergone substantial changes since Title IX's creation.

Purpose of the Study

The purpose of this study is to gain insight about and understanding of the OCR's definition of gender discrimination and how that is expressed through practice in Title IX implementation with a focus on how it has changed over time. The end result will demonstrate not only how Title IX has evolved over the past thirty years, but also provide insight into what has driven those changes. This study will examine changes in Title IX implementation expectations that have occurred over the past thirty years relative to the socio-political context of this period. OCR's evolving socially constructed definition of gender discrimination is demonstrated through OCR's guidance on Title IX factors such as notice of harassment, expectations of the Title IX coordinator, guidance on institutional policies and procedures, expectations of campus investigations and disciplinary hearings and elements of institutional responses. Specifically, this study will

examine OCR resolution letters, which are generated anytime the OCR is responding to a complaint, conducting a review or responding to an IHE's request for assistance. The end result will provide a historical overview of not only how Title IX has evolved over time, but why.

Theoretical Framework

Social Construction Theory

Often when we think of social problems, we think the existence of the problem is objective, factual and real. We believe opinions, approaches, legislation and reactions and suspected causes of the problem may all be subjective, but the problem itself is not. Rather, the problem is perceived as an unbiased observation of the social world around us (Burr, 2003). Proponents of social construction theory argue that our understanding of the world and social issues is not an objective reality, but a socially constructed and subjectively understood definition of societal issues (Burr, 2003). For example, sexual assault of women is an act of violence where an oppressor takes advantage of another's vulnerability and victimizes her. This view of sexual assault may seem like an obvious and objective truth, but it is a socially constructed definition of a problem (Best, 1999; Burr, 2003; Caringella, 2009). An elaborate social process evolves that results in teaching us how to define a problem (Burr, 2003).

When a specific social problem becomes the center of attention, we are often told these issues have always existed; we may have just been ignoring them. Best (1999) argues that this is not the case; rather, social problems are subjective, created and defined by us. We use intentionally selected, cultural resources to define problems and advocates, such as social justice groups, political platforms, awareness campaigns, etc., help shape

our understanding and definitions of problems (Best, 1999; Caringella, 2009). Social problems such as rape, poverty or addiction all have intentionally and subjectively constructed definitions that give a simple name to a complex and multifaceted issue (Best, 1999). Furthermore, social problems do not exist on their own, independent of people's actions. They are a result of societal choices, behaviors and constructed perceptions (Best, 1999; Burr, 2003). The manner in which they are brought to the forefront and social interactions around the issue construct our knowledge, understanding and definitions of the problem. These definitions are subject to cultural and historical influences (Burr, 2003). Our understanding of a social issue is a result of numerous factors coming into play, which means the definition we reach for a social problem is just one of many possibilities. Truly understanding a social problem requires taking cultural and historical factors into account.

Best (1999) explains that problems have histories of when they were discovered and defined by society. To gain society's attention a problem needs to be constructed and defined in a way that compels people to pay attention and act. Many of the tactics used to define a social problem in a way that will gain societal attention revolve around instilling fear. Instilling fear in society is a powerful tool for bringing an issue to the forefront and defining it as a social problem. Best (1999) offers that a societal problem is defined as something to which individuals should fear being subjected. She goes further to explain fear is instilled through tactics such as pointlessness, patternlessness and deterioration, which are terms used in social construction theory. Patternlessness refers to a tactic to instill fear by defining a social problem in a way that makes the violence random and therefore likely to impact almost anyone (Best, 1999). Pointlessness refers

to a tactic to instill fear by defining a social problem in a way that demonstrates there is no known reason for the violence to exist. Best elaborates, explaining that the reality is people commit crimes for a reason, but ignoring this and painting crimes without reason, cause or risk factors increases anxiety. Deterioration refers to the process of demonstrating a crime or problem is getting worse and/or more pervasive (Best, 1999). Keeping a social problem on the forefront and gaining activist momentum also requires showing that the problem continues to worsen or deteriorate.

Problems are also defined as other tactics are used to help them gain momentum and attention. Rationale expansion is the processes of altering and expanding the definition of a social problem (Best, 1999). It helps to keep claims fresh and maintain societal interest and concern. Linking is a process in which a social agenda gains momentum by piggy-backing on an existing prominent agenda (Best, 1999). Domain expansion is a social constructionist theory term referring to a process by which social problems or crimes expand to become more inclusive of other behaviors (Best, 1999). This provides an opportunity for an issue to wedge its way in and gain more advocacy. These practices of attaching one social problem or crime to an existing social problem or crime enable them to take advantage of existing advocate support, social reform momentum, legislative efforts, etc.

Tactics such as these are used to bring an issue to the light and begin its social construction. Once an issue is defined as an important social problem or crime, activist, media and legislative flurries can all begin. The social construction and definition of gender discrimination and accompanying practice expectations for IHEs is analyzed through this theoretical framework.

Research Design

This study examines why changes in Title IX implementation expectations have occurred over the past 30 years relative to their socio-political context. Chapter Two will provide an overview of the creation and implementation of Title IX from its initial inception to present-day. The socio-political context that shapes the socially constructed definition of gender discrimination includes forces such as political movements, societal agendas and prominent court cases surrounding gender discrimination. This context is important in examining and understanding the priorities identified for Title IX and its implementation that are then reflected in the OCR resolution letters. The history is written using significant legal, political and social actions that pertain to Title IX and gender discrimination such as elections of presidents, alterations in legislation, social movements, prominent court cases interpreting Title IX and Department of Education (DoE) OCR guidance letters on implementing Title IX. These guidance letters provide a dataset to be used in analyzing the ways that gender discrimination has been defined.

OCR enforces Title IX in several ways. These include conducting compliance reviews, investigating complaints and providing guidance and assistance when requested. If a Title IX violation is found the OCR is required by federal law to first offer the IHE the opportunity to voluntarily remedy the violation and seek resolution. If the IHE does not voluntarily remedy the violation then the OCR may either terminate federal funding to the IHE or refer the case to the U.S. Department of Justice to be handled in federal court. The OCR does not impose fines. Complaints may be filed by anyone, even individuals who are not victims or associated with the IHE. OCR may also initiate investigation of an IHE even if no complaint has been filed. Whether OCR is responding

to a complaint, conducting a review or responding to a request for assistance, OCR's role is to be neutral. OCR is tasked with determining if federal funds have been used in a discriminatory way. This determination is made after an investigation which may involve requesting information from the IHE, conducting campus visits and holding interviews. If a violation is found, OCR asks the IHE to commit in writing to remedy the violation and may issue a closure letter outlining the voluntary resolution agreement. If the IHE chooses not to commit to resolution, the OCR may issue a formal letter of finding and seek to withdraw federal funds or refer the case to the U.S. Department of Justice. The closure letter or letter of findings marks the end of the investigation phase. These Title IX OCR resolution letters can be obtained through a FOIA (Freedom of Information Act) request. The National Council for Higher Education Risk Management (NCHERM) submitted a FOIA request for the letters that are the basis for this study. There were 174 Title IX OCR resolution letters during the period from 1997 to 2011. These letters provide the primary data analyzed in this study. Common themes and elements that help define the OCR's interpretation of gender discrimination and institutional responsibility were evaluated. Chapter Three will provide a more in depth explanation of the methodology used in analyzing the OCR letters. This includes the use of NVIVO software to organize the letters and code them for themes thereby helping to identify patterns and make meaning of the data.

The socially constructed definition of gender discrimination provides the foundation for what is demonstrated in the OCR resolution letters. As a result the changes seen in the OCR Title IX enforcement criteria lag slightly behind the historical context. These letters are based on the socially constructed definition of gender

discrimination used by OCR at a given point in time and accompanying OCR expectations for IHE practices in implementing Title IX. Chapter Four provides a framework for making meaning of the data setting the framework for analysis and interpretations by exploring themes that resulted from the methodology in Chapter Three. Themes are also analyzed in light of the historical context.

Finally, Chapter Five further develops the theme analysis of Chapter Four with their socio-political context providing deeper insight into what drove OCR practice expectations and succinctly answering the research questions of the study. Understanding the historical socio-political context of the time and how that influences OCR's Title IX changes, priorities and enforcement will demonstrate the evolutionary process of Title IX in this context. Looking at the changes in the context of their historical context will provide a deeper understanding for why Title IX implementation has evolved the way it has.

Research Questions

The research questions that drive this study center around the evolution of the socially constructed definition of gender discrimination for purposes of Title IX and how that definition is expressed through OCR expectations of IHE practice as demonstrated through OCR resolution letters. The research aims to answer the following questions.

1. How have the types of conduct determined to be gender discrimination changed over time?
2. How have expectations of IHE responsibilities for gender discrimination issues changed over time?

3. What gender discrimination issues have surfaced as priorities in the implementation of Title IX, as reflected in OCR resolution letters?

Significance of the Study

The interpretation of Title IX as expressed through OCR guidance and accompanying expectations for IHEs, reflects a socially constructed state of affairs that has evolved over time and experienced significant shifts. Most recently, Title IX has received significant attention in the political scene and media coverage. IHEs are receiving a strong message that the problem of gender discrimination on their campuses must be addressed. Understanding the history and evolution of gender discrimination and Title IX through the OCR Resolution Letters helps inform contemporary perspectives on issues related to gender discrimination for purposes of Title IX. This study traces the evolution of the OCR's definition of gender discrimination and how that definition has been expressed in practice through Title IX implementation by analyzing the historical socio-political context that predated the changes in OCR Title IX enforcement as demonstrated through the OCR resolution letters. Issues related to gender discrimination such as behaviors, contexts in which it occurs, educational efforts, preventive measures and IHE ownership of the issue have continue to grow. Understanding this context is a key component to IHE future practice.

Chapter Two: Literature Review

Introduction

Title IX has been central to defining the issue of sexual misconduct on college campuses. Today, the power of Title IX is well known and its existence seemingly commonplace. It is no secret that Title IX has had a huge impact, specifically on women's athletics. While it is commonly known as the law pertaining to college athletics, this was actually not even its original intent. Title IX was created as and remains an equity law, not an athletics law. However, its central role in defining women's athletics set important groundwork and laid the foundation for its application to all forms of gender discrimination.

As IHEs have been under increased scrutiny to address gender discrimination on campus, the power of Title IX in addressing sexual misconduct has amplified. However, before sexual misconduct could become such a prominent part of Title IX, it had to be defined. This chapter will examine the history of Title IX's development through the lens of social constructionism. What follows is a historical account of the evolution of Title IX highlighting prominent social and political factors that helped it gain momentum and define the issue of sexual misconduct.

The Construction of Sexual Misconduct

Sexual misconduct has been defined through social constructionist frames of deterioration, patternlessness and pointlessness that demonstrate it is a worsening problem to which almost anyone could be a victim. Such framing has helped to create a social response that focuses on prosecution and adjudication issues (Caringella 2009). Advocates have jumped on board focusing on reactionary and preventive measures

rather than focusing on understanding why the social problem exists. College campus policies focus on victim services and adjudication issues with a few efforts toward education. Actually understanding the root of the issue and why the behavior occurs does not go far beyond mentioning a few risk factors (alcohol, social pressure, etc.) and scenarios to avoid.

The initial focus of Title IX did not include sexual misconduct. However, as the foundation of Title IX is to establish gender equity, activists were able to attach issues of sexual misconduct to the law saying such issues prevented women from participating fully in educational opportunities and thereby were discriminatory. Best (1999) explains such practices are known as linking, domain expansion and rationale expansion. These tactics allow a social problem to expand and benefit from the momentum of an existing movement. Linking is a process in which a social agenda gains momentum by piggy-backing on an existing prominent agenda (Best, 1999). Domain expansion is a social constructionist theory term referring to a process by which social problems or crimes expand to become more inclusive of other behaviors (Best, 1999). This provides an opportunity for an issue to wedge its way in and gain more advocacy. These practices of attaching one social problem or crime to an existing social problem or crime enable them to take advantage of existing advocate support, social reform momentum, legislative efforts, etc. This is exactly what happened with sexual misconduct and Title IX as it married with gender equity issues. The issue of sexual misconduct came to fall under Title IX as its applicability to addressing problems of gender equity expanded.

The 1960s and 1970s: The Social and Political Climates that Set the Scene for Title

IX

Although now it is heavily associated with athletics and sexual harassment, Title IX was created as and remains an equity law. Much of its creation and implementation can be attributed to the culture of the time and a few key activists. Political agendas, societal interests and key figures all merged together in a cultural environment that provided the necessary momentum for Title IX to emerge.

Title IX was very much a product of the mindset and societal priorities that were prevalent in the 1960's (Suggs, 2005). Society's expectations of fair treatment and feeling of entitlement were growing (Best, 1999). The Civil Rights Movement, Victim's Rights Movement, Feminist Movement, and Rape Reform movement all had prominent impacts on the social construction of sexual misconduct (Best, 1999; Caringella, 2009; Salomone, 1986; Suggs, 2005).

Civil Rights & Feminist Movements

In many ways, the motivation and success of Title IX can be traced to the Civil Rights movement. It left a wake that primed societal interest and encouragement for equity issues. Many describe Title IX as an extension of the Civil Rights movement (Suggs, 2005). The success racial minorities had with the Civil Rights Movement encouraged people with new motivation and tactics for implementing social change (Salomone, 1986; Suggs, 2005). The power of organizing and activist groups had been realized.

The Feminist Movement also played an important role in setting the scene for Title IX. In the 1970's sex bias and discrimination were emerging as prominent public

policy issues (Salomone, 1986). The dynamics of the labor force changed as the baby boomers entered. Suddenly record numbers of educated people were seeking employment only to be met with limited opportunities and stark differences between the sexes (Salomone, 1986).

The feminist movement had begun and its agenda was now prominent. Political groups such as the National Organization for Women (1966) and Women's Equity Action League (1968) had formed with the goal of eliminating sex bias in multiple arenas (Salomone, 1986). It was a time when large numbers of people saw need for change and were motivated at the potential for affecting social change.

Victim's Rights Movement

The Victim's Rights Movement played a very large role in setting the stage for the social construction of sexual misconduct and accompanying legislation. The movement started in the 1970's with goals of defining victimization and giving victims more meaningful roles in criminal proceedings. Victims were to be recognized as active participants with rights, interests and a voice (Best, 1997).

Advocating for those less fortunate and the oppressed was and still is a powerful political platform. In the 1970's, republican political candidates began advocating heavily for victim's rights in their political agendas (Best, 1997). Soon language and reform efforts surrounding victim compensation, victim impact statements and victim allocation in criminal proceedings saturated political agendas (Best, 1997).

The call for equal rights relied heavily on portraying groups as victimized (Best, 1999; Caringella, 2009). Victims of discrimination were portrayed as helpless and deserving of sympathy (Best, 1997; Best, 1999). Attention was focused on the structure

of the social system and helping those too weak to help themselves rather than on the actions of individuals (Best, 1999; Caringella, 2009).

William Ryan, a psychologist and Civil Rights activists published “Blaming the Victim” in 1971. The premise of the book was that the African-American under-class were victims of racial and class oppression. Ryan argued that criticizing them for street crime or dependence on welfare amount to blaming a powerless population for their own victimization. The term “blaming the victim” quickly took on a life of its own as advocates argued individuals carried little to no responsibility for their own victimization (Best, 1997). This movement sought to redirect attention from “blaming the victim” which made the portrayal of social problems as pointless and patternlessness vital (Best, 1999). Socially constructing and defining sexual misconduct without a focus on the perpetrator or why it occurs was reinforced.

Thought processes and rhetoric such as this quickly snowballed (Best 1997). The Victim’s Rights Movement developed with the focus on serving the victim and punishing the accused rather than understanding the origin of the behavior (Caringella, 2009). The Victim’s Right Movement strongly defined what it meant to be a victim resulting in the creation of what has been referred to as the Victim Industry (Best, 1997; Best, 1999; Caringella, 2009). The Victim Industry is a set of social arrangements that make it possible to define and label large numbers of victims thereby providing a foundation for social response (Best 1997; Best 1999).

Joel Best (1997) identified several tenants central to creating and defining groups as victims. The victimization (the potential and process of becoming a victim to the crime) must be widespread and affecting many. It must be consequential and carry with

it long term effects, such as trauma. The relationship between the victim and the victimizer (the one who makes another a victim) is clear. Society must be taught to recognize victims. Individuals must be taught to recognize their own victimization and hope not to be subject to the crime. Claims of victimization must be treated with respect. These elements are all central to creating groups of victims (Best, 1997).

As a result, crimes are socially constructed to fit the victims into this mold because this mold is the most advantageous for gaining support, action, momentum, reform, services, etc. (Best, 1997). Focusing on victims through this lens defines them in a way that they are unable to control what happens to them and so need advocates and social reform to step in (Best, 1997). Social scientists took the task of defending vulnerable victims and exposing powerful and oppressive institutions or social structures (Best, 1997). Advocates seek victim support while ignoring the victimizer or identifying why the victimizing behavior happens (Best, 1997; Caringella 2009).

In the 1970s, victimization started to become fashionable. It began, and continues to be, the focus of talk shows, political speeches, commentaries and documentaries (Best, 1997). New forms of victimization and groups are commonly identified such as victims of abuse, elder abuse, clergy abuse, eating disorder, PTSD, credit card dependency, hate crimes, battering and drunk driving (Best, 1997). The Victim Industry also grew as those who partake in it have vested interests that are generally met (Best, 1997). Enhanced prestige or career opportunities may result from being an advocate. Victims may have opportunities to write books, be treated as experts, appear on talk shows and receive attention and or sympathy.

Since the start of the Victim's Rights Movement, victims' services have expanded greatly (Best, 1997; Caringella, 2009). Both therapeutic specialists and insurance coverage for victim services have expanded (Best, 1997; Caringella, 2009). State and federal legislation have supported the expansion by requiring coverage (Best, 1997). Since 1960 the respective size of the mental health profession has grown more rapidly than that of the general population (Best, 1997). Regarding sexual assault victimization services, rape crisis centers, emergency services, ongoing therapies and hotlines all spread quickly starting in 1972 (Caringella, 2009).

Rape Reform Movement

The Rape Reform Movement pulled heavily from this social climate to define sexual misconduct. It redefined rape as criminal violence, a violation of a civil right and a discrimination crime against a gender (Best, 1999; Caringella, 2009). Rape was explained as being not about sex, but about power and dominance and as a violent crime (Best, 1999).

The movement focused on prosecuting offenders. Large amounts of attention were given to the legal system's treatment of victims (Caringella, 2009). The legal system was criticized for creating a situation in which victims experienced a "second rape" as rights and dignity were stripped of victims as they utilized the criminal justice system (Best, 1999; Caringella, 2009; Orchowski, 2010). The "second rape" or "secondary victimization" became a prominent political, advocate and lawmakers' agenda item. (Caringella, 2009; Sieben, 2011; Walker 2010). Secondary victimization is psychological distress a victim experiences through negative interactions with systems or people as a result of primary victimization (Bennett & Goodman, 2010; Orth, 2002).

Advocates and social scientists argued that criminal justice agencies and court systems were simply not set up in a way to properly attend to psychological needs of victims (Bell, Perez, Goodman & Dutton, 2011; Parsons & Bergin, 2010) and could in fact exacerbate a victim's traumatic symptomology (Caringella, 2009; Parsons & Bergin, 2010). Therapeutic jurisprudence is a criminal justice system structure that focuses on enhancing the positive and therapeutic elements of the system while minimizing the negative (Bennett & Goodman, 2010). Rape statutes were reformed with therapeutic jurisprudence in mind to make prosecution easier for victims with the hope of decreasing secondary victimization (Caringella, 2009).

So, an anti-rape movement that focused on identifying the social issues that brought about instances of rape never took off (Caringella, 2009). Instead the focus was on prosecution of offenders and protecting victims from the "second rape" occurring in the legal system (Caringella, 2009). This premise for rape law reform made its way to college campuses as Title IX came to mirror many of these agendas as well in how to handle issues of sexual misconduct (Sieben, 2011; Walker, 2010).

These movements all converged to not only bring the issues of sexual misconduct and equity to the forefront of societal agendas, but also to help define the problem. More specifically, they helped shape the response to the problem. They shaped the mindsets, priorities and political platforms of activists.

The 1970s: The Creation and Implementation of Title IX

Activists and Key Players

While there were multiple players and factors contributing to the creation of Title IX, Bernice Sandler is given primary credit for leading the way (Blumenthal, 2005;

Salomone, 1986; Suggs, 2005). Sandler was a faculty member at the University of Maryland in 1969. At the time there were seven openings in her department. However, Sandler was not even considered for any. When she asked why, she was told, “You come on too strong for a woman”. While Sandler felt ashamed and embarrassed for her conduct, her husband labeled it as sex discrimination (Sandler, 2000).

In the following two months Sandler received similar employment rejections based on her gender (Sandler, 2000). Frustrated, she continued to contemplate the basis of the rejections and came to the conclusion that it was in fact sex discrimination. Sandler assumed it must be illegal (Sandler, 2000). She began to research, but much to her dismay found while sex discrimination was illegal in the workplace, it was not illegal in education (Sandler, 2000, Suggs, 2005). Sandler started to research the Civil Rights movement to see how they desegregated the school system and addressed employment discrimination. While reading about the U.S. Commission on Civil Rights she saw a Presidential Executive Order that prohibited federal contractors from employment discrimination based on race, color, religion or national origin (Sandler, 2000). There was a footnote though that said the order had been amended by President Johnson in 1968 to include discrimination based on sex (Sandler, 2000). That was exactly what Sandler needed. She realized that since colleges and universities had federal contracts, they too were forbidden from sex discrimination in employment (Sandler, 2000).

Sandler paired with the Women’s Equity Action League (WEAL) and on January 31, 1970 filed a class action complaint with the Department of Labor against all colleges and universities (Sandler, 2000; Suggs, 2005). Sandler asked they conduct an immediate compliance audit of all educational institutions holding federal contracts (Sandler, 2000).

This was the first time the executive order had been used for sex discrimination (Sandler, 2000).

Sandler's actions started a flurry of activity and discussion in Congress, but the press coverage was limited (Sandler, 2000). Frustrated by this and aided by WEAL, other women in the academic community began to contact Sandler asking her to file charges for them too. Within the next two years Sandler and WEAL helped to file charges against approximately 250 other institutions (Sandler, 2000). The campaign had begun to gain tremendous momentum.

Edith Green was a congress woman and chair of a House of Representatives subcommittee that dealt with higher education issues. She was well aware of sex discrimination issues in the field and in a good position to effect change. Sandler paired with Green who agreed to draft legislation and hold a hearing (Sandler, 2000; Suggs, 2005).

The first hearing of the bill that eventually became Title IX was held in June of 1970 (Frost, 2005; Sandler, 2000; Suggs, 2005). The bill proposed change in three different avenues. First was amending Title VII of the Civil Rights Act to also cover employees in educational institutions. Second was to amend Title VI to prohibit sex discrimination in federally assisted programs. The third was to extend the Equal Pay Act to cover executives, administrators and professionals (Sandler, 2000; Suggs, 2005). The bill was met with a response that sex discrimination in higher education did not exist and if it did, it obviously was not a problem (Sandler, 2000).

Sandler and Green responded by making six thousand copies of the hearing records and distributing them to every member of Congress, prominent organizations, the

press and individuals in higher education (Sandler, 2000). They received feedback from African-American women though, asking they not push to amend Title VI of the Civil Rights Act to include sex discrimination because they thought opening Title VI for amendment could weaken it. So a new bill was proposed, Title IX.

Title IX was identical to Title VI, but focused on educational activities and included the amendment to the Equal Pay Act (Sandler, 2000; Suggs, 2005). Title IX focused on sex discrimination in education specifically (Edwards, 2010; Suggs, 2005) and issues such as equal pay, tenure opportunities and sex bias in school texts (Edwards, 2010). It prohibited using federal money to support sexually discriminatory practices in the field of education (Brown, 2009). Actions had been set into motion to make sex discrimination in education a legitimate issue on forefront of women's minds (Sandler, 2000; Suggs, 2005).

The Passing of Title IX

Senator Birch Bayh joined Sandler and Green in managing the new bill, Title IX (Frost, 2005). Bayh was also a member of WEAL's advisory board (Sandler, 2000). Sandler had offered to help lobby for the bill, but Green advised against it. Green was very aware of the potential impact of Title IX and the push back that would likely result. She advised that the less people knew about Title IX, the better. At the time there was relatively little opposition and Green advised they think tactically and take advantage of that (Sandler, 2000; Salomone, 1986). Furthermore, Green was very aware of the potential debates that would result from including athletics in Title IX as she knew the topic would result in massive protest and likely overshadow the intent of the legislation

as a whole (Suggs, 2005). So the original text of the bill made no specific mention of athletics (Edwards, 2010; Frost, 2005; Maschke, 1997; Suggs, 2005).

Title IX was originally introduced in 1971, but defeated by Senator Strom Thurmond who said it was unnecessary and irrelevant (Frost, 2005). Bayh reintroduced it in 1972 and titled it “Title IX – Prohibition of Sex Discrimination (Frost, 2005). Title IX was part of a much larger legislative package that affected Title s IV and VII of the Civil Rights Act as well as the Equal Pay Act. Basically, Title IX slipped in and was relatively un-noticed as it was overshadowed by the larger legislative efforts (Salomone, 1986; Sandler, 2000).

At the time, colleges and universities really had only a minimal understanding of the sex discrimination issues they faced. In fact, they thought they had already addressed the major goals of Title IX through changing admissions practices and football (Sandler, 2000). Higher education did not lobby for or against the bill. Likewise, since the bill was attached to a higher education measure, secondary and elementary schools took no notice (Sandler, 2000). It took colleges and universities a while to realize what Title IX really meant for their institutions and athletic programs (Suggs, 2005).

On June 23, 1972 Title IX passed and was signed into law by President Nixon. It was not a historic moment. In fact hardly anyone noticed what had just transpired (Sandler, 2000; Salomone, 1986).

Implementing Title IX

Congress charged the Department of Health, Education and Welfare (HEW) with administering and enforcing Title IX (Frost, 2005) and at first, very little was done (Simon, 2005). However, after its passing, colleges and universities started to realize just

how deeply it could affect them (Sandler, 2000; Salomone, 2006). They realized that Title IX's coverage of revenue producing sports, specifically football, could have serious implications (Salomone, 1986). After the bill became law, groups such as the American Football Coaches Association and National Collegiate Athletic Association realized they were against it.

Suddenly institutions were flurried with concern and activity about what to do about Title IX, but it was already law. So multiple post-enactment amendments were made to Title IX as it was now receiving the attention it should have before its passing. Title IX application exceptions were made for the Boy Scouts, Girl Scouts, YMCA, YWCA, Camp Fire Girls, social fraternities and sororities, youth service organizations, gender specific conferences, mother-daughter and father-son activities, beauty pageant scholarships, religious educational institutions, military schools, elementary and secondary school admission policies and historically single gender institutions of higher education. There were also efforts to exempt revenue producing sports from Title IX reaches (Salomone, 1986).

The overwhelming response to granting exceptions for Title IX application was viewed by many as a steady movement by Congress to limit and minimize Title IX (Salomone, 1986). Groups in favor of Title IX organized and pressured HEW to strengthen its implementation of Title IX regulations (Salomone, 1986). HEW responded with the Educational Task Force whose job was to create and approve regulations to protect Title IX against further attempts to amend and minimize it (Salomone, 1986). The task force was made up of a coalition of women's groups including the American Council on Education, American Association of University Women, National Student

Lobby, Women's Lobby, Project on Equal Education Rights, Project on the Status and Education of Women, National Student Association and League of Women Voters. (Salomone, 1986).

In June of 1975 HEW submitted the final Title IX regulations created by the Educational Task Force to Congress (Blumenthal, 2005; Salomone, 1986). The proposed regulations interpreted Title IX coverage to include employment, athletics, admissions policies, financial aid awards, testing, recruitment and counseling. They stated there may be separate, but equal services in these areas. Fairness in determining athletic opportunities should include factors such as interest, ability, facilities, scheduling of games and practices, academic tutoring and opportunities for coaching (Salomone, 1986). The regulations passed and it seemed Title IX had been defined and had the structure necessary for implementation.

The 1980s: Defining the Reach of Title IX

It quickly became evident there was still much work to be done in determining the scope and power of Title IX. Leaning on the newly established regulations, Title IX complaints flew in. The HEW quickly became overwhelmed trying to enforce Title IX and could not keep up (Salomone, 1986). It became clear the changes required by Title IX could not be fulfilled and enforced through administrative procedures alone (Salomone, 1986).

One of the first Title IX cases to make it to the Supreme Court was *Grove City College v. Bell* (Salomone, 1986). The court's ruling in this case set a very important precedent for future interpretations of Title IX.

Grove City College is a private liberal arts school. Since its founding Grove City College had denied any state or federal financial assistance. The college prided itself on maintaining full institutional control (Cooley, 2012). When college president Charles MacKenzie was asked to sign the Title IX compliance request, he refused. MacKenzie said Grove City College already did not discriminate against women since was founded as a coeducational institution. Furthermore, the institution intended to stay free of government control or intervention (Cooley, 2012). Therefore, Grove City College had no requirement or intention to make changes in its athletic department or anything else.

However, the college did enroll students who received Basic Educational Opportunity Grants. These grants were issued by the Department of Education. The DOE said that these grants did in fact count as federal assistance, therefore making Grove City College subject to Title IX compliance regulations. The college refused to comply with Title IX so the DOE attempted to withdraw its assistance through Basic Educational Opportunity Grants (Oyez, 2012).

The Supreme Court's ruling here determined that the "program or activity receiving federal assistance" in this case was the financial aid program. They determined it was not the athletics program that fell under Title IX requirements. The Supreme Court stated there was no evidence that Title IX regulations were intended to cover all student activities and in specific settings. Rather, it was meant to cover only those programs directly receiving federal aid. Therefore, institutions could in fact discriminate in their athletic programs and even admissions practices as long as they did not do so when dispensing student financial aid (Salomone, 1986).

This case set a strongly used precedent in handling Title IX violations of the time. Within a year of the *Grove City College v. Bell* ruling the Department of Education had closed, limited or suspended 63 discrimination cases based on the court's finding (Salomone, 1986).

Again, women's groups were outraged at the attempts to weaken Title IX. The need to define "program or activity" and "recipient of funds" was clear (Salomone, 1986). They attempted to address this through the Civil Rights Act of 1984 by changing "program or activity" to read "recipient". The bill passed overwhelmingly in the House (375 to 32), but died in the Senate as they said it demonstrated too much federal power in the education field (Blumenthal, 2005; Salomone, 1986).

It was the Civil Rights Restoration Act of the 1988 that was able to implement the necessary changes and overturn the precedent set by *Grove City v. Bell*. The Civil Rights Restoration Act said that any institution receiving federal funds must comply with civil rights laws in all areas, not just those directly receiving funds. This was accomplished by including a definition of "program or activity" saying that discrimination is prohibited throughout an entire institution/organization if any single part of that entity received federal funds (Blumenthal, 2005; Salomone, 1986). Likewise, it said that specific programs not acting in compliance with Title IX could be cut off from receiving federal funds (Salomone, 1986). This meant that the likelihood of Title IX enforcement was much higher as non-compliance meant terminating federal funds to only specific programs rather than an entire institution. The bill was originally passed by Congress in 1987, but vetoed by President Regan who said it would unjustifiably expand federal

power. In 1988 the veto was over-ridden and the bill became law. (Simon, 2005). This law solidified the power, application and enforceability of Title IX.

Title IX Focal Points and Applications Identified by Societal Interest

With law now in place to address gender discrimination, specific settings for its implementation and avenues for its application could now be identified. Addressing specific forms of gender discrimination could now be done by applying the law specifically using linking and domain expansion. Two prominent examples are athletics in the 1970s and sexual harassment beginning in the 1980s.

The 1970s: Title IX and Emergence of an Athletic Focus

Today, Title IX is most often equated with college sports. However, the original text of the bill had no specific mention of athletics (Edwards, 2010; Frost, 2005; Maschke, 1997; Suggs, 2005). Congress was originally opposed to placing athletics under Title IX (Maschke, 1997, 361) so omitting the word athletics helped it to pass with little attention (Sandler, 2000). At the time there was very little understanding of how Title IX would really impact athletics because society's understanding of women in sports was both vague and changing (Edwards, 2010). Women's participation in athletics was a new issue with a vague definition in the 1970's. Battle lines and political stances had not yet been defined (Edwards, 2010). However, as the issue began to take front stage, it was clear Title IX would play a prominent role.

Societal change. It was the middle of the 20th century when societal views about women's athletic ability began to change (Maschke, 1997). Women physical educators began to voice that women's bodies could in fact safely survive even strenuous physical activity (Maschke, 1997). The Association for Intercollegiate Athletics for Women was

founded and the movement for women's involvement in athletics gained momentum (Maschke, 1997). In the early 1970's female athletes became more visible, both socially and politically (Edwards, 2010). Billie Jean King was the first female athlete to win \$100,000 in a year (Edwards, 2010). In the historic "Battle of the Sexes" tennis match in 1973 she beat her male rival, Bobby Riggs (Blumenthal, 2005; Edwards, 2010). The first women had participated in the Boston Marathon in the late 1960's. Spurred by excitement and successful role modeling, women's participation in women athletics in schools started to increase (Edwards, 2010). Female athletes began to challenge the negative stereotypes associated with women in sports saying participation would not cause infertility, damage ovaries and prevent them from attracting men (Edwards, 2010). Magazines and article began to cover women's athletic abilities and highlight gender inequities (Edwards, 2010). The women's sports movement had begun and Title IX would be crucial in helping it gain ground (Maschke, 1997).

Contention. Interestingly, it was actually groups fighting against Title IX's involvement in athletics that helped it gain ground in reaching its stretch to that arena. It was the passionate contention of Title IX's application to athletics that turned so much attention in that direction (Edwards, 2010). Those opposing it inadvertently brought huge attention to the issue and battle lines were clearly drawn even though at that time fewer than 10% of Title IX regulations directly addressed athletics. (Edwards, 2010). Men worried sports equality would result in the end of intercollegiate sport. Once those in favor of Title IX saw how strenuously others opposed the equality, they realized just how important Title IX could become (Edwards, 2010). Athletics came to the forefront not

due to overwhelming pressure to incorporate it, but because it was clearly a major point of contention.

Legislation. So, it was time again to utilize and change Title IX. There were several important legislative steps and amendments made pertaining to Title IX and athletics specifically. Title IX advocates linked onto existing legislative efforts and movements to bring Title IX clearly into the athletic realm and domain expansion efforts came to mean that gender discrimination could take place in this arena as well.

One of the legislative issues to bring women and athletics into conversation was the Women's Educational Equity Act of 1973. Arlene Horowitz was a clerical worker for the Education and Labor Committee in the House of Representatives. Horowitz felt under-utilized and under-valued in her role as she had education and political experience that should have qualified her to do more than clerical work (Edwards, 2010). Horowitz believed sex-role stereotyping was to blame and wanted to make a change. Horowitz contacted Bernice Sandler and the Women's Equity Action League. Her goal was to create legislation that would address sex-role stereotyping and actually change societal attitudes about women in the workplace (Edwards, 2010). Horowitz paired with Representative Patsy Mink to create the Women's Educational Equity Act. Horowitz chose Mink not because she was a feminist, but because she was in a key area to affect change. Mink was a senior ranking member on the Education Subcommittee in the House of Representatives (Edwards, 2010).

The Women's Educational Equity Act authorized the Secretary of the HEW to issue grants for special educational programs and activities specifically designed to promote educational equity. It spurred conversations about gender equity in athletics.

Billie Jean King spoke on the bill's behalf helping it to gain publicity. Athletics was now seen as a component of an individual's educational experience (Edwards, 2010). The bill was passed into law in 1973 and seen as a logical complement to Title IX.

The 1980s: Title X and the Emergence of a Sexual Harassment Focus

Understanding the history and origin of Title IX dispels the myth that it is based on athletics. The use of linking and domain expansion fueled its amendment to specifically address equity issues in athletics. More recently, Title's IX application to sexual misconduct on college campuses has come to light. Those same tactics of linking and domain expansion used to bring athletics under the Title IX umbrella came into play as Title IX was further amended to address sexual misconduct. A key component to this was redefining sexual misconduct as crimes of discrimination. Events, societal climate and key players converged to institute Title IX enforcement in issues of sexual misconduct much as they had in athletics (Gavora, 2002, 93).

Redefining sexual harassment. The Rape Reform Movement and Violence Against Women Association redefined Sexual Harassment as a violation of Civil Rights and therefore a federal crime (Caringella, 2009). Sexual harassment was no longer seen as a crime against an individual. Instead it was an act of discrimination against an entire group. This change in thought is largely credited to Catherine MacKinnon's 1979 book, *The Sexual Harassment of Working Women* (Gavora, 2002).

The definition of what constitutes sexual misconduct also evolved and widened (Caringella, 2009). Rape was no longer only forced sexual intercourse, but also included behaviors such as coercion, date-rape, pressure, manipulation, etc. More sex acts could

fall into the category of sexual misconduct demonstrating the pervasiveness of the problem.

Furthermore, the Clinton administration saw a surge in feminist advocates and publicized exploits. At the same time colleges and universities were under scrutiny for the high level of sexual misconduct taking place on campuses (McMahon, 2008).

Women's groups came together to say sexual harassment in schools was one of their top agenda items and pointed out Title IX had done little to affect change in that arena (Gavora, 2002). The desire and opportunity for Title IX to expand its coverage was clear.

Court cases that defined Title IX's application to sexual harassment. Mary Daly helped to springboard this extension in Title IX application. Daly was a faculty member at Boston College who taught feminist theory. However she declared her classroom off limits to men saying the only way women could safely learn was without men present. She said the societal pressure for women to be sexy was so overwhelming that the presence of even a single man could prevent them from being able to learn (Gavora, 2002, 93). In 1999, Duane Naquin attempted to enroll in Daly's course, but was denied as he was male. Naquin threatened to sue under Title IX. Daly refused to admit him and was fired from Boston College. She countersued Boston College though for depriving her of her right to teach freely. Daly said she should have been allowed to prevent men from attending her class because it leveled the playing field as women and minorities were consistently oppressed by white male power. Daly contended women needed to be protected from male victimization and that protection was granted by Title IX (Gavora, 2002). Daly's attorney pointed out that in some circumstance the law recognized it was not discriminatory to treat men and women differently if it remedied

past discrimination and created more opportunities for a valid educational goal (Gavora, 2002). The case never made it to court as Daly ended up settling in February of 2001. However, the action set important plays into motion.

The momentum started by Daly's case was further fueled when coupled with the courts findings in *Franklin v. Gwinnett County Public Schools* (1992). Christine Franklin was a high school student who had been continually sexually harassed by a coach. School officials investigated the allegations, but took no further action. Franklin filed suit against the school for monetary damages. Franklin's request was originally denied by the lower courts, but the Supreme Court reversed their decision saying that in fact Title IX did allow for monetary damages to be awarded in such cases (Justia, 2012). This decision made cases such as this lucrative for lawyers as they could claim monetary damages (Gavora, 2002).

Title IX cases grew in popularity as people more clearly understood how it could be applied and that was further fueled by the new potential for financial compensation. Court cases and liability claims snowballed. IHEs experienced increased pressure to protect their communities from all forms of sex discrimination and react appropriately if it did occur. Sex discrimination had been clearly defined as something that could prohibit an individual from benefiting from the protected right to an educational opportunity. The responsibility for ensuring this did not take place was clearly placed on the shoulders of IHEs.

OCR Title IX Policy Guidance

From time to time the Office of Civil Rights has aided educational institutions by issuing guidance documents about how to implement Title IX and stay in compliance. In

the 1990's, students started to rely on and use Title IX more and more in sexual misconduct issues. Pressure to pay close attention to issues of sexual harassment to and utilize Title IX increased. Sexual harassment in education had been brought to the light and was defined as something that could create a hostile environment. Sexual misconduct issues on campus saw huge increases in litigation in the 1990's and at the start of the 21st century (Edwards & Gasser, 2001; Gavora, 2002; Pulley, 2005). IHEs were compelled to show greater attention to addressing sexual misconduct on their campuses (McMahon, 2008). Title IX seemed to be the obvious avenue for addressing the issue of sexual misconduct, but questions around how to interpret and implement it were numerous. Institutions struggled to create sexual misconduct policies that kept them in compliance, correctly interpreted Title IX and accounted for recent court findings. It became apparent guidance was needed. In 1997 and 2001 the OCR issued policy guidance on Title IX compliance titled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties". Additionally, in 2011 the OCR issued a "Dear Colleague" letter to institutions about how to respond to issues of sexual harassment.

These guidance documents are important pieces in demonstrating the evolution of Title IX. The institutional priorities defined in these guidance documents are identified and impacted by things such as social and political movements and well as court cases. Sexual harassment and sexual assault are of course great platforms for political figures. It is hard to argue that taking a stance to end sexual violence is the wrong choice. So using such issues can be a savvy political move that can gain the support of many. This is not to say it is not also something that may be of personal importance to the individual

as well, but Title IX has most definitely seen change as it has been used as a political platform. Correspondingly, these agendas are reflected in the court system. Prominent cases, especially those that make it to the Supreme Court level are a good mirror of societal interests. What follows is a summary of the 1997, 2001 and 2011 guidance documents. Each contains information about social, political and legal issues that predated and impacted the guidance.

1997 OCR Guidance

The first OCR guidance document was issued in 1997 as a response to increasing pressure described above to pay attention to and utilize Title IX. IHEs were compelled to show greater attention to addressing sexual assault on their campuses (McMahon, 2008). Title IX was clearly an important tool in addressing this issue, but questions around how to interpret and implement it were numerous. During this era, the Office for Civil Rights (OCR), actually issued two letters to educational institutions in an effort to help them understand and implement Title IX, specifically how it pertained to issues of sexual harassment and sexual assault. Both documents were titled “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties” with one issued in 1997 and another in 2001. The fact that both of these very impactful guidance letters were issued in such a short time helps demonstrate the political and social interests of the era and just how important issues of sex discrimination on campus had become. The 1997 guidance attempted to address some of the confusion around implementing Title IX and incorporate the criteria set in cases such as the Mary Daly case and *Franklin v. Gwinnett County Public Schools*.

Societal influences. In the late 1990's the awareness and public concern over sexual assault on college campuses amplified. Pressure for IHEs to respond and address the problem increased (McMahon, 2008). At the same time colleges and universities were under scrutiny for the high level of sexual assaults taking place on campuses (McMahon, 2008). Women's groups came together to say sexual harassment in schools was one of their top agenda items and pointed out Title IX had done little to affect change in that arena (Gavora, 2002). Before the 1997 OCR guidance it seems that IHE policies pertaining to sexual assault were minimal including some protective measures such as escort services, security patrols as well as emergency and phone systems and a few reactionary supports such as counseling hotlines (Lewis, Farris and Green, 1997). Few policies, preventive measures or trauma support services were in place.

What the 1997 guidance said. The 1997 guidance said the critical issue in Title IX compliance was where the institution recognized the sexual harassment occurred and followed up with prompt and effective action to end the harassment, prevent its recurrence and remedy its effects. OCR acknowledged that while there may be multiple ways to respond, the important is not to hesitate and act with reasonableness. Doing nothing was always the wrong choice (Office for Civil Rights, 1997).

A focal point of this guidance was establishing a definition for sexual harassment. Sexual harassment was defined in 3 categories; “ 1) quid pro quo harassment, 2) creation of a hostile environment through an employee's apparent authority, or 3) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority” (Office for Civil Rights, 1997). The guidance

explained that if sexual harassment occurred in any of these 3 contexts, the institution had Title IX obligations to take immediate action to remedy the harassment.

In addition, the guidance defined the level of behavior that constituted sexual harassment thereby warranting Title IX obligations. It was determined that for a behavior to be considered sexually harassing it must be sexual in nature and sufficiently severe, pervasive or persistent as to limit or prevent a student from participating in an educational program or activity (Office for Civil Rights, 1997).

Also important in this OCR guidance was an explanation of notice. OCR guidance explained that an institution could be held liable for a Title IX violation if a responsible employee (one with authority or opportunity to address the harassment) was made aware of the harassment or if they should have known based on reasonable care (Office for Civil Rights, 1997). OCR guidance explained that once an institution had notice of the harassment, it was responsible for taking immediate and appropriate action to determine what occurred. Steps must be immediately taken to end the harassment, eliminate hostile environments and prevent the harassment from occurring again. Furthermore, if the institution has knowledge of sexual harassment, it has a responsibility to respond in this way even if the harassed student has not made a formal complaint or asked that action be taken (Office for Civil Rights, 1997).

Also addressed was the issue of confidentiality. OCR acknowledged that in some cases the institutional response may be limited if the harassed student requests confidentiality. However, the OCR guidance explained that this request alone does not free an institution of the requirement to respond. Rather the student requesting confidentiality must be made aware that the request may hinder the institution's ability to

fully respond to the harassment. Furthermore, the institution still has a responsibility to provide a safe environment for all students. Therefore the IHE may still need to take steps to prevent the recurrence of the harassment (Office for Civil Rights, 1997).

Some of the most valuable and tangible guidance given by the OCR was on institutional grievance procedures. This 1997 guidance helped define what constituted prompt and equitable grievance procedures. It emphasized the importance of having procedures in place and disseminating them widely, because without those elements grievance procedures clearly could not meet the requirement of being prompt. Grievance procedures must be made readily available to both students and employees and easy to understand so they can be utilized.

Grievance procedures must offer impartial investigations of complaints, opportunities to present witnesses and/or evidence. Complaints and resolutions must be handled in prompt time frames. Both parties (both the accused and the accuser) must be notified of the outcome as well as assured the IHE will take action to prevent its recurrence and remedy its effects (Office for Civil Rights, 1997).

2001 OCR Guidance

The 1997 OCR guidance gave IHEs some direction with which to formulate sexual misconduct policies. However, the importance and gravity of Title IX was still growing and it was rapidly becoming increasingly important institutions have a solid sexual misconduct policy in place. Since the 1997 guidance, several landmark cases set precedent establishing how an institution could be held liable for a Title IX violation and monetary damages in a private action (Lewis, Schuster and Sokolow, 2010). The outcomes of these cases encouraged OCR to send a strong message to institutions to

reaffirm much of what was said in the 1997 guidance as well as offer some new guidelines (Office for Civil Rights, 2001). As a result, merely four years after the first guidance letter, OCR issued another to help IHEs understand and implement the necessary changes.

Legal influences and landmark cases. The case that really set the ground rules for an institution to be held liable for a Title IX violation and civil damages was in 1998 with *Gebser v. Lago Vista Independent School District* (Lewis, et al., 2010). In this case, high school student Alida Gebser filed suit against the district under Title IX because the school had not distributed grievance procedures for filing sexual harassment complaints or published a formal anti-harassment policy. The case made it to the Supreme Court, which ruled that Lago Vista was not responsible of a Title IX violation because the school did not have actual notice of the violation, therefore was not given the opportunity to remedy the situation. While the court agreed that the harassment was severe, pervasive and persistent enough to interfere with Gebser's educational opportunity, having not been given actual notice, the school district was not in violation. This case set the groundwork necessary for an institution to be held liable for Title XI violations (Lewis et al., 2010). Furthermore, the court announced that in student-to-student sexual harassment an institution could be held liable for monetary damages under private action for Title IX violations if a responsible employee was aware of the violation and acted with deliberate indifference.

The Gebser case established a strong groundwork for institutional liability and Title IX. Three criteria had to be met for an institution to be responsible for monetary damages if an employee sexually harassed a student (Office for Civil Rights, 2001):

1. The institution must be given actual notice and this notice must have been given to an appropriate person, someone with the power and capacity to act to remedy the situation.
2. Once actual notice is given to an appropriate individual, the institution must act with deliberate indifference and that deliberate indifference resulted in discrimination
3. The discrimination must be so severe, pervasive and/or persistent that it denies an individual's access to an educational opportunity.

The strict requirement for an institution to received actual notice of sexual harassment was further strengthened in *Turner v. McQuarter* (1999). Meredith Turner was a student at Chicago State University who brought suit under Title IX saying she was coerced into engaging in a sexual relationship with her basketball coach. Chicago State argued they had received no actual notice. However, Turner contended that officials should have known of the inappropriate relationship since her official college records indicated that her address and the coach's home address were the same. The courts said that the identical addresses did not provide actual notice and Turner's complaint was dismissed.

Warren ex rel. Orlando v. Reading School District (2000) followed and in this instance the Supreme Court found the school district was in violation of Title IX because not only had officials with the power to act been given notice of the harassment, they had acted with deliberate indifference in doing nothing to stop or remedy the harassment.

Shortly after this, in *Davis v. Monroe Country Board of Education* (1999) the Supreme Court announced that an institution could also be liable for monetary damages for student-to-student sexual harassment if the conditions of *Gebser* were met. This

decision as well as *Franklin v. Gwinnett County Public Schools* made Title IX cases lucrative for lawyers as they could claim monetary damages (Gevora, 2002). Title IX sexual harassment cases exploded in the 1990's. Sexual harassment in education had been brought to the light and was defined as something that could create a hostile environment. Cases such as these set a strong framework for holding institutions accountable for Title IX violations.

What the 2001 guidance said. With such clear criteria being set for Title IX violations in respect to private action and monetary damages, the OCR felt the need to remind institutions that these criteria did not define an institution's obligations to act in enforcing Title IX (Office for Civil Rights, 2001). While in the Gebser and Davis cases actual notice had to be given to a responsible employee who then acted with deliberate indifference for a violation to occur, this was not the sole criterion used for defining if an institution was in violation of Title IX. IHEs still had a responsibility to recognize situations where sexual harassment was likely occurring, even without receiving actual notice (AAUW, 2009). The 2001 Revised Sexual Harassment Guidance reaffirmed many of the compliance standards set forth in the 1997 guidance pertaining to investigations and administrative enforcement of Title IX. It also explained the distinction between an institution's Title IX responsibilities and the criteria set forth by Gebser and Davis for private action suits. In addition it made some further changes in defining the arena for sexual harassment as well as offered expanded clarification on several other areas.

The 2001 OCR guidance moved away from the 3 categories of harassment laid out in the 1997 guidance. Now, the conditions for a situation to be sexually harassing were not quite as specific or limited. Rather than have to create a hostile environment or

fit the category of *quid pro quo*, a situation could be defined as sexually harassing as long as it limited or denied a student's opportunity to benefit from an educational program or activity on the basis of sex (Office for Civil Rights, 2001). The standard of severe, pervasive or persistent in determining the level of harassment still stood; however the context in which it could take place was much broader.

The 2001 guidance also reiterated and expanded on what constituted notice. It remained true that if an employee was given actual notice or should have reasonably known about the harassment, the institution was responsible for taking action to end the harassment and remedy its effects. However, this guidance further defined a responsible employee. Now, a responsible employee was not just someone with a duty to report and/or the authority and power to act, it was also any individual a student could reasonably believe had such authority or responsibility (such as a professor, bus driver or Student Affairs staff). The guidance also emphasized the importance of training employees on how to respond to issues of sexual harassment (Office for Civil Rights, 2001).

The 2001 guidance also let institutions know what criteria they would use to determine if an institution was in violation of Title IX. There were 3 criteria that would be evaluated

1. the school has a disseminated policy prohibiting sex discrimination and effective grievance procedures
2. the school appropriately investigated or otherwise responded to allegations of sexual harassment

3. the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects

OCR affirmed that if an institution had taken each of those steps it would not risk losing federal funding just because sex discrimination had occurred (Office for Civil Rights, 2001).

2011 OCR Guidance: The Dear Colleague Letter

The 2011 Dear Colleague Letter was aimed at encouraging educational institutions to take a more aggressive stance in addressing sexual harassment issues while enhancing equity and preventing re-victimization (Seiben, 2011; Smith 2011). It was the topic of much controversy and left IHEs struggling to revamp their sexual harassment policies as it defined several major changes in how an IHE must respond to sexual harassment issues. There were substantial political influences and court decisions that set the stage for this most recent guidance.

Societal influences. In 1999 the public voiced concern over the incidence of sexual assault on IHE campuses. Congress responded by instructing the National Institute of Justice (NIJ) to assess IHEs compliance with the Clery Act. The NIJ was instructed to investigate compliance with the requirements to “make public their on-campus crime statistics, publicize prevention and actions designed to respond to crime, institute crime logs, and demonstrate the rights of victims of sexual assault are preserved” (McMahon 2008). Following that, several other studies began to investigate IHE compliance with federal law as it pertains to sexual assault. The results showed similar inconsistencies in the way IHEs were complying with federal regulations surrounding

sexual harassment (Karjane et al., 2005). Furthermore, first responder and administrator handlings of sexual assaults indicated they were unaware of how to properly support victims. (Karjane et al., 2005; McMahon 2008; Orchowski 2010; Sable, Danis, et al. 2006).

The NIJ responded recommending that IHE policies and actions surrounding sexual assault show a commitment to encourage a victim to come forward and to support that victim (McMahon 2008). The NIJ recommended a IHE campus sexual assault policy “(1) affirm the emotional trauma a victim experiences with services available to aid the victim with their trauma, (2) provide for the safety needs of the victim by coordinating with on and off campus services, (3) demonstrate a legal system that is sympathetic to the victim’s needs through written law enforcement protocols, (4) offer essential medical services (5) educate the campus on the needs of a victim of sexual assault in new student orientation programs and prevention program directed at Greek organizations and athletics, and (6) assure confidentiality for the victim” (McMahon 2008).

Political influences. In 2011, Vice President Joe Biden demonstrated an interest in Title IX issues. Biden’s campaign claimed to combat an educational and workplace culture that is permissive of sexual harassment (Rhodes Project, 2011). When sixteen Yale students filed a Title IX suit against the institution for failing to adequately address multiple issues of sexual harassment, Biden said that while he was not a cosigner, he strongly supported them (Rhodes Project, 2011). Biden stated “Rape is rape and the sooner universities make that clear, the sooner we will begin to make progress on campuses” (Rhodes Project, 2011). In a news release Biden said, “Students across the country deserve the safest possible environment in which to learn. That’s why we’re

taking new steps to help our nation's schools, universities and colleges end the cycle of sexual violence on campus" (Sieben, 2011).

Biden worked with Education Secretary Arne Duncan and Assistant Secretary for Civil Rights, Russlynn Ali to, issue the April 2011 Dear Colleague letter (Sieben, 2011). The intent was to again reiterate its importance as well as provide clarification on the law. Much of the interpretation and clarifications in the Dear Colleague Letter were aimed at strengthening its implementation and pushing IHEs to be more aggressive in addressing issues of sexual harassment and assault while protecting victims from being further victimized in the process. A more in depth analysis of the Dear Colleague Letter will follow, but Title IX was again currently a hot topic on political agendas.

Landmark cases. Sexual assault and sexual harassment issues on campus saw huge increases in litigation in the 1990's and at the start of the 21st century (Edwards & Gasser, 2001; Gavora, 2002; Pulley, 2005). United Educators (an insurer of hundreds of IHEs) analyzed liability claims brought against IHEs they insured from the years 2004-2008. Of all claims in the category of bodily injury and wrongful acts, assault was the 2nd most commonly filed claim and 66% of those assaults were sexual in nature (United Educators, 2009). Other evidence suggests that issues surrounding sexual assault and harassment may be the number one source of liability claims against IHEs (Pulley, 2005).

In the mid 2000's, court rulings started to alter the rules established by *Gebser*. Seemingly frustrated by the often slow responses and lack of initiative of educational institutions in taking action, the courts sent a strong message to institutions about Title IX compliance and responsibility, as demonstrated in the cases below. The court rulings introduced the idea that the old definition of actual notice was not necessary. Rather, it

was possible that an institution could be liable for a Title IX violation if it knew or should have known of sexually harassing behaviors (Walker, 2010). Court rulings demonstrated that an institutional policy could demonstrate deliberate indifference if that policy or practice resulted in situations that were likely to result in sex based discrimination and/or leave individuals in situations without proper training, guidance or supervision.

Simpson v. University of Colorado (2006) marked a change in the courts' ruling of the necessity for actual notice to hold an institution liable under Title IX. A regular part of being recruited for the University of Colorado was to be brought to campus and assigned an "ambassador". It was the job of the ambassador to know how to entertain and show the recruits a "good time" during their campus visit. Anne Gilmore and Lisa Simpson were two such ambassadors who were sexually assaulted while hosting one of these events. Simpson and Gilmore filed a Title IX lawsuit. The Court found in their favor, determining that CU had an official policy of showing these recruits a "good time" and hosts were not provided proper guidance and did not have adequate supervision. Likewise, and maybe most importantly, the court said the chances of such inappropriate behaviors occurring was so high and therefore so obvious that by allowing it to go on CU showed deliberate indifference. Furthermore, even though these assaults happened off campus, the institution was liable. This case set a new standard of institutional Title IX liability as institutions no longer needed actual notice to be held liable; instead, they could be held liable if they "should have known" incidents of sexual harassment could have or did occur.

Extending the "should have known" standard was *Williams v. Board of Regents of the University System of Georgia* (2007). Tiffany Williams, a University of Georgia

student was sexually assaulted by basketball player Tony Cole. Prior to being admitted to the University of Georgia, Cole had prior disciplinary and criminal problems involving harassment of women at other colleges. Williams brought forth a Title IX claim saying the head basketball coach, the Athletic Director, and the President were all involved in recruiting and admitting Cole even though they were aware of his criminal history. Despite prior knowledge of Cole's behaviors and the threat he posed, they took steps to allow him "special admission" to UGA even though he was not academically eligible to attend. The circuit court found in William's favor saying UGA was liable.

From this point on, numerous other cases found institutions in violation of Title IX if their prior knowledge of student or employee behavior should have led them to realize the individual posed a threat to the community (e.g. *J.K. v. Ariz. Bd. of Regents, 2008*; *McGrath v. Dominican College of Blauvelt, 2009*). In fact, some argue that *J.K. v. Ariz. Bd. of Regents* (2008) was a dramatic turning point in Title IX as the "should have known" standard of deliberate indifference in this case marked the end of male athletic privilege in regards to sexual violence (Walker, 2010).

As a result of these rulings, institutions now carry a much larger responsibility to be aware of campus climate and culture. Furthermore courts are seemingly holding institutions responsible for playing a role in protecting their culture from individuals who could do harm. The courts sent the message that IHEs could no longer be rape tolerant campuses, but instead must strive to be safe educational communities working towards a culture of sexual respect (Walker, 2010).

What the 2011 Dear Colleague Letter says. In April of 2011 the OCR issued new guidance to institutions about Title IX compliance in the form of a Dear Colleague

letter. Again, the guidance reaffirmed an institution's responsibility to respond to sexual harassment issues about which it was formally informed or should have known, take steps to end and remedy the effects of the harassment and have grievance procedures in place (Office for Civil Rights, 2011). However, there were also some substantial changes made to how an IHE must handle sexual harassment cases.

One objective was to make efforts to help protect the victim from being re-victimized in campus response policies and adjudications of sexual misconduct (Sieben, 2011; Walker, 2010). It was argued that some Title IX case law demonstrated instances in which victims experienced academic, mental or emotional stress while school administrators were unresponsive to their complaints of sexual harassment (Walker, 2010). Assistant Secretary for Civil Rights, Russlynn Ali, reported many victims feel further victimized by the campus response process itself. It was hoped that these new guidelines would help to change that (Sieben, 2011). Furthermore, said she hoped addressing these issues with the new guidelines would encourage more students to report instances of sexual harassment (Sieben, 2011).

Likewise, the Dear Colleague Letter came with a hope of decreasing the long standing prevalence of sexual violence on IHE campuses (Smith, 2011; Walker, 2010). The Dear Colleague Letter ordered institutions to get more aggressive in investigating and adjudicating allegations of sexual assault and harassment (Smith, 2011). Campus judicial hearings could be used as an important avenue for removing sexual violence threats to campus as they provide survivors with access to justice systems utilizing a lower burden of proof and non-criminal sanctions (Walker, 2010).

The Dear Colleague Letter also clarified that an institution had a responsibility to respond to issues of sexual harassment quickly and should strive to seek resolution in a sixty day time period. This would prevent institutions from running down the clock to avoid having to handle, address and remedy issues of sexual harassment (Smith, 2011). It set new standards for resolution of sexual assault claims (Smith, 2011).

The 2011 guidance gave further specifics about how the grievance procedures should be structured. Heavy emphasis was placed on prompt and equitable procedures that allow both the accused and accuser equal opportunities in proceedings including witnesses and appeal rights (Office for Civil Rights, 2011). It was noted again that both parties should be notified of the outcome and it must be in writing. Institutions were also reminded that mediation could not be used to resolve issues of sexual harassment.

Also addressed were issues around an institution's responsibility to investigate and provide confidentiality. The 2011 guidance explained explicitly that complete confidentiality could not be offered in sexual harassment issues because if the situation could potentially threaten other students, the institution had an obligation to respond and investigate, even if the student did not want to file a formal complaint (Office for Civil Rights, 2011).

Perhaps the most potent part of the 2011 Dear Colleague Letter was its instruction that the only standard of proof appropriate to be used in cases of sexual harassment was preponderance of the evidence. Grievance procedures using another standard, such as clear and convincing evidence, were said to not be equitable under Title IX (Office for Civil Rights, 2011; Sieben, 2011).

IHEs have responded with various levels of changes in efforts to stay out of Title IX litigation. Campuses have changed their judicial proceedings when it comes to issues of sexual harassment as a result of an April 2011 “Dear Colleague” letter and prominent court cases. Some institutions have even taken sexual misconduct cases out of the hands of student judicial boards entirely as they strive to maintain Title IX compliance. Cases that carry as much gravity as sexual assault and deprivation of a federally conferred right leave little room for error. Some believe that is far too much to leave in the hands of minimally trained students. Undoubtedly, IHEs are seeing rapid changes in the interpretation and application of Title IX and institutional behavior.

Conclusion

Title IX is now an incredibly impactful, far-reaching and powerful law. At the time of its creation and initial implementation, few realized the gravity it carried. Social pressures, advocacy movements, legislative efforts and court cases all intertwined to create the social construction of gender discrimination, sexual assault and Title IX. The law’s implementation and the behaviors to which it applies are heavily influenced by social pressures of the time. What results is a law that is a nebulous and moving target. It has undergone many evolutionary changes and will likely continue to do so.

Chapter 3: Methodology

Introduction

Gender discrimination is socially constructed and there are many elements that come into play in creating how it is socially defined. Furthermore, the way that definition is applied varies as it interacts with unique environments. This study looks specifically at the socially constructed definition of gender discrimination on campuses of higher education and how that definition is exhibited through Title IX policy enactment and enforcement. This definition can be studied by examining OCR resolution letters sent to IHEs that are filed anytime a complaint is lodged or a compliance review is conducted. These resolution letters are used as a qualitative data set to better understand the socially constructed definition of gender discrimination in the context of higher education campuses. This chapter will provide an overview of the problem as well as the method used in an approach to answer the questions pertaining to OCR's evolving definition of gender discrimination and how that definition is expressed through practice.

Problem and Purposes Overview

As explained in the Chapter Two, gender discrimination is a prominent issue on IHE campuses. Legislative attempts to address the issue focus heavily on reactive procedures IHEs must follow. Title IX focuses on these issues in regards to policies an IHE must have in place, how the IHE must react upon knowledge of potential gender discrimination and procedures that must be followed in addressing the alleged misconduct. Gender discrimination represents a socially constructed concept that has changed over time; however, that evolving definition is intertwined with the ever-changing application of Title IX. Correspondingly, DoE guidance on Title IX

implementation is also responsive to societal definitions of the problem. The purpose of this study is to gain insight and understanding about OCR's definition of gender discrimination and how that is expressed through practice in Title IX implementation with focus on how it has changed over time. The end result demonstrates not only how Title IX has evolved over the past 15 years, but provides insight into what has driven those changes. The research aims to answer the following questions.

1. How have the types of conduct determined to be gender discrimination changed over time?
2. How have expectations of IHE responsibilities for gender discrimination issues changed over time?
3. What gender discrimination issues have surfaced as priorities in the implementation of Title IX, as reflected in OCR resolution letters?

The conceptual framework used to answer these questions is social constructionism. Specifically, the content of the OCR resolution letters from 1997 to 2011 is thematically analyzed within the context of significant legal, political and social actions that pertain to Title IX such as elections of presidents, alterations in legislation, social movements, prominent court cases interpreting Title IX and DoE guidance letters on implementing Title IX.

Methodology

Qualitative data analysis approaches vary widely. In qualitative data analysis it is important to specifically define how the researcher analyzed data and what assumptions drove the analysis (Burn & Clarke, 2006). While an overall research question should guide the project (Braun & Clarke, 2006), theory and definitions are generated from the data set

rather than fitting that data into a preexisting theory or definition (Braun & Clarke, 2006). The OCR resolution letters are organized chronologically and then thematically analyzed in their social-cultural context to gain insight on the socially constructed definition of gender discrimination and how that definition has been implemented in IHE practice. Braun and Clarke (2006) offer a step-by-step guide to thematic analysis as well as a check-list for good thematic analysis. This structure guided this study.

Braun and Clarke's Phases of Thematic Analysis

| Phase | Phase Description of the process |
|---|--|
| 1. Familiarizing yourself with your data: | Transcribing data (if necessary), reading and rereading the data, noting down initial ideas. |
| 2. Generating initial codes: | Coding interesting features of the data in a systematic fashion across the entire data set, collating data relevant to each code. |
| 3. Searching for themes: | Collating codes into potential themes, gathering all data relevant to each potential theme. |
| 4. Reviewing themes: | Checking in the themes work in relation to the coded extracts (Level 1) and the entire data set (Level 2), generating a thematic map of the analysis. |
| 5. Defining and naming themes: | Ongoing analysis to refine the specifics of each theme, and the overall story the analysis tells; generating clear definitions and names for each theme. |
| 6. Producing the report: | The final opportunity for analysis. Selection of vivid, compelling extract examples, final analysis of selected extracts, relating back of the analysis to the research question and literature, producing a scholarly report of the analysis. |

There were five distinct steps involved in moving through the process described above: (1) understanding the data; (2) uploading the data to NVIVO; (3) coding; (4)

content analysis; and (5) identifying themes. An in depth description of each of these steps follows.

Step 1: Understanding the Data

Data Set Characteristics

The first step to analyzing the information in the letters involves understanding the characteristics of the data set. Before any coding or analysis could begin, substantial time must be spent reading the letters in order to become familiar with the structure, format and content. At the time of this study there were 174 Title IX OCR resolution letters, the first occurring in 1997 and the last in 2011. These letters serve as the sample. An OCR resolution letter is generated anytime the OCR is responding to a complaint, conducting a review or responding to an IHE's request for assistance. The resolution letters give OCR's finding in determining if an IHE's practices have resulted in gender discrimination or lack of compliance with federal law. The resolution letters also provide the IHE with directives for compliance if necessary. These Title IX OCR resolution letters can be obtained through a Freedom of Information Act (FOIA) request. The National Council for Higher Education Risk Management (NCHERM) submitted a FOIA request for these letters to provide IHEs with resources for understanding Title IX implementation and history by posting them on their website (www.ncher.org).

The 174 OCR resolution letters analyzed for the study contain elements that create both limitations and advantages. One notable aspect is variation in the level of detail provided in particular letters. Several of the letters offer no information on the type of complaint made or the OCR's finding. Instead the letters merely state that any Title IX issues had been resolved and closed. In addition several letters do not pertain to Title

IX. These letters were eliminated from the analysis resulting in a total of 141 letters that are fully coded and analyzed.

Several challenges exist in analyzing the letters. For example, the letters do not adhere to a standardized format, resulting in a range of responses and structures. In addition, in the letters, OCR typically provides little to no indication as to whether it believes that the behaviors and actions underlying the issuance of the letter constitute gender discrimination. Instead, OCR focuses on the process, policies and determination involved in whether there is sufficient evidence to show that a specific Title IX violation occurred.

Demographic data is rarely presented. It is often unclear if the complainant is a graduate or undergraduate, a traditional student, an athlete and the complainant's race and gender (although there are generally pronouns to indicate gender) are not consistently identified. The nature of the complaint, the details of the incident, the format of the investigation and the findings of fact are not necessarily defined in each letter. Most letters provide an overview of those topics, but the depth and detail given varies widely. Some letters do not even explain the nature of the complaint, but merely state that a complaint was submitted and that the IHE has agreed to resolve it by taking certain steps. In these cases the issue that spurred the complaint is very superficially discussed, if at all. The resolution letters are authored by different investigators and while many have a similar format, there is little consistency in the information gathered or how it is presented.

Likewise, letters may relate the details of the case, but almost never indicate if OCR agrees with the IHE's findings or not. In fact, there are only several letters where

OCR indicates agreement or disagreement with the finding made by the IHE. Instead, OCR comments specifically on whether OCR concluded the IHE was in violation of the specific complaint made (retaliation, failure to respond, etc.). To further complicate analysis, OCR investigations rely heavily on witness interviews, many of which are contradictory. There are many situations where witnesses cannot be obtained or contacted as well. So, often OCR finds there was insufficient evidence to determine if a violation did or did not occur. OCR's stance on the situation and whether it rose to the level of gender discrimination is unclear. OCR does not make a determination if gender discrimination occurred; rather they make a determination if the IHE violated Title IX by failing to follow policy, lacking policy, demonstrated retaliation, etc. The lack of standard format, incomplete information, reliance on witnesses, focus on policy only and lack of information on OCR's assessment of the behavior result in bits of data that need to be pieced together and analyzed in context.

Despite limitations with some letters, there are also ones very rich in data. While most of OCR's stance on Title IX and gender discrimination is gained through 1997 and 2001 guidance documents and the 2011 Dear Colleague Letter, there are instances in the resolution letters where OCR clearly defines its process for evaluating an issue of gender discrimination and Title IX violation. Several letters contain large amounts of descriptive information about not only the incident, but OCR conclusions, their thought processes behind their conclusion and their opinions on IHE actions. This clear methodology for analysis helps to define OCR's stance and priorities as enacted in addressing gender discrimination.

The letters demonstrate the frequency with which an issue is cited, changes in that frequency, their priorities and how society does or does not respond to recent court cases, civil actions and political movements. This is valuable data in understanding how social and political agendas impact societal actions, how those agendas may be interpreted and enacted by society resulting in intended or unintended consequences and what issues society truly sees as priorities. This interplay drives policy creation and IHE response to gender discrimination. These elements interplay with many others to create the evolving definition of gender discrimination, specifically for IHEs and what responsibilities they hold.

Step 2: Uploading the Data to NVIVO

Several software packages have been created to assist with the analysis of qualitative data. The software used in this study is NVivo. NVivo is a qualitative research software designed to help organize and analyze unstructured data. The software is a tool to search, sort, code, and classify data to examine relationships and themes. NVIVO allows the researcher to organize qualitative data and create corresponding notes so the researcher may look for patterns and make meaning of the data. The 141 OCR Title IX resolution letters were all in PDF format originally. They were first reformatted for optical text recognition making them searchable documents. They were then uploaded into NVivo. To effectively use NVivo the researcher must identify some sort of systematic process for analyzing and coding the qualitative data. That process follows.

Step 3: Coding

Coding is the process of attaching labels and meaning to parts of the data (Hutchison et al, 2010). In NVivo this is done through the creation of nodes. A node is a

storage area that stores a concept and is then linked to coded text. So each time a concept is identified a node is created for it. The first step in thematic analysis is open coding. In this process all concepts in the data are identified (Hutchison, et al, 2010). This preliminary analysis sets the stage for deeper exploration of ideas and identification of emergent themes. Memos are attached to nodes and provide spaces where the researcher can expand on the information and make sense of it.

In this process, each letter was read and as an issue or finding was cited a node was created. Nodes were created for identifiable and seemingly significant points of each letter. There were initially 238 nodes identifying letter content such as specific complaints, gender of the complainant, OCR findings and definitions, location of the incident and many other elements. After all letters were read and nodes assigned, the nodes were condensed or expanded into codes. The coding organized the data to allow for exploration of meaning. For example, during the initial stage when nodes were created, there were several instances related to harassment identified. The nodes labeled included terms such as “harassment”, “harassing behavior” and other synonyms. All these nodes were then coded as “harassment”. However, further analysis revealed a need to expand the code of “harassment” as there were several different types of harassment labeled. The code “harassment” expanded to “harassment by faculty”, “harassment by student”, “harassment by 3rd party”, “harassment by employee” and “harassment by campus newspaper”. This process of organizing the nodes into codes resulted in forty-two codes.

Step 4: Establishing a Code Analysis Structure

Once the codes were completed it was necessary to organize the data in a way that made looking for patterns and significance possible. In order to look for patterns and extrapolate meaning, codes were grouped categorically. This set the stage for further data analysis.

Categorical Grouping of Codes

The data corresponding to each content code varied widely in terms of meaning and application. For example, the code of “harassment” was identified in several settings including when OCR stated a clear definition for the term, when a compliance review was conducted, when it was the issue that compelled the complainant to contact OCR and when it was a peripheral issue to another issue that had initially compelled the complaint. The codes were organized into categories to aid in analysis, thereby preparing for interpretation. This level of categorization is similar to the kind of semantic theme identification discussed by Burr and Clarke (2006). Arranging the codes in these categories served as an intermediary step in engaging in latent thematic analysis with OCR letters. The codes were organized into four organizing categories, which emerged from the content of the letters: (1) OCR Standards, (2) compliance reviews, (3) nature of the incident and (4) other issues cited. Explanations of categories and corresponding codes follow.

OCR Standards. Many would argue that a clear and concise directive of how to implement Title IX does not exist. There are elements seemingly open to interpretation and spaces where discretion is left up to the IHE. Deciphering expectations for enactment of the law is a process that draws from many criteria such as the law itself, guidance

documents and Dear Colleague letters. Likewise, there are many instances in the resolution letters where OCR provides very specific definitions of behaviors, expectations or practices. These provide valuable insight into OCR expectations of Title IX enactment, practices and definitions for gender discrimination. In these letters, after OCR states the facts of the complaint, specific definitions (of a behavior, practice or standard) are stated prior to OCR's discussion of findings. Instances where OCR provided concise or clear definitions and directives on Title IX implementation were coded and categorized together. This category does not reflect findings or opinions, but rather succinct information on OCR standards for law enactment.

There are seven topics on which OCR elaborates that pertain to the standards or practices in enacting Title IX. The topics relate to (1) imposing sanctions, (2) investigating complaints, (3) sexual harassment, (4) sexually hostile environments, (5) equitable treatment, (6) IHE reasonable responses and (7) policies and procedures. The information on these topics is spread throughout the entire time span of the letters of resolution and not concentrated in any one era. The definitions are given in various contexts either in support of a complainant or an IHE, in a compliance review or as clarification. The definitions on their own do not necessarily find in favor of or against either side, but being so explicitly stated provide valuable data. These definitions serve as the standard for finding an IHE responsible for a violation or in non-compliance and so are imperative as guidance for IHEs. Likewise, looking for alterations in definitions over time provides an opportunity to analyze changes in expectations or practices. To fully understand OCR expectations and changes in standards these codes were all categorized into the group of OCR Standards.

Compliance Reviews. On occasion, the OCR will conduct a compliance review of an IHE. This may be done because the IHE practices have been called into question, the IHE was randomly selected for review or the IHE requested the OCR conduct a review. The review does not include the IHE policies or practices, but does cite them where necessary. Typically the compliance review states what issues specifically they will be assessing when evaluating the IHE's compliance with Title IX. The compliance reviews are a bit different than the other letters of resolution as they do not cite specific instances of alleged non-compliance. Instead, they are an overview of those specific elements of Title IX enactment that OCR chose to review.

This information provides valuable insight into a couple of areas. First of all, those issues which OCR chooses to review may be reflective of OCR priorities, societal priorities or both. Likewise, the growth or decline in review of a certain issue provides information about its importance at that point in history. Finally, grouping them as a whole allows for analysis of changes in standards for compliance or non-compliance. Each letter was coded for the elements the compliance review indicated would be assessed. Those codes are defined below.

- **Assessment:** Does the IHE engage in practices to assess the incidence of gender discrimination occurring on their campus?
- **Confidentiality:** Does the IHE have procedures in place to protect the confidentiality to individuals who report? Are records kept in secure locations to further protect confidentiality?
- **Designated Coordinator:** Is there a designated Title IX Coordinator in place and is that individual's contact information easily accessible?
- **Hostile Environment:** Are there situations in which a hostile environment exists?

- Equitable Treatment: Do policies and practices treat both genders equally? Do the complainant and accused have equal rights in the grievance processes?
- Investigations: Are investigations thorough and conducted by individuals trained in issues of gender discrimination?
- Policies: Are policies thorough, adequate, easily accessible and disseminated across campus?
- Response Practices: Does the IHE take proper steps to offer complainants support services, remedy the harassment and prevent its recurrence?
- Support Services: Are support systems such as mental, physical and legal assistance available on campus? In situations where they are not, does the IHE take steps to connect individuals to these services?
- Timeliness: Does the IHE respond to both formal and informal complaints in a timely manner? Does the grievance procedure take place in a timely manner?
- Training: Is training given to the Title IX Coordinator, individuals involved in first response, investigators, judicial boards and the campus community on issues of gender discrimination?
- No Information Given: Several compliance reviews share no information about what was assessed and simply state the IHE was in compliance or is taking steps to be in compliance.

All elements evaluated in a compliance review were coded and organized into a category together.

Nature of the Incident. Each letter was coded for the nature of the incident that set the context in which the filed complaints occurred. The nature of the incident could be things such as sexual harassment, academic fairness or sexual assault. Most letters cite multiple alleged Title IX violations and instances where the complainant feels the IHE is responsible for a violation. The specific incident that spurred the subsequent complaint is not always the complaint that was filed though. The complaints filed may be related to

how the IHE handled the incident. The nature of the incident is valuable information, regardless of whether or not the complainant felt it was a place where the IHE failed to adhere to the law. For example, the nature of the incident may be that a faculty member sexually harassed a student, but the complaint filed with OCR may not be that the sexual harassment occurred, but that the IHE acted in retaliation against the complainant for making the report. Focusing only on the specific complaints made, or issues cited, would completely dismiss the context in which the complaint occurred. The nature of the incident provides data illustrating society's understanding of Title IX, its' familiarity with Title IX's reach and when/how it should be applied. It provides insight into situations in which society knows to look for Title IX issues and where society expects Title IX to provide protections. It also provides guidance to IHEs in terms of situations that should be kept on the radar and that the IHE should be proactive in attempts to prevent its' occurrence.

Each letter received one code for nature of the incident and another code if the complainant was male. This category allowed for grouping of the letters organized by the type of incident that occurred rather than the allegations of non-compliance. The grouping helped to expand the information in the letters to issues beyond complaints, thereby providing deeper insight into society's ability and knowledge of instances to apply the law. Coding identified seven types of situations (some with sub-categories for clarity and differentiation) where complainants claimed IHEs had responsibility and eventually led to the filing of a complaint with OCR. They are as follows:

1. Academic Fairness: These are situations in which complainant felt the material, testing or class was biased against his/her sex
2. Compliance Review: OCR conducted a compliance review of the IHE

3. Harassment: These situations involved sexual harassment, but not assault. Issues such as gender-based jokes, inequitable treatment and improper touching were cited. The alleged harassers in this category varied widely so it was divided into sub-categories.
 - a. Harassment by Faculty
 - b. Harassment by Student
 - c. Harassment by 3rd Party
 - d. Harassment by Campus Employee
 - e. Harassment by Campus Newspaper
4. Hostile Environment: These situations involved instances where the environment itself was alleged to be discriminatory against a gender and thereby caused or contributed to gender-based discrimination. There were three distinct types of hostile environments described.
 - a. Hostile Environment Existed: These letters referenced situations where the environment was hostile due to its history or configuration. For example, a class of mostly men took place in a room with gender discriminatory posters hanging on the wall.
 - b. Hostile Environment Due to IHE Failure to Respond: These letters referenced situations in which the hostile environment was created or persisted because when the complainant notified the IHE about the problem, the IHE did not take action or did not take appropriate action.
 - c. Hostile Environment Due to Bullying and Teasing: These letters referenced situations in which a hostile environment was created specifically because of bullying or teasing.
5. Retaliation: In these situations the complainant said he/she was retaliated against due to his/her gender because that he/she was treated differently than those of the opposite gender.
6. Sexual Assault: These situations are those in which sexual assault (rape or attempted rape) occurred. The role of the alleged assailant, faculty or student, was identified and the letter sub-coded accordingly.
 - a. Sexual Assault by Faculty

b. Sexual Assault by Student

7. Single Parent: These situations are those where the complainant said the issues arose due to his/her single parenthood and that was the cause of the subsequent gender discrimination.

Other Issues Cited. As discussed in the Nature of the Incident section above, typically the complainant cited several instances in which the complainant alleged the IHE failed to abide by Title IX. The problems cited go far beyond the mere nature of the incident that initially spurred the complaint. It is worth repeating that just because these issues were cited, that does not mean the IHE was found in violation. This is just the allegation. The Other Issues Cited codes expand each resolution letter by identifying all the elements the complainant felt the IHE was responsible for a Title IX violation. The meaning is drawn as insights and understanding around the socially constructed definition of Title IX and its implementation are made clear. The issues cited demonstrate those societal priorities and expected protections from Title IX. Likewise they may demonstrate the socially constructed definition of gender discrimination. They also demonstrate societal understanding of Title IX and when/how society expects it to come into play. Correspondingly, it demonstrates to IHEs those things that are most important to society providing valuable guidance in creating environments, taking preventive measures, policy creation and responding to complaints.

This information was also coded and organized into its own category. Fifteen codes emerged and are as follows.

1. Academic Issues: These are situations in which the complainant felt the material, testing or class was biased against his/her sex.

2. Alcohol Sanction Imposed: These are situations in which the complainant felt an alcohol sanction was inappropriately imposed when she reported an issue where gender-discrimination occurred.
3. Athlete: These are situations in which demographic data indicated a student athlete was involved. It should be noted that demographic data was not always presented in the letters though so there could be situations where a student athlete was involved, but not identified as such.
4. Complainant Told to Face Accused: These are situations in which the complaint was instructed at some point to face the accused, which is in violation of Title IX.
5. Denied Opportunity to File Grievance: These are situations in which a complainant made the IHE aware of an issue of gender-discrimination, but was denied the opportunity to file a grievance.
6. Denied Opportunity to Participate in Activity: These are situations in which the gender-discrimination was allegedly severe enough to deny the complainant the opportunity to participate in an educational program or activity.
7. IHE Response Inadequate: These are situations in which the complainant reported an issue of gender-discrimination to the IHE, but felt the IHE's response was inadequate.
8. IHE Response Not Prompt: These are situations in which the complainant reported alleged gender-discrimination to the IHE, but the complainant felt the IHE was not timely in its response.
9. Inadequate Investigation: These are situations in which the complainant reported an issue of alleged gender-discrimination to the IHE, but felt the IHE did not conduct a complete an adequate investigation of the complaint.
10. Inequitable Treatment: These are situations in which the complainant stated he/she was treated differently based solely on his/her gender.
11. Off Campus: These are situations in which the alleged gender-discrimination occurred at an off-campus location.

12. Notification of Outcome Not Received: These are situations in which the complainant stated he/she did not received notice of the outcome of the IHE's investigation and/or findings.
13. Touching: These are situations in which the complainant cited some form of physical touching took place. This includes behaviors such as caressing or grazing the complainant's body in an unwelcome or inappropriate way as well as sexual assault.
14. Policies Not in Place/Not Adequate: These are situations in which the complaint said he/she should could not file a grievance or an IHE response was inadequate as policies were not in place or those that were in place, were not adequate.
15. Retaliation: These are situations in which the complainant said the IHE retaliated against him/her after a report of gender-discrimination was made.

Coding the letters for Other Issues Cited and organizing them into their own category illustrated the frequency an issue was brought to the forefront thereby providing insight into society's understanding of the reach of Title IX. Separating these issues from nature of the incident or OCR standards allowed them to be viewed in a constructionist paradigm revealing greater understanding.

Summary Overview of the Coding Process

In sum, as a precursor to the development of themes, codes were organized into the four categories discussed in this sub-section: (1) OCR Standards, (2) Compliance Reviews, (3) Nature of the Incident, and (4) Other Issues Cited. Most of the OCR resolution letters had codes that fell into several of the categories, so a letter may have had codes that fell under multiple categories. Organizing the codes into the four categories allowed for deeper analysis of the data presented and therefore further extrapolation of meaning. The categories helped to expand the data and then organize it

into categories in which meaning could be made during the thematic analysis, which is discussed next.

Step 5: Content Analysis

There are two broad types of content analysis, manifest and latent. Manifest content analysis involves merely looking for the appearance of certain content, but latent analysis dives deeper to analyze the interpretation of the content (Hseih & Shannon, 2005). There are several methods of content analysis that fall under these broad categories of content analysis. Summative content analysis is a form of latent analysis. In summative content analysis certain words or content are identified with the objective of understanding their contextual use (Hseih & Shannon, 2005). This study used summative content analysis. Content relating to the research questions or prominent Title IX issues helped to drive the coding process. The frequency of the codes helps to identify patterns in the data and set the stage for contextualizing the codes (Hseih & Shannon, 2005). However, latent analysis goes beyond just counting frequency. The next step was to look for underlying meaning of the codes through analysis of the context in which they codes (such as harassment or investigations) were identified. These steps constitute summative content analysis.

There were two structures that set the stage for summative content analysis. Those were a sociopolitical timeline and tables. The layering of these two constructs served as the foundation for the content analysis described above. Each construct is explained in more detail below.

Socio-political Timeline

Since this study aims to understand the evolution of the socially constructed definition of gender discrimination and how that definition is demonstrated through OCR's Title IX interpretations and expectations of IHEs, there was a historical dimension to the coding. The next step of analysis was to contextualize the data chronologically based on the socio-political timeline described in Chapter Two. To do that a timeline summarizing the history of the development of Title IX (as explained in Chapter Two) was created. Appendix A provides the timeline that was used to divide and analyze the letters for relevant themes that emerged during that period. The Socio-Political Timeline condenses the information in Chapter Two organizing it into eras highlighting the major developments of the time. The socio-political events of the time play prominent roles in socially constructing the definition of gender discrimination and guide OCR expectations for IHE practice. The historical context that helps to drive the definition is provided in Chapter Two and condensed to a timeline in Appendix A. This definition impacts how OCR sets expectations for IHE practices as demonstrated through the OCR resolution letters. The practice expectations illustrated in these letters reflect the historical context in which they occurred. The changes in OCR expectations of IHE practices would not occur simultaneously however with the historical context. The historical context predates the changes as that is what sets the groundwork for the changes in practice. So what results is lag in policy implementation that reflects the socially constructed definition of gender discrimination of the time. The historical context was organized into five phases which were identified based on prominent and similar socio-political events of the time. The phases follow.

Phase 1: 1960's – 1980's: Development of Title IX: This phase focused on the creation and development of Title IX including the addition of important amendments that strengthened the reach and power of the law.

Phase 2: 1990-1996: Increase in Title IX Litigation, *Gebser* Criteria: This phase reflects the time in which students started to hold IHEs accountable to Title IX requirements in new ways. Several cases were brought to the Supreme Court which sent power messages to IHEs about their role in enacting the law. IHEs used the actual notice standards set forth in the *Gebser* Criteria to define when they had Title IX responsibilities.

Phase 3: 1998-2005: OCR Guidance on Title IX: This phase reflects a time when Title IX enforcement was growing. Similarly, confusion around the law enactment and expectations grew. OCR issued two guidance documents to IHEs in attempts to better explain the law and IHE expectations for enactment. Likewise, these documents set to clarify how findings from Supreme Court cases should be enacted on IHE campuses.

Phase 4: 2006-2008: Constructive Notice: This phase demonstrates when the shift from “actual notice” to “constructive notice” really began to take place. The shift in IHE actions resulted from several prominent court cases such as *Simpson v. University of Colorado* and *Williams v. Board of Regents of the University System of Georgia*.

Phase 5: 2009- Present Day : Victim Focus: This phase, while new, appears to shift the focus of Title IX enactment to be more heavily centered on victims as IHEs are held to new standards for providing supports, resources, and student disciplinary guidelines.

The phases were central in organizing the codes to look for meaning in the data, identify trends, discover evolutionary changes and investigate connections, if any, to prominent socio-political events of the time.

Tables

To more clearly demonstrate the overlaying of the two constructs (codes and socio-political phases), chronological tables were created to identify codes, category and frequency. The tables demonstrate how often codes were cited and divide them chronologically by socio-political phase. These tables set the scene for content analysis, the process in which meaning is interpreted from data (Hseih & Shannon, 2005). Code frequency helps to identify patterns and context of the codes (Hseih & Shannon, 2005). This allows for deeper understanding of the meaning of the codes. The tables organized the codes so frequency counts could be identified to recognize prevalence of certain kinds of language used in the letters and the types of complaints, situations, and institutional practices involved and thus the ways that definitions might be developing. This division and organization made identifying prominent issues or themes in each phase possible. Then, connections between prominent issues and the socio-political events of the time could be identified. Conversely, prominent socio-political events not mirrored in OCR resolution letters could be seen. A summary table that included identifying information

as well as all codes was created as well as individual tables for each of the 4 topical areas: (1) OCR Standards, (2) compliance reviews, (3) nature of the incident and (4) issues cited. The tables and their descriptions are included at the end of Chapter Three.

Step 6: Identifying Themes

After the coding was complete, the next step was to identify themes that emerged from the now expanded and organized data so patterns could be seen and meaning could be made. Theme identification is driven by coding of the data (Braun & Clarke, 2006). Thematic analysis is a method for identifying, analyzing, organizing and describing themes within qualitative data (Braun & Clarke, 2006). A theme captures something important about the data as it relates to the research question (Braun & Clarke, 2006). The identification of a theme is not based on quantifiable measure, but rather whether it addresses a key issue related to the research question (Braun & Clarke, 2006). This study utilized an inductive approach to theme identification based on the data presented rather than fitting the data into a pre-existing frame (Patton, 1990). Themes are identified at one of two levels; semantic or latent (Burr & Clarke, 2006). At the semantic level the research only looks for surface meaning of the data and uses that to theorize the significance of presenting patterns. The latent level goes beyond that though and analyses the themes for underlying concepts and ideas that shape the semantic content of the data. Themes for this study were identified at the latent level. Burr (1995) explains that latent theme analysis is often based in a constructionist paradigm whereby meaning and experience are understood as socially created and such thematic analysis focuses on socio-cultural elements (Burr, 1995) making latent theme analysis the ideal fit for this study. This thematic analysis was done through the layering of two constructs: (1) the

coding which derived meaning from the letter content layered with (2) the socio-political context in which it occurred. This structure allowed for recognition of specific themes that carried across time phases and code categories.

Braun and Clarke's Point Checklist of Criteria for Good Thematic Analysis

| Process | No. | Criteria |
|----------------|-----|--|
| Transcription | 1 | The data have been transcribed to an appropriate level of detail, and the transcripts have been checked against the tapes for accuracy |
| Coding | 2 | Each data item has been given equal attention in the coding process. |
| | 3 | Themes have not been generated from a few vivid examples (an anecdotal approach), but instead the coding process has been thorough, inclusive and comprehensive. |
| | 4 | All relevant extracts for all each theme have been collated. |
| | 5 | Themes have been checked against each other and back to the original data set. |
| | 6 | Themes are internally coherent, consistent, and distinctive. |
| Analysis | 7 | Data have been analyzed – interpreted, made sense of - rather than just paraphrased or described. |
| | 8 | Analysis and data match each other – the extracts illustrate the analytic claims. |
| | 9 | Analysis tells a convincing and well-organized story about the data and topic. |
| | 10 | A good balance between analytic narrative and illustrative extracts is provided. |
| Overall | 11 | Enough time has been allocated to complete all phases of the analysis adequately, without rushing a phase or giving it a once-over-lightly. |
| Written Report | 12 | The assumptions about, and specific approach to, thematic analysis are clearly explained. |
| | 13 | There is a good fit between what you claim you do and what you show you have done – i.e., described method and reported analysis are consistent. |
| | 14 | The language and concepts used in the report are consistent with the epistemological position of the analysis. |
| | 15 | The researcher is positioned as <i>active</i> in the research process; themes do not just, emerge. |

Theme identification followed a process very similar to the one used in creating codes from the nodes. Following the creation of code categories and tables to organize the data based on socio-political phases, an open coding process was used to identify prominent or recurring themes. As data analysis progressed, certain themes emerged that transpired across multiple code categories and socio-political phases. For example, recurring or common elements of Title IX enactment exhibited by OCR compliance reviews, OCR actions and societal complaints all formed a theme of Title IX priorities. There were also instances where a specific code fell into multiple code categories. For example, sexual harassment fell into the code categories of nature of the incident, issues cited, OCR standards and compliance reviews. Those instances that pertained to a particular theme were extracted and analyzed in light of theme. Once those explanations and meaning were gained from coding analysis, they could then be condensed into themes that transpired across all four categories of codes and all socio-political phases.

Four themes emerged from the data: (1) context; (2) priorities; (3) response; and (4) power. These themes are explained and elaborated upon further in Chapter Four. The coded data were organized into which theme it fell. This allowed for the integration of all four code content areas (OCR Standards, compliance reviews, nature of the incident and issues cited) into each theme. The expanding and condensing in organization provided many opportunities for making meaning of the data thereby providing insight and opportunities for application. Themes were also analyzed in light of the major socio-political movements of their time. As themes and issues grew in prominence, attention to corresponding and/or driving socio-political movements of the time were identified. Opportunities were gained for understanding the socially constructed

definition of gender discrimination on campuses of higher education and how that definition is exhibited through Title IX policy enactment and nature of the incident and other issues cited. Likewise, insight into why certain issues in Title IX policy enactment came to the forefront could be understood in terms of the socio-political pressures of the time. Conversely, instances in which issues came to the forefront with no clear connection to socio-political pressures provided valuable insight into societal priorities regardless of pressures and Title IX's impact when enacted verses the lawmakers' intent.

Trustworthiness

Studies using qualitative summative content analysis must take efforts to attempt to improve the trustworthiness of the study. While evaluating the trustworthiness of qualitative analysis studies can be difficult, Elo, et. al (2014) offers a checklist for researchers to report content analysis in a valid manner. There are three major research phases in which trustworthiness should be evaluated; preparation, organization and reporting (Elo, et al, 2014).

The preparation phase poses trustworthiness issues in data collection and sampling strategy (Elo, et al, 2014). Care should be taken to ensure the data collected is appropriate for answering the research questions of the study (Elo, et al, 2014). The research questions in this study specifically center around the socially constructed definition of Title IX as evidenced in the resolution letters making that data set the most suitable, logical and appropriate choice with minimal threats to trustworthiness. As this study uses a pre-existing data set in its entirety, trustworthiness issues are minimized as sampling strategies or interview methods did not pose threats.

The organization phase poses trustworthiness issues of ensuing very rich data is interpreted and coded in valid and reliable ways (Elo, et al, 2014). Elo, et al (2014) provide guidance on this aspect saying each category should be well created, identify the level of interpretation used and explain in detail the structures used for organization. Chapter Three presents an in depth explanation of the organization used explaining all tools, code categories, tables, timelines and methods of analysis used in this study. These detailed explanations that yielded the final interpretations of data help to increase trustworthiness in this phase.

The final phase to assess trustworthiness is the reporting phase. The reporting phase aims to interpret the findings in meaningful ways. The presentation of these findings can however pose trustworthiness issues. Elo et al (2014) suggests reporting of results be done systematically with detail given about the connections between the data and the results. The reporting depends heavily on the researcher's insight and intuitive process making the description of the process used especially important (Elo et al, 201). Therefore, the structure used in creating the content analysis must be presented in a clear and understandable way. That is accomplished in Chapter Four of this study. Rather than directly address each of the initial research questions posed, the coded data are organized into themes. The explanation of those themes and the meaning made from the coded data are explained in Chapter Four. The coded data used in the explanation of each element of the themes is also identified topically. This allows the reader to see how the data was expanded and the intuitive process used prior to it being refined again to answer the research questions of the study. Elo et. al (2014) explains trustworthiness is increased when the reader can see the intuitive process used and thereby have the opportunity to

look for different interpretations of the data. Therefore a full description of the analytical processes used is vital.

Ultimately, qualitative summative content analysis carries with it subjectivity. Full transparency of the analytical processes used along each step of the way though help to increase the trustworthiness of the study.

Summary

A great deal of information and meaning became clear in data analysis. The methodology of this studied yielded opportunities for understanding the socially constructed definition of gender discrimination on campuses of higher education and how that definition is exhibited through Title IX policy enactment and enforcement. The data analysis steps resulted in the formation of three themes; (1) context, (2) priorities, (3) response and (4) power. The theme of context identifies situations in which gender discrimination can occur and how that behavior is defined. The theme of priorities identifies those issues that seem to rise to the forefront in Title IX implementation as demonstrated by society, OCR or both. The theme of response identifies IHE responsibilities in addressing gender discrimination as evidenced by both society and OCR actions. The theme of power identifies the role authority plays in the relationship between OCR, IHEs and society and how power is enacted. Chapter Four will describe the emergent themes in more detail.

Tables

Table 2.1: Summary Overview

Table 1 is a comprehensive table that included all information from each letter. It includes identifying information about the letters including the letter number, the year it was written, the institution, the state, the gender of the complainant and complete coding. There are 141 letters included in this table. While there were 174 letters in all, those that did not pertain to Title IX or offered no information were eliminated from the data set and thus not reflected in the tables. The letters are organized chronologically. The information from the summary overview table was then extracted and organized into tables pertaining to the topical areas of compliance reviews, nature of the incident and issues cited. Information from these sub tables was then organized into chronological order so patterns and important elements could be identified. A table for OCR standards was not created as there was no need for a table organizing the data from these codes. These codes identify direct text where OCR provided definitions rather than the number of times a topic was cited.

Table 2.1 (continued)

| Year | Institution | Nature of the Incident | Male complainant | Academic Issues | Alcohol Sanction Imposed | Athlete | Complainant | Denied opportunity to face accused | Denied opportunity to file grievance | Harassment - Faculty on Student | Harassment - Faculty on Student in activity | Harassment - Campus Employee | Harassment - Student | Hostile Environment | IHE response inadequate | Inadequate investigation | Inequitable Treatment | Off Campus | Policies not in place/Not received | Retaliation | Sexual Assault | Single Parent | Touching |
|------|---|--------------------------------------|------------------|-----------------|--------------------------|---------|-------------|------------------------------------|--------------------------------------|---------------------------------|---|------------------------------|----------------------|---------------------|-------------------------|--------------------------|-----------------------|------------|------------------------------------|-------------|----------------|---------------|----------|
| 2001 | Tarrant County College | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2001 | Central Missouri State University | Harassment - Faculty on Student | | | | | | x | | | | | | x | | | | | | | | | |
| 2001 | Utah College of Massage Therapy | Harassment - Student on Student | | | | | | | | x | | | | | | | | | x | | | | |
| 2002 | Interdenominational Theological Center | Academic Fairness | | x | | | | | x | | | | | | | | | | x | | | | |
| 2002 | Southern IL University of Carbondale | Academic Fairness | x | x | | | | | | | | | | | | | | | | | | | |
| 2002 | St. Paul School of Theology | Academic Fairness | | | | | | | | | | | | | x | | | | | | | | x |
| 2002 | University of Maryland | Academic Fairness | | x | | | | | x | | | | | | | | | | | | | | x |
| 2002 | Providence College | Compliance Review | | | | | | | | | | | | | | | | | | | | | |
| 2002 | East Tennessee State University | Harassment - Campus Employee | | | | x | | | | x | | | | | | | | | | | x | | |
| 2002 | Loyola University | Harassment - Campus Employee | | | | | | | | x | | | | | | | | | | | | | |
| 2002 | Westwood College of Technology | Harassment - Campus Employee | | | | | | | | x | | | | | | | | | | | | | |
| 2002 | Tufts University | Harassment - Campus Newspaper | | | | | | | | | x | | | | | | | | | | | | |
| 2002 | Texas Southern University | Harassment - Faculty on Student | | | | | | | x | | | | | | | | | | | | | | |
| 2002 | University of Texas at Austin | Harassment - Faculty on Student | | | | | | | | x | | | | | | | | | | | | | |
| 2002 | The Art Center Design College | Harassment - Faculty on Student | x | | | | | | | | | | | | | | | | | | | | |
| 2002 | University of West Florida | Harassment - Faculty on Student | | x | | | | | | | | | | | | | | | | | | | |
| 2002 | State Barber College | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | x |
| 2002 | University of California | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | x |
| 2002 | Des Moines University | Hostile Environment | | | | | | | | x | x | | | | | | | | | | | | |
| 2002 | Western Culinary Institute | Hostile Environment | | | | | | | | | | | | | | | | | | | | | |
| 2002 | Vattertot College | Hostile Environment: Fail to Respond | | | | | | | | x | | | | | | | | | | | | | x |
| 2003 | Loyola University | Academic Fairness | | | | | | | | | | | | | | | | | | | | | x |
| 2003 | Morgan State University | Academic Fairness | x | | | | | | | | | | | | | | | | | | | | |
| 2003 | Gilbert Community College | Academic Fairness | | x | | | | | | | | | | | | | | | | | | | x |
| 2003 | Durham Technical Community College | Academic Fairness | | x | | | | | | | | | | | | | | | | | | | x |
| 2003 | University of New Hampshire | Compliance Review | | | | | | | | | | | | | | | | | | | | | |
| 2003 | Bridgewater State College | Harassment - Faculty on Student | | | | | | | | x | | | | | | | | | | | | | |
| 2003 | Westfield state College | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2003 | University of Maryland | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2003 | Full Sail Real World Education | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2003 | Central Georgia Technical College | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2003 | National Louis University | Harassment - Faculty on Student | | x | | | | | | | | | | | | | | | | | | | |
| 2003 | University of Missouri System | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2003 | San Bernardino Valley College | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2003 | Ivy Technical State College | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2003 | San Jose City College | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2003 | Concord Career College | Hostile Environment | x | | | | | | | | | | | | | | | | | | | | |
| 2003 | Penn State University | Hostile Environment: Fail to Respond | | | | | | | | | | | | | | | | | | | | | |
| 2003 | Lassen College | Hostile Environment: Fail to Respond | x | | | | | | | | | | | | | | | | | | | | |
| 2003 | University of California San Diego | Hostile Environment: Fail to Respond | | | | | | | | | | | | | | | | | | | | | |
| 2003 | Boston University | Sexual Assault - Student on Student | | | | x | | | | | | | | | | | | | | | | | |
| 2004 | Berkley College | Compliance Review | | | | | | | | | | | | | | | | | | | | | |
| 2004 | Sojourner Douglas College | Harassment - Campus Employee | | | | | | | | | | | | | | | | | | | | | |
| 2004 | California Statue University - Northridge | Harassment - Faculty on Student | x | | | | | | | | | | | | | | | | | | | | |
| 2004 | Christian Brothers University | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2004 | California State University | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2004 | Crums Beauty College | Hostile Environment: Fail to Respond | | | | | | | | | | | | | | | | | | | | | |

Table 2.1 (continued)

| Year | Institution | Nature of the Incident | Male complainant | Academic Issues | Alcohol Sanction Imposed | Athlete | Complainant told to face accused | Denied opportunity to file grievance | Denied opportunity to participate in activity | Harassment - Faculty on Student | Harassment - Campus Employee | Harassment - Student | Hostile Environment | I/E response inadequate | Inadequate not prompt | Inequitable investigation | Notification of outcome not received | Off Campus | Policies not in place not adequate | Retaliation | Sexual Assault | Single Parent | Touching |
|------|---|--|------------------|-----------------|--------------------------|---------|----------------------------------|--------------------------------------|---|---------------------------------|------------------------------|----------------------|---------------------|-------------------------|-----------------------|---------------------------|--------------------------------------|------------|------------------------------------|-------------|----------------|---------------|----------|
| 2004 | Madison Area Technical College | Retaliation | x | | | | | | | | | | | | | | | | | | | | |
| 2004 | Oklahoma State University | Sexual Assault - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2004 | Georgetown University | Sexual Assault - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2005 | Sandhills Community College | Academic Fairness | x | x | | | | | | | | | | | | | | | | | | | |
| 2005 | Maine Community College | Compliance Review | | | | | | | | | | | | | | | | | | | | | |
| 2005 | Georgia State University | Harassment - Faculty on Student | | x | | | | | | | | | | | | | | | | | | | |
| 2005 | Marian College of Fond du Lac | Harassment - Faculty on Student | x | | | | | | | | | | | | | | | | | | | | |
| 2005 | Texas Vocational School | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2005 | North Central Texas College | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2005 | University of Arkansas - Little Rock | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2005 | Missouri Southern State University | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2005 | University of Arizona | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2005 | California Statue University - East Bay | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2005 | Wenatchee University | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2005 | Bates College | Sexual Assault - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2005 | University of Georgia | Sexual Assault - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2006 | Louisiana Technical College | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2006 | Wright Business School | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2006 | Wright Business School | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2006 | Wright Business School | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2006 | Las Vegas College | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2006 | Simpson College | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2006 | Illinois College | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2006 | University of California Berkeley | Sexual Assault - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2006 | University of Wisconsin | Sexual Assault - Student on Student | x | x | | | | | | | | | | | | | | | | | | | |
| 2007 | Southern Methodist University | Harassment - 3rd Party | | | | | | | | | | | | | | | | | | | | | |
| 2007 | Garden City Community College | Harassment - Campus Employee | | | | | | | | | | | | | | | | | | | | | |
| 2007 | Olympia College | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2007 | Lassen Community College | Harassment - Faculty on Student | x | | | | | | | | | | | | | | | | | | | | |
| 2007 | Northwest Kansas Technical Institute | Hostile Environment | | | | | | | | | | | | | | | | | | | | | |
| 2007 | Temple University | Sexual Assault - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2007 | Indiana University | Sexual Assault - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2008 | University of MD | Academic Fairness | x | x | | | | | | | | | | | | | | | | | | | |
| 2008 | Eastern Michigan University | Compliance Review | | | | | | | | | | | | | | | | | | | | | |
| 2008 | Notre Dame College | Compliance Review | | | | | | | | | | | | | | | | | | | | | |
| 2008 | Art Institute of Florida | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2008 | Florida International University | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2008 | Monmouth College | Harassment - Faculty on Student | x | | | | | | | | | | | | | | | | | | | | |
| 2008 | University of Illinois - Springfield | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2008 | University of California Davis | Harassment - Faculty on Student | | | | | | | | | | | | | | | | | | | | | |
| 2008 | Merced College | Harassment - Faculty on Student | | x | | | | | | | | | | | | | | | | | | | |
| 2008 | Newbridge College | Harassment - Faculty on Student | x | | | | | | | | | | | | | | | | | | | | |
| 2008 | University of Tampa | Sexual Assault - Student on Student | | | | | | | | | | | | | | | | | | | | | |
| 2009 | University of MD | Academic Fairness | | x | | | | | | | | | | | | | | | | | | | |
| 2009 | Hofstra University | Hostile Environment: Bullying, Teasing | | | | | | | | | | | | | | | | | | | | | |
| 2010 | SUNY | Compliance Review | | | | | | | | | | | | | | | | | | | | | |
| 2010 | Concordia University | Harassment - Student on Student | | | | | | | | | | | | | | | | | | | | | |

Table 2.2: Compliance Reviews

Table 2.2 shows the coding of each compliance review letter. Eleven letters make up this table and the codes reference the topics reviewed by OCR in each compliance review. The OCR resolution letters for this sub table range from 1999-2010. Table 2.3 organizes the information chronologically for pattern identification.

Table 2.2

| Year | Institution | State | Assessment | Confidentiality | Designated Coordinator | Environment | Equitability | Investigations | Policies and Procedures | Response Practices | Support Services | Timeliness | Training | No Info Given |
|------|-----------------------------|-------|------------|-----------------|------------------------|-------------|--------------|----------------|-------------------------|--------------------|------------------|------------|----------|---------------|
| 1999 | Riverside Community College | CA | | | | | | | | | | | x | |
| 2001 | Tufts University | MA | x | x | x | | | x | | | x | | | |
| 2001 | Babson College | MA | | | x | | | x | | | | | | |
| 2001 | Bentley College | MA | | | | | | | | | | | x | |
| 2002 | Providence College | RI | | | x | | | | x | | | | | |
| 2003 | University of New Hampshire | NH | | | x | | | | x | | | | | |
| 2004 | Berkley College | MA | | | | | | x | x | x | | | | |
| 2005 | Maine Community College | ME | | | | | | | | | | | x | |
| 2008 | Eastern Michigan University | MI | | | | | | | | | | | x | |
| 2008 | Notre Dame College | OH | x | x | | | | x | x | x | x | x | | |
| 2010 | SUNY | NY | | | | x | x | x | x | | | x | | |

Table 2.3

| Compliance Review Breakdown | | | | | | | | | | | | |
|-----------------------------|----------|------|----------|----------|----------|----------|----------|------|------|----------|----------|-----------|
| Topics Reviewed | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2010 | Totals |
| Assessment | | | | | | | | | | 1 | | 1 |
| Confidentiality | | | 1 | | | | | | | | | 1 |
| Designated Coordinator | | | 1 | | | | | | | 1 | | 2 |
| Hostile Environment | | | 2 | 1 | 1 | | | | | | | 4 |
| Equitable Treatment | | | | | | | | | | | 1 | 1 |
| Investigations | | | | | | | | | | | 1 | 1 |
| Policies | | | 2 | | | 1 | | | | 1 | 1 | 5 |
| Response Practices | | | | 1 | 1 | 1 | | | | 1 | 1 | 5 |
| Support Services | | | | | | 1 | | | | 1 | | 2 |
| Timeliness | | | 1 | | | | | | | 1 | | 2 |
| Training | | | | | | | | | | 1 | 1 | 2 |
| No Info Given | 1 | | 1 | | | | 1 | | | 1 | | 4 |
| Totals | 1 | | 8 | 2 | 2 | 3 | 1 | | | 8 | 5 | 30 |

Tables 2.4-2.7: Nature of the Incident

Tables 2.4-2.7 show the coding of each letter for the nature of the incident. This is the issue that occurred and eventually led to the filing of a complaint. Each of the 141 letters was coded for this information. Each letter was assigned only one code. Gender of complainant was also noted here. The data was compiled into tables noting the incidence of each issue by year. Individual tables were created based on the socio-political phase of the time and ordered chronologically as well.

Table 2.4

| Phase 2 | |
|--|-------------|
| Nature of the Incident | 1995 |
| Academic Fairness | |
| Compliance Review | |
| Harassment | 1 |
| <i>Harassment by Faculty</i> | |
| <i>Harassment by Student</i> | 1 |
| <i>Harassment by 3rd Party</i> | |
| <i>Harassment by Campus Employee</i> | |
| <i>Harassment by Newspaper</i> | |
| Hostile Environment | |
| <i>Hostile Environment Existed</i> | |
| <i>Hostile Environment Due to IHE Failure to Respond</i> | |
| <i>Hostile Environment Due to Bullying and Teasing</i> | |
| Retaliation | |
| Sexual Assault | |
| <i>Sexual Assault by Faculty</i> | |
| <i>Sexual Assault by Student</i> | |
| Single Parent | |
| Male Reports | |
| Totals | 1 |

Table 2.5

| Phase 3 | | | | | | | | | | |
|--|------|------|------|------|------|------|------|------|--------|------|
| Nature of the Incident | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | Totals | Male |
| Academic Fairness | 1 | 1 | | 2 | 4 | 4 | | 1 | | 3 |
| | | 1 | | 3 | 1 | 1 | 1 | 1 | 8 | |
| Harassment | | | | | | | | | 67 | 6 |
| <i>Harassment by Faculty</i> | 6 | 5 | 11 | 4 | 4 | 8 | 1 | 8 | 47 | 4 |
| <i>Harassment by Student</i> | | | 3 | 1 | 2 | 2 | 2 | 1 | 11 | 1 |
| <i>Harassment by 3d Party</i> | | | | | | | | | | |
| <i>Harassment by Campus Employee</i> | 2 | 1 | 1 | | 3 | | 1 | | 8 | 1 |
| <i>Harassment by Newspaper</i> | | | | | 1 | | | | | |
| Hostile Environment | | | | | | | | | 11 | 3 |
| <i>Hostile Environment Existed</i> | | 1 | | | 2 | 1 | | | 4 | |
| <i>Hostile Environment Due to IHE Failure to Respond</i> | | 1 | | | 1 | 3 | 1 | | 6 | |
| <i>Hostile Environment Due to Bullying and Teasing</i> | | | | | | | | | 1 | |
| Retaliation | 1 | | | | | | 1 | | 2 | |
| Sexual Assault | | | | | | | | | 7 | |
| <i>Sexual Assault by Faculty</i> | | | | | | | | | | |
| <i>Sexual Assault by Student</i> | | | 2 | | | 1 | 2 | 2 | | |
| Single Parent | 1 | | | | | | | | 1 | |
| Male Reports | | | | | | | | | | 13 |
| Totals | 11 | 10 | 17 | 11 | 18 | 20 | 9 | 13 | 109 | |

Table 2.6

| Phase 4 | | | | | |
|--|------|------|------|--------|------|
| Nature of the Incident | 2006 | 2007 | 2008 | Totals | Male |
| Academic Fairness | | | 1 | 1 | 1 |
| Compliance Review | | | 2 | 2 | |
| Harassment | | | | 18 | 2 |
| <i>Harassment by Faculty</i> | 5 | 2 | 7 | 14 | 2 |
| <i>Harassment by Student</i> | 2 | | | 2 | |
| <i>Harassment by 3rd Party</i> | | 1 | | 1 | |
| <i>Harassment by Campus Employee</i> | | 1 | | 1 | |
| <i>Harassment by Newspaper</i> | | | | | |
| Hostile Environment | | | 1 | 1 | |
| <i>Hostile Environment Existed</i> | | 1 | | | |
| <i>Hostile Environment Due to IHE Failure to Respond</i> | | | | | |
| <i>Hostile Environment Due to Bullying and Teasing</i> | | | | | |
| Retaliation | | | | | |
| Sexual Assault | 2 | 2 | 1 | 5 | |
| <i>Sexual Assault by Faculty</i> | 1 | | | | |
| <i>Sexual Assault by Student</i> | 1 | 2 | 1 | | |
| Single Parent | | | | | |
| Male Reports | | | | | 3 |
| Totals | 9 | 7 | 11 | 27 | |

Table 2.7

| Phase 5 | | | | |
|--|----------|----------|------|----------|
| Nature of the Incident | 2009 | 2010 | 2011 | Totals |
| Academic Fairness | 1 | | | 1 |
| Bullying and Teasing | 1 | | | 1 |
| Harassment | | | | 1 |
| <i>Harassment by Campus Employee</i> | | | | |
| <i>Harassment by Faculty</i> | | | | |
| <i>Harassment by Student</i> | | 1 | | |
| <i>Harassment by 3rd Party</i> | | | | |
| <i>Harassment by Newspaper</i> | | | | |
| Retaliation | | | | |
| Single Parent | | | | |
| Compliance Review | | 1 | | 1 |
| Hostile Environment | | | | |
| <i>Hostile Environment Existed</i> | | | | |
| <i>Hostile Environment Due to IHE Failure to Respond</i> | | | | |
| <i>Hostile Environment Due to Bullying and Teasing</i> | | | | |
| Sexual Assault | | | | |
| <i>Sexual Assault by Student</i> | | | | |
| <i>Sexual Assault by Faculty</i> | | | | |
| <i>Male Reports</i> | | | | |
| Totals | 2 | 2 | | 4 |

Table 2.8: Other Issues Cited

The complaints and issues cited in the OCR Resolution Letters were often times numerous and went far beyond nature of the incident that originally led to the complaint. This information was coded and compiled into tables noting the incidence of each issue cited by year. There are 130 letters coded for this as the 11 letters that were compliance reviews did not fall into this category. Individual tables were created based on the socio-political phase based on the timeline provided in Appendix A.

Table 2.8

| Phase 2 | |
|---|-------------|
| Other Issues Cited | 1995 |
| Academic Issues | |
| Alcohol Sanction Imposed | |
| Athlete Identified | |
| Complainant Told to Face Accused | |
| Denied Opportunity to file grievance | |
| Denied Opportunity to Participate in Activity | |
| IHE Response Inadequate | 1 |
| IHE Response Not Prompt | |
| Inadequate Investigation | |
| Incident Occurred Off Campus | |
| Notification of Outcome Not Received | |
| Physical Touching Cited | |
| Polices Not in Place/Not Adequate | |
| Retaliation Occurred | |
| Treated Differently Based on Gender | |

Table 2.9

| Phase 3 | | | | | | | | | |
|---|-----------|-----------|-----------|----------|-----------|-----------|-----------|-----------|------------|
| Other Issues Cited | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | Totals |
| Academic Issues | 5 | 3 | 3 | 1 | 4 | 3 | 1 | 2 | 22 |
| Alcohol Sanction Imposed | | | | | | 1 | | | 1 |
| Athlete Identified | 1 | | | | 1 | | 1 | | 3 |
| Complainant Told to Face Accused | | | | | | | | | |
| Denied Opportunity to file grievance | | | | | | 1 | 1 | 1 | 3 |
| Denied Opportunity to Participate in Activity | 1 | 1 | | | 1 | 1 | | | 4 |
| IHE Response Inadequate | 3 | 2 | 8 | 2 | 6 | 7 | 4 | 4 | 36 |
| IHE Response Not Prompt | | | 2 | | 1 | 2 | | | 5 |
| Inadequate Investigation | | | 3 | | | 2 | 3 | 2 | 10 |
| Incident Occurred Off Campus | | | 1 | | | 1 | 1 | 1 | 4 |
| Notification of Outcome Not Received | | | | | | 1 | 1 | | 2 |
| Physical Touching Cited | | | | 1 | 5 | 5 | 1 | 1 | 13 |
| Polices Not in Place/Not Adequate | 1 | 3 | 2 | 1 | 1 | 1 | 2 | 2 | 13 |
| Retaliation Occurred | 4 | 1 | 4 | 1 | 3 | 7 | 3 | 5 | 28 |
| Treated Differently Based on Gender | 1 | 2 | 1 | | 4 | 5 | 1 | 1 | 15 |
| Totals | 16 | 12 | 24 | 6 | 26 | 37 | 19 | 19 | 159 |

Table 2.10

| Phase 4 | | | | |
|---|-----------|-----------|-----------|-----------|
| Other Issues Cited | 2006 | 2007 | 2008 | Totals |
| Academic Issues | 1 | 1 | 2 | 4 |
| Alcohol Sanction Imposed | | | | |
| Athlete Identified | 1 | 2 | | 3 |
| Complainant Told to Face Accused | | | 1 | 1 |
| Denied Opportunity to file grievance | | | | |
| Denied Opportunity to Participate in Activity | | | | |
| IHE Response Inadequate | 4 | 4 | 4 | 12 |
| IHE Response Not Prompt | 2 | 1 | | 3 |
| Inadequate Investigation | | 1 | 2 | 3 |
| Incident Occurred Off Campus | 1 | 1 | | 2 |
| Notification of Outcome Not Received | 1 | 1 | | 2 |
| Physical Touching Cited | 1 | | 1 | 2 |
| Polices Not in Place/Not Adequate | 2 | 2 | | 4 |
| Retaliation Occurred | 3 | 2 | 5 | 10 |
| Treated Differently Based on Gender | | 1 | 1 | 2 |
| Totals | 16 | 16 | 16 | 48 |

Table 2.11

| Phase 5 | | | | |
|---|-------------|-------------|-------------|---------------|
| Other Issues Cited | 2009 | 2010 | 2011 | Totals |
| Academic Issues | 1 | | | 1 |
| Alcohol Sanction Imposed | | | | |
| Athlete Identified | | | | |
| Complainant Told to Face Accused | | | | |
| Denied Opportunity to file grievance | | | | |
| Denied Opportunity to Participate in Activity | | | | |
| IHE Response Inadequate | 1 | 1 | | 2 |
| IHE Response Not Prompt | | | | |
| Inadequate Investigation | | | | |
| Incident Occurred Off Campus | | | | |
| Notification of Outcome Not Received | | | | |
| Physical Touching Cited | | | | |
| Polices Not in Place/Not Adequate | | | | |
| Retaliation Occurred | | | | |
| Treated Differently Based on Gender | | | | |
| Totals | 2 | 1 | | 3 |

Chapter Four: Analysis and Interpretations

Introduction

The four emergent themes of (1) context, (2) priorities, (3) response and (4) power will be discussed in this chapter. The themes span multiple code categories and socio-political phases. The themes organize the coded data into similar groups that allow for making meaning of data. This chapter will explain each theme organized by the coded data that came together to form the theme. Interpretations of the data and meaning are given for each theme. Chapter Five will apply the findings of these themes to the research questions of the study.

Theme One: Context

The first theme is context. Context refers to the settings, situations and environments in which gender discrimination was determined to have occurred. The context itself provides valuable insight for several reasons. To begin with, the context in which the behavior occurred plays a definitive role in deciphering if the behavior was harassing or discriminatory. OCR guidance and resolution letters state that issues such as isolation can increase the severity or impact of a potentially discriminatory or harassing behavior. The setting and context in which the behavior occurs decreases the need for a behavior to be repetitive to be considered harassing. Furthermore, the context itself plays a prominent role in defining issues of gender discrimination. An environment that has historically or prominently been comprised of a single gender may create potential for a hostile environment upon the inclusion of the opposite gender. The context also identifies and defines the environment in which the IHE is determined to have had

responsibility in either creating, preventing or addressing the harassment. The letters provide a wealth of information and specific examples of contexts in which gender discrimination could occur. This is both driven by and drives the socially constructed definition. Information pertaining to this can be extrapolated from several different elements of the data. OCR standards, compliance reviews and issues cited all provide information on what types of conduct have been determined by both OCR as well as society to be sex discrimination and this conduct is closely tied to the context in which the behavior occurs.

Issues relating to context and the role it plays in defining gender discrimination are exhibited in several ways. The role of context in gender discrimination is defined explicitly, within the illustration of the situational details of the complaint and through OCR analysis of the facts of the case. OCR standards for defining specific gender discriminatory behaviors are stated in almost every resolution letter. These definitions are stated explicitly or illustrated through OCR analysis and findings. In most cases, such definitions or criteria are documented and repeated in several letters. In a resolution letter, the issue at hand is measured by these OCR standards and definitions to determine if in that specific context, the defined behavior constituted gender discrimination.

Looking at how Title IX has been applied to various contexts helps to understand the definition of what behaviors constitute gender discrimination. What follows are interpretations of OCR's definitions of behaviors determined to be gender discrimination. These decisions are applied to the context of a complaint to determine if gender discrimination occurred. There are four topics below (sexual harassment, hostile environment, inequitable treatment and off campus incidents) in which OCR states and

illustrates definitions of how a gender-discriminatory behavior is defined by the context in which it occurs.

Sexual Harassment

Sexual harassment is one of the most commonly cited complaints in the resolution letters. What constitutes sexual harassment is defined in several ways, through OCR resolution letters and OCR guidance documents. In addition, major events in the socio-political timeline impacted and changed the definition of sexual harassment. This is a clear example of how the context impacts the definition of the behavior.

The earliest definition of sexual harassment comes in the first OCR letter filed in 1995 against Evergreen State College. This says that “sexual harassment occurs when there are unwelcome sexual advances, requests for favors or other sex based verbal or physical conduct and (1) submission to such conduct is explicitly or implicitly made a term or condition of an individual’s continued participation in the program or (2) the conduct has the purpose or effect of unreasonably interfering with the individual’s participation in the program because the environment has become hostile or offensive”. Furthermore, if the IHE fails to respond, whether the harassing actions are carried out by agents or non-agents of the institution, the IHE is in violation of Title IX.

The 2000 letter to East Carolina University explains that sexually harassing conduct includes behaviors such as unwelcome sexual advances, requests for sexual favors and verbal or nonverbal conduct of a sexual nature including physical touch or actions. The 2003 Penn State letter affirms and elaborates on OCR’s definition of sexual harassment saying that in order for a behavior to be considered sexual harassment, it must be unwelcome. Specifically it says that if the student did not request or invite the

behavior and found it offensive, that behavior is considered sexual harassment. While these definitions all work together, the rewording, reorganization and expanding definitions follow that of the OCR Title IX guidance of the time. As situations arise and OCR addresses Title IX implementation on IHE campuses the definitions become fuller with more detail and clearer expectations for practice.

The 2004 San Jose City College letter also has an example of OCR's stance of what constitutes sexual harassment. In this instance in 2003 a female student filed complaint with the OCR against San Jose City College saying the college failed to respond appropriately after she advised them of issues of sex discrimination. The complainant said that while working for the college radio station, the student manager sought sexual favors from him while they were in his home. He asked her about genital body piercings and said he would like to see them. The complainant refused to show the manager and was fired. OCR said the behavior that took place in the radio station manager's home was not sufficiently severe, pervasive or persistent to constitute harassment since because despite having occurred in isolation, it occurred only one time.

The socio-political timeline shows that the 1997 guidance defined sexual harassment by categorizing it into one of three categories; 1) quid pro quo harassment, 2) creation of a hostile environment through an employee's apparent authority, or 3) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority" (Office for Civil Rights, 1997). The 2001 guidance did away with those categories though and said the conditions for a behavior to be considered sexual harassment were not limited to whether it occurred in one of these three contexts. Rather, a behavior was considered sexually harassing if it limited or

denied a student's opportunity to benefit from an educational program or activity. The political climate of the time advocated that gender discrimination, such as sexual harassment, was a crime against a group, not an individual. The context in which it occurred became less important as its' potential effects impacted many rather than a select group of individuals.

While the definition of the explicit behaviors that constitute sexual harassment remained stable, the context in which sexual harassment was defined to have been able to occur changed drastically, thereby changing the overall definition. The definition for sexual harassment was initially directly tied to unwelcome sexual advances, requests for favors touching. However, while those elements are certainly still included in the definition, it expanded greatly to include any behavior that limited or denied a student's opportunity to benefit from an educational program or activity. Sexual harassment is now defined in such a way it can occur in any context or setting. It is not the behavior alone that constitutes sexual harassment, it is the results of that behavior on the victim. Under the evolved and present day definition, if the victim is denied or limited participation in an educational activity, that is what defines sexual harassment.

Hostile Environment

A sexually hostile environment is clearly tied to context. This refers to some situational aspects of that specific environment that result in gender discrimination. The definition of sexually hostile environment is clearly tied to contextual elements in which the behavior occurs, rather than just the behavior itself. There are seventeen instances in which complainants specifically cite a hostile environment and many more where the alleged issue presented indicates a hostile environment may have existed. There are

numerous instances where OCR takes the opportunity to elaborate on what issues create a sexually hostile environment.

To begin with, the 1995 Evergreen State College letter provides some insight into what constitutes as Hostile Environment by OCR terms. In this situation the complainant was enrolled in a Quantum Theory Physics class of seven students. The class met in the professor's home once a week for the winter and spring quarters. The complainant did not officially enroll in the class until March 29th. On March 25th, four days prior to complainant officially enrolling in the class, the complainant and the professor met in his home to review a play she had for another class and kissed. The professor said the kiss was consensual and the student said it was not. The Quantum Theory Physics class ended on June 4th. On November 25th the student filed a formal grievance saying inappropriate sexual contact had occurred between the two of them on March 25th. OCR found that a hostile environment did not exist because the student had not officially enrolled in the class until after the kiss occurred. This is a valuable instance where OCR opines on the power imbalance implications or lack thereof in romantic relationships between students and faculty. It illustrates OCR's stance that the power imbalance is directly tied to supervisory elements, i.e., if a student is enrolled in that faculty member's class. There must be some sort of supervisory element present to create the context necessary to establish a hostile environment. Without that context, seemingly the mere status of faculty vs. student is not enough to create a situation in which a sexually hostile environment could occur.

Specific criteria for evaluating factors that could contribute to a sexual hostile environment are listed in the 2000 letter to the University of Colorado, Boulder. This

letter explains relevant factors include issues such as the degree to which the alleged harassment affected the student/s education, the type, frequency and duration of the harassment, the age and sex of the harasser and harassed, the size of the IHE, the location and context in which the harassment occurred and other instances of gender based and/or sexual harassment that occurred at the IHE.

There are four instances in the compliance reviews where the OCR specifically evaluates issues pertaining to hostile environment. Interestingly these all occur in 2001 and 2003. The 2001 OCR guidance said the three categories of harassment laid out in the 1997 guidance were no longer the basis for defining harassment. Now, a situation could be defined as sexually harassing as long as it limited or denied a student's opportunity to benefit from an educational program or activity. The standard of severe, pervasive or persistent in determining the level of harassment still stood, however the context in which it could take place was much broader. Understanding exactly what constituted a sexually hostile environment became much more important as it could occur in any context. IHE responsibilities for preventing and addressing potential gender discrimination now expanded to many more contexts or setting.

The importance of context is further supported and demonstrated in 2003 Penn State letter. This letter explains that to be considered a sexually hostile environment the situation must be sufficiently severe, pervasive or persistent to deny or limit a student's ability to participate in an educational opportunity or program provided by the institution. Specifically, it defines a sexually hostile environment as one that occurs when unwanted and offensive statements or acts that are sexual in nature occur at a level that is sufficiently severe, pervasive and/or persistent to create an environment that is offensive,

intimidating or abusive for an individual due to his/her sex. The 2003 Penn State letter explains that harassing conduct that takes places in isolated or secluded areas may be seen as more threatening and have greater impact than had the conduct occurred in a more public setting. This sentiment is also echoed in the 2008 letter to the Art Institute of Ft. Lauderdale where it is explained that in some instances a single or isolated instance could be so severe as to create a hostile environment. The severity of the incident plays a critical role in determining this. The 2008 Art Institute of Ft. Lauderdale letter explains that while typically a single action would not be considered enough to create a hostile environment, the more severe the conduct, the less repetition needed. Furthermore, the context in which the alleged harassing behavior occurs is critical in determining if a sexually hostile environment existed.

The definition of a sexually hostile environment has been closely tied to issues of isolation as that context itself greatly increases the severity thereby decreasing the need for repetition in defining sexual harassment. Similarly, issues such as frequency, duration, age and sex of the harasser, location of the harassment, and size of the IHE and power imbalances that exist with supervisory roles also play roles in defining what constitutes a sexually hostile environment. Perhaps most interestingly, much like the evolved definition of sexual harassment, the definition of sexually hostile environment hinges on the victim's experience rather than just the behaviors that took place. Determination of a sexually hostile environment takes into account the degree to which it impacts the student's participation on the educational activity.

Inequitable Treatment

While sexual harassment is an obvious form of gender discrimination, it is not the only context in which gender discrimination can occur under Title IX. Title IX is an equity law and so issues of equitable treatment also fall under its umbrella. It would seem often people think Title IX is a law about athletics or sexual harassment, but truly it is an equity law. Athletics and sexual harassment are just contexts in which it could be applied. An issue frequently and consistently cited in Phase Three and Phase Four of the socio-political timeline is when an IHE was accused of treating individuals differently based solely on gender. This of course is the foundation of Title IX. While it could be argued that every instance of a complaint or violation would fall into this category, the fact that it is specifically cited is interesting because these allegations rest on the foundation of the law. Complaints could pertain to how policies were applied, participation in opportunities afforded, how testing was administered, treatment of individuals or any other form of gender discrimination. In these cases the complainant specifically cited how he/she was treated different than what had been witnessed in the treatment of the opposite gender or how he/she was treated differently based on gender without instances of sexually harassing behavior being included.

The 2000 letter to East Carolina University helps to illustrate an example of inequitable treatment and how gender discrimination encompasses more than sexual harassment behaviors. It explains issues of verbal, nonverbal or physical aggression, intimidation and/or hostility that are gender based are also prohibited by Title IX even if they are not sexual in nature. In this instance, a student said he was victim to discrimination because he did not conform to stereotypical male college student

mannerisms. The 2001 American International University and 2009 Hofstra University letters both also demonstrate similar instances in which Title IX was applied to such behavior.

The 2005 Sandhills Community College letter sets forth criteria for determining if inequitable treatment constituted gender based discrimination. The assessment criteria include determining if the complainant is a member of a protected class, determining if the complainant was treated adversely by the IHE and finally assessing if individuals in similar circumstances as the complainant, but of the opposite gender were treated better. Should it appear sex based discrimination existed the next step is to seek the reasons for the different treatment. Specifically, it is investigated if the IHE had a legitimate, nondiscriminatory reason for the different treatment and that is not an excuse or pretext for discrimination.

These examples and definitions define instances in which gender discrimination could occur, but were not tied to behaviors that are sexual in nature, thereby expanding the context in which gender discrimination could occur. Furthermore, none of these specified the action had to take place in the classroom, between certain individuals or in specific educational opportunities. These definitions were broad enough to encompass behaviors that can occur in any setting, all of which IHEs have a responsibility to both prohibit and address. The fact that inequitable treatment is defined and cited in this way shows not only a societal understanding for the law's intent, but the potential for it to expand to other contexts. Gender discrimination was defined to include issues that were sexual in nature, bullying, how policies were applied to one gender in comparison to another, intimidation and all forms of physical aggression. This is evidenced in Title

IX's history as the contexts in which harassment could occur continued to expand. If the behavior took place and the complainant's gender was the basis, then gender discrimination was determined to have occurred.

Off Campus Incidents

Between 2000 and 2007 there are six instances where the alleged sex discrimination happened off campus and the complainant expected the IHE to respond. Prior to 2000, no letters cited off-campus incidents. It should be noted that it is not always clear where the alleged gender discrimination occurred, so there may be more off-campus incidents, however the context may not have been given so the identification could be made. The 2001 OCR guidance differed from the 1997 OCR guidance because in 2001 OCR explained that IHEs had a responsibility to recognize situations where sexual harassment was likely occurring, even if they had not received actual notice of the incident. All six of these instances of off-campus complaints pertained to issues of sexual harassment or sexual assault. Likewise, all but one (the 2000 University of California, Santa Barbara letter) were student on student issues. The letters demonstrate students' expectations that IHEs be responsible for the conduct of their student body, regardless of location. This expectation was supported by the 2006 *Simpson v. University of Colorado* case where the Supreme Court affirmed IHEs had responsibility for off-campus incidents. This, too, was supported in OCR guidance documents and resolution letters. Together, these elements meant that IHE's responsibilities for maintaining environments free from sex discrimination expanded beyond just campus activities, but any educational program or activity. In addition, IHEs had a responsibility to recognize situations where sexual harassment was likely occurring, even if they had not received

actual notice of the incident and even if it was not on campus. IHEs now shouldered responsibility for creating environments free of gender discrimination both on and off campus, in organized and sanctioned events and even in some non-sanctioned events that were considered customary. In IHE and OCR interactions on this topic, OCR readily found in favor of complainants and provided guidance documents to affirm the importance of this foundation and IHEs responsibilities.

Findings from Context Theme

There were both constants and changes in the relation to how various forms of gender discrimination were defined and measured by the context in which they occurred. In all instances, the definitions of the behaviors that constituted gender discrimination did not change. There were no instances where a behavior that was once considered gender discrimination was later no longer defined as gender discrimination. However, those definitions most definitely expanded. Not only did they expand in terms of the addition of behaviors, but also in terms of settings in which these behaviors could occur and how the victim experienced the behaviors. These elements all interface to define contextual elements that play central roles in defining gender discrimination.

Theme Two: Priorities

The second theme is the theme of priorities. The theme of priorities refers to gender discrimination issues which rise to the forefront of societal agendas. There are many elements involved in the implementation of Title IX. While the specific application of the law provides valuable information, there is more to be gained than simply looking at the allegations of how an IHE went wrong in applying the law. One of the most clarifying ways to understand the socially constructed definition of various

forms of gender discrimination is to identify what issues come to the forefront. There are many behaviors which could be defined as gender discrimination. Sexual harassment, academic fairness, opportunities to participate in an educational activity and sex based bullying are just a few of the situations in which the law could be applied. These priorities play a pivotal role in the social construction of gender discrimination as they carry the most gravity and force, thereby encouraging other issues to align with them so they can make a greater impact. Some issues increase in strength while others fall off the radar. Correspondingly, those issues that were very infrequently cited could also demonstrate important messages regarding what is not considered a priority in defining gender discrimination. The information below pertains to the elements of gender discrimination come to the forefront or in some cases, were very infrequently cited. These codes were identified the most and where possible connections to major socio-political events are made. This theme specifically applies to topics of Title IX that have helped define gender discrimination while also identifying topics that have been brought to the forefront of Title IX, but are not reflected in the OCR resolution letters.

Sexual Harassment

It is no surprise issues of sexual harassment rose to the forefront. The socially constructed definition of sexual harassment is strongly grounded and easily understood by many. Socio-political efforts also consistently focused on encouraging people to speak about their victimization and taught them to recognize and name sexual harassment. The majority of the resolution letters were rooted in issues of sexual harassment. Specifically, eighty-seven of the one hundred and forty-one codes for nature of the incident were sexual harassment. The dominance of this issue was true across all

socio-political phases. Sexual harassment was so frequently noted it was divided into categories based on the role of the harasser (student, faculty, etc.). The type of harassment most frequently cited was faculty on student harassment. For example, in socio-political Phase Three, forty-seven of the sixty-seven codes for sexual harassment were pertaining to faculty-on-student harassment. This was followed by eleven reports of student-on-student harassment, eight reports of employee on student harassment and one report of harassment by the campus newspaper on student. In socio-political Phase Four, fourteen of the eighteen codes for sexual harassment were pertaining to faculty on student harassment, followed by two reports of student on student harassment, one report of 3rd party harassment on student and one report of campus employee harassment on student.

The focus on applying the law in this avenue and defining gender discrimination with this priority is mirrored by the socio-political timeline. From the inception of Title IX was the foundation that sexual harassment was no longer seen as a crime against an individual, but an act of discrimination against an entire group. This was the foundation for the law. In Phase Two of the socio-political timeline, the 1990's saw an increased pressure for IHEs to address sexual harassment on their campuses coupled with students' new familiarity with Title IX and their beginning to rely on it more for issues of sexual misconduct. Likewise the Clinton administration brought increased media chatter on sexual harassment and feminist activism was prevalent. These actions of course set the stage for increased reliance on Title IX pertaining to sexual harassment so the 1997 and 2001 OCR guidance documents focused heavily on defining the types and context of sexual harassment.

Sexual harassment issues are prominent in resolution letters, OCR guidance documents and socio-political movements. The applicability of Title IX to these issues is seemingly well understood.

Sexual Assault

Not surprisingly, issues in which sexual assault occurred were also identified. Much like sexual harassment, the concept and definition of sexual assault is easily identified and widely known. Interestingly, the frequency at which such issues were illustrated through the OCR resolution letters more than doubled from Phase Three to Phase Four. Phase Three was eight years long and there were seven instances where the nature of the reported instance was a sexual assault. Phase Four was three years long and there were five letters coded for sexual assault. All but one of these twelve instances were student on student sexual assault, with the anomaly being a faculty on student sexual assault.

On the socio-political front, throughout this time, sexual assault advocates had continued to help victims find a voice and feel empowered to report instances of sexual assault. Phase Four saw two very prominent Supreme Court cases in which IHE's were held responsible for Title IX violations pertaining to sexual assault; *Simpson v. University of Colorado* in 2006 and *Williams v. Board of Regents of the University System of Georgia* in 2007. Perhaps connected to that, the socio-political actions had focused on making talking about sexual assault more acceptable. Victims seemingly took confidence to act in the foundation that had been set focusing on their rights vs. victim blaming.

Hostile Environment

Hostile environment was also an issue that was cited more frequently than others. The specific details of what constitutes a hostile environment vary widely and are

extremely situational. As described earlier in the discussion of the Contexts theme, OCR uses a standard definition for a hostile environment and measures the specific elements of the individual situation against that definition, including elements such as isolation, duration and frequency to decipher if a hostile environment exists. Regardless of the highly situational specific elements of this definition, hostile environment was cited numerous times. There were thirteen instances where the nature of the incident was related to a hostile environment. While at face value this may not seem like a lot, twelve of those thirteen occurred in Phase Three.

Students made complaints pertaining to hostile environment for three issues; (1) the existence of a hostile environment, (2) the hostile environment existed because the IHE failed to respond or (3) the hostile environment existed specifically because of bullying and teasing. Phase Three on the socio-political timeline was when OCR issued two guidance documents to help IHEs in applying Title IX. Seemingly this is when students started to become more aware of the law and rely more heavily on it in different ways, such as hostile environment issues. Societal pressure was placed on IHEs as they were instructed to address the inequitable environments perceived to exist on their campuses. IHEs had a greater responsibility to be aware of, address and prevent the types of contexts in which gender discrimination could occur. IHEs were to take a holistic and comprehensive approach to addressing gender discrimination so looking for instances of hostile environment would only make sense. Socio-political movements put great pressure on IHEs to address these issues. That pressure, combined with Title IX implementation enforcement by OCR placed a greater burden on IHEs to create an environment in which gender discrimination would not occur. The responsibility of

gender discrimination issues was not shouldered only by an individual, who under an old thought process would have been deemed to have made a poor choice. Instead, now the responsibility for the discrimination was shared, if not owned, by IHEs for creating or allowing environments in which gender discrimination could take place to have existed in the first place.

Academic Fairness

The expectation that IHEs address sex discrimination in a holistic manner is also strengthened by the number of times the nature of the incident resulting in an OCR filed complaint pertained to issues of academic fairness. In these instances students cited issues such as unfair testing and perceived bias based on gender. Students claimed they were treated unfairly in the classroom not based on their academic performance, but rather based on their gender. There are fourteen times when the nature of the incident was academic fairness and all but one of these occur after 2001. The 2001 OCR guidance eliminated the categories used to define sexual harassment; (1) quid pro quo harassment, (2) creation of a hostile environment through an employee's apparent authority, or (3) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority. Now, a situation could be defined as sexually harassing as long as it limited or denied a student's opportunity to benefit from an educational program or activity on the basis of sex. Students quickly applied this new found freedom in defining gender discrimination, specifically sexual harassment to the classroom. The environmental management responsibilities carried by IHEs were thereby increased. Again, the responsibility for gender discrimination was not shouldered by the complainant or the aggressor alone, it

was also shouldered by the IHE that created or allowed an environment conducive to gender discrimination to exist.

Male Reports

As the huge majority of complainants were female, it seemed notable to code those letters in which the complainant was male. Perhaps this would identify a different set of social priorities for the application of Title IX. While male reports were far fewer than female reports, the issues they reported on and the frequency at which they came up were relatively the same as female reports. Seemingly male expectations of the applicability of Title IX were the same as females with most reports being on sexual harassment, hostile environment and academic fairness. The exception however was sexual assault. None of the OCR letters indicated situations in which a male said he was a victim of sexual assault. Looking at the socio-political timeline, little attention was given to this topic during any of the phases. In fact, this is a more recent issue that is now making the socio-political scene and so may eventually be reflected in future resolution letters.

Touching

Physical touch seems an easily identifiable and definable behavior that could constitute forms of gender discrimination. However, issues that cited physical touch while relatively low, were consistent throughout Phase Three and Phase Four. It is evident that inappropriate touch is clearly defined as sex discrimination, but the fact that it is low, may demonstrate that it is just one of the many ways in which society defines gender discrimination. Rather, gender discrimination it can occur in many other contexts beyond what most people would consider the obvious.

Inequitable Treatment

Another issue frequently and consistently cited in Phase Three and Four is when an IHE was accused of treating individuals differently based on gender. This could pertain to how policies were applied, participation opportunities that were afforded, how testing was administered or any other form of gender discrimination. In these cases the complainant specifically cited how he/she was treated different than what had been witnessed in the treatment of the opposite gender. Treating genders differently can be applied to a wide range of contexts and rather than focuses on a specific action or behavior, focuses on equality, the central point of the law. The fact that this is cited in complainant letters shows not only a societal understanding for the law's intent, but the potential for it to expand to other contexts. This application of the law means that it could expand to almost any context or set of behaviors as the problem is not the behavior itself, but equality of treatment between genders. The reach of Title IX seemingly knew fewer and fewer boundaries as its potential for application continued to expand.

Findings from Priorities Theme

Complainant priorities, similar to the theme of context, show the fields in which gender discrimination can occur and in which IHEs have responsibility, has continued to expand. This is demonstrated through the expansion in environments (on campus and off campus), the expansion in contexts (academic fairness and treating genders differently) and the expansion in an IHE's responsibility to know about potential gender discrimination (constructive vs. actual notice). The seemingly obvious and egregious forms of gender discrimination such as touching and sexual assault were actually rarely cited. While it could be that barriers to reporting decrease the likelihood that such

instances would be brought forth, the fact that the law is relied on so heavily for other forms of gender discrimination sends an important message. Socio-political movements in defining gender discrimination elements appear to be effective as specific issues are brought to the forefront by those efforts and that is reflected in an increase in their citing in the OCR resolution letters. This is demonstrated as issues such as types of sexual harassment, academic fairness and off campus incidents are brought forward. The power of socio-political efforts and those being reflected in resolution letters may also be indicated by an increase in male reports. The theme of priorities provides great insight into the socially constructed definition of many of the tentacles of gender discrimination.

Theme Three: Response

The third theme is responses. This theme refers to both the IHEs preparedness to respond to gender discrimination and the methods used in the respond to an allegation of gender discrimination. Response practices are of course what create the playing field for interactions between OCR and IHEs. While OCR provides guidance on how an IHE must respond to gender discrimination, an exact recipe to be used is not provided. Each IHE must create its own structure for responding to gender discrimination. This is a daunting task that carries with it a great deal of liability should and IHE go wrong in policy creation. Issues pertaining to IHE response mechanisms were frequently cited by complainants. These provide insight into specific expectations for IHE response to gender discrimination.

Notice

The issue of what constitutes notice is an important one for IHEs in terms of response. Notice refers to when an IHE is expected to take action on a gender

discrimination issue. While this heading does not reflect coded data, it is worth reviewing the distinct change that took place in regards to notice prior to analysis of this theme as an awareness of this is necessary to grasp the importance of many of the elements of this chapter. This is also the foundation for many of the findings that come to light. The definition of notice is pivotal in determining compliance and if the IHE responded appropriately implementing the various elements of Title IX. The shift from actual to constructive notice is one of the most significant events in the history of Title IX. Actual notice refers to formally informing the IHE about an issue of gender discrimination through filing a complaint or clearly notifying an individual with the ability and responsibility to address the complaint. Constructive notice refers to situations where no formal notice of gender discrimination was given, but a reasonable person would have likely known it was occurring. In other words, the IHE reasonably knew or should have known about the gender discrimination even without a formal complaint being filed.

Prior to the 2001 OCR Guidance, IHE's had been operating with the understanding that the criteria set forth in the *Gebser v. Lago Vista Independent School District* Supreme Court case were the criteria by which an IHE would be held responsible for Title IX violations. Those criteria were:

1. The institution must be given actual notice and this notice must have been given to an appropriate person, someone with the power and capacity to act to remedy the situation.

2. Once actual notice is given to an appropriate individual, the institution must act with deliberate indifference and that deliberate indifference resulted in discrimination

3. The discrimination must be so severe, pervasive and/or persistent that it denies an individual's access to an educational opportunity.

However, the 2001 OCR guidance changed this practice. The 2001 guidance clarified the *Gebser* criteria was only true when an individual was claiming monetary damages. An IHE could still be held responsible for a Title IX violation if it failed to recognize a situation where sexual harassment was likely occurring, even without actual notice. Furthermore, if the IHE knew or should have known any form of gender discrimination was likely occurring in any of these environments, it the IHE could have shared responsibility for the environments creation, preventing gender discrimination and addressing its effects, even without being officially put on notice. Environments for which IHEs had responsibility for preventing and addressing gender discrimination continued to grow as did their responsibility for knowing it was occurring, even without actual notice.

Understanding notice however, is just the first step of many in terms of response practices. The resolution letters cite multiple issues in which specific response practices were called into question. Those are outlined below.

Policies and Procedures

Whether an institution had policies in place was frequently cited in complainant letters. Phases Two and Three show that on average the issue of having adequate Title IX policies in place comes up one to two times per year. This may demonstrates societal expectations that IHEs be prepared to handle issues of sex discrimination and that their commitment be evidenced by their readiness to address issues. Furthermore it may say society sees issues of gender discrimination as something that happens regularly enough

that having policies in place is important. The message seemed to be sent that gender discriminatory situations are not anomalies or rare, but rather occur regularly. The expectation that IHEs have policies in place so they may respond quickly was apparent through complainants.

While there are numerous letters that cite specific elements of IHE policies and procedures (such as notification, grievance procedures, response mechanisms), several in particular comment on an IHE utilizing multiple policies. The 1995 Evergreen State College letter is one example. In this case OCR found that while the college followed its process, the process itself was not compliant. The college grievance procedures had differing processes that are based on the status of the respondent. OCR said that using the faculty handbook shifts the focus from resolving discrimination complaints to determining if adverse action should be taken against the faculty member. Furthermore, that determination is made by the faculty member's peers and the accused can affect the makeup of the committee by challenging what members serve on it. So OCR found that the college failed to provide equitable resolution. Likewise, the 2010 Concordia University Irvine letter says that when an IHE has multiple procedures that could be applicable to students' complaints of sexual harassment, this can lead to confusing situations for both the administrators implementing the procedures and the student filing the complaint. Multiple and overlapping procedures can inhibit an IHE's ability to resolve complaints promptly and effectively. For example, should there be a student handbook, faculty handbook and staff policies all meant for addressing issues of sex discrimination, this will likely become overwhelming and confusing.

Elements pertaining to policies and procedures are cited in almost every OCR resolution letter. Policies and procedures vary widely from IHE to IHE and addressing such complaints consume likely the largest amount of OCR and IHE interactions. Despite this, IHEs are free to create their own policies and procedures tailored to their institutional needs, provided they are in compliance with the overarching Title IX requirements.

Inadequate Responses and Investigations.

Also commonly cited were specific issues relating to IHE responses to gender discrimination allegations and investigation practices. One of the highest cited and most consistent issues are those pertaining to inadequate responses. Response methods refer to how the IHE did or did not respond to the alleged gender discrimination in terms of timeliness, response practices, thoroughness, etc. There are fifty-one letters that cite the IHE did not respond adequately and eight letters that cite the IHE did not respond promptly. The reason a complainant felt and IHE did not offer a reasonable response varied widely.

While the reasons for inadequate response allegations varied, the 2006 letter to California Berkeley best explains an overview of OCR's expectations for an IHE's response. In this letter OCR states that a reasonable response involves many factors such as whether a complainant asks that his/her name be kept from the alleged harasser. OCR says that under these circumstances and IHE's ability to respond will be limited. While the IHE still has an obligation to provide a safe environment for all students and needs to take reasonable steps to protect the campus community and/or investigate, should the IHE find it is able to comply with the complainant's request for confidentiality (i.e. the

alleged behavior does not put the individual others at risk) this will understandably limit the IHE's ability to respond and the IHE will be granted some leniency for doing so out of necessity.

Starting in 2000 issues citing inadequate investigations became prevalent and consistent. This meant that the complainant specifically stated the IHE did not investigate appropriately. So while it may have provided other responses that were appropriate, such as offering counseling or change of housing assignment, the complainant thought a thorough investigation was not conducted. The message was sent that simply responding to an issue of gender discrimination and acknowledging its occurrence was not enough. An IHE's responsibility was to respond thoroughly by not only offering supports, but investigation to truly understand the gender discrimination that had taken place. Without a thorough investigation true environmental management to prevent its recurrence could not be achieved.

Complaints about IHE responses and investigations are critically important as they demonstrate societal expectations of IHEs in addressing gender discrimination. The message is sent that IHE's must heavily focus on not just having policies in place, providing training and taking ownership of preventing gender discrimination, but when it does happen the IHE has a huge responsibility to respond thoroughly and appropriately. Great attention must be paid to every step of the response with no investigation being deemed too thorough. IHEs must put great emphasis on offering remedy and support to complainants, being thorough in every step of the response as well as documenting the steps taken to address the complaint.

Retaliation

Retaliation also falls into IHE response issues. Retaliation is among the highest cited and most consistent issues in the Letters of Resolution. There are thirty-eight letters that cite retaliation and they occur relatively evenly across all phases. While due to its' frequency this topic could have been incorporated into the Priorities theme, it has been placed here as it pertains specifically to IHE response practices. Retaliation could mean the complainant felt targeted for making a complaint or suffered negative consequences as a result of making the complaint. Obviously, should a complainant feel he/she experience retaliation, he/she would claim the IHE did not respond appropriately. Analysis of retaliation issues cited in complaints is critically important as they demonstrate OCR's expectations of IHEs as to what constitutes thorough, prompt and appropriate responses. The interaction that takes place between OCRs and IHEs in determining retaliation responses illustrates OCR's standards and expectations for IHEs actions.

The 1999 Fox Valley Technical College letter demonstrates an important element of retaliation in an interesting way that combines it with equitable treatment. The complainant stated a professor sexually harassed her by looking down the front of her shirt, touching her, massaging her making inappropriate comments. Furthermore she said she was tested differently than the men in her class and the professor made disparaging remarks about women's ability to succeed in flight school. The student tried to file a grievance through the formal polices in place, but was denied the opportunity. Fox Valley Technical College chose to resolve the situation through less formal means. She claimed this was retaliation against her based on her sex and so filed a complaint with

OCR. OCR investigated and found that Fox Valley Technical College did in fact have procedures in place, but intentionally chose not to follow them. Fox Valley said they commonly chose not to adhere to the published policies and their history for the past few years demonstrated they had been successful in resolving complaints satisfactorily. OCR said that since Fox Valley Technical College typically chose to detour from their own policies in handling issues of sex discrimination, they did not treat the complainant differently and therefore did not engage in retaliation against her. This also sends an interesting message about the importance of consistency and equity in practice being more important to adhering to an IHE's own published and disseminated policies in determining if retaliation occurred. OCR's finding in this case demonstrates importance of treating both genders equally, even if that means neglecting the IHE's own policies. Equality in treatment is more important than adhering to published policies so much so that it aids in defining retaliation.

The 2001 South College letter specifically defines criteria for assessment of retaliation. That criteria says OCR will (1) determine if the individual engaged in a protected activity, (2) establish if the IHE was aware of the protected activity, (3) evaluate if the IHE took adverse action against the individual, (4) assess if there was a causal connection between the adverse action and the protected activity and (5) seek to find if the IHE can show a legitimate, non-discriminatory reason for the adverse action. If none can be shown, then retaliation is found to have existed. These criteria are routinely cited in letters where retaliation is claimed to have taken place. In each of these allegations, OCR uses those steps to assess the potential for violation. The letters did not demonstrate notable changes in the frequency with which retaliation was cited, the

reasons retaliation was alleged to have occurred, OCRs definition of what constitutes retaliation or change in how OCR assessed for retaliation violations. All elements of this code were surprisingly consistent.

There is a high expectation that complainants be free to report issues of alleged sex discrimination and not be subject to negative consequences for doing so. Society demonstrates expectation of being able to report such issues freely and to be met with a response from the IHE that indicates it is invested in caring for them, addressing the issue and open to hearing about the alleged complaint without retaliating.

Finding from Responses Theme

Analysis of compliance reviews reveals that response practices and policies and procedures were evaluated routinely starting in 1999. These were consistently a focal point for OCR compliance reviews. In fact, this was the most commonly cited area in the compliance reviews. This is not surprising as the socio-political timeline and findings from the theme of context demonstrates this is a consistently changing and broadening area. Policies and practices expanded to mean IHEs must be prepared to handle gender discrimination issues on campus, off campus, in retaliation scenarios and without actual notice. Policies and procedures had to apply to more scenarios and be more accessible. The overall definition remained constant while its application broadened. OCR expectations of IHE policies demonstrated IHEs had to offer policies (including response practices) to a wider range of activities. These elements relating to response demonstrate the pressure placed on IHEs to be ready to address these issues and to do so in a specific and thorough manner. IHE responsibilities for addressing gender discrimination mean being ready to respond quickly with thorough procedures that supported victims and took

an in-depth approach to understanding the genesis of the gender discrimination. IHEs must to use great intentionality in going deeper in every step of the process.

Theme Four: Power

The final theme is power. This theme refers to the power balance demonstrated through OCR and IHE interactions. OCR is tasked with enforcing Title IX and could take several approaches in doing so such as creating as administering punitive responses like withdrawing federal funds, deferring to the IHE authority or taking collaborative approaches to finding solutions. Information about the power relationship between OCR and IHEs is demonstrated in their interactions through the letters of resolution. Their interactions help to clarify what OCR expects of IHEs, what drives how complaints are addressed, what IHEs need to do to stay in compliance and how the two entities work in collaboration or independently of each other. This is the foundation for the analysis and findings of this theme. Insight into expectations, power differentials and interplay are demonstrated through the specific OCR and IHE interactions of investigating complaints, imposing sanctions and compliance reviews. Each of these platforms is explained below.

Compliance Reviews

Perhaps the most logical place to look for information on the power relationship between OCR and IHEs is to analyze the compliance reviews. A compliance review is conducted because the IHE practices have been called into question, the IHE was randomly selected for the review or the IHE requested OCR conduct a review. The compliance reviews offer interesting insights on several fronts. Compliance reviews illustrate OCR actions if an IHE is found not to be in compliance of course. They also offer insight about the gravity OCR gives to issues society sees as the most important (i.e.

do OCR compliance agendas reflect societal priorities?). There are eleven compliance reviews total and they start in 1999.

When looking at the actions taken by OCR when conducting a compliance review, it demonstrates OCR is seemingly willing to be an investigative partner and offer guidance to IHEs in obtaining compliance. After the compliance review is conducted, OCR writes a letter to the IHE outlining the findings. The IHE is given the opportunity to right the wrongs while OCR makes a plan to follow up to assess compliance in the future. This is the action taken with all the compliance reviews. Rather than respond with withdrawing funding, OCR aids the IHE in identifying problem areas and gives the IHE the opportunity to fix the problems by signing a Voluntary Resolution Agreement.

The second piece to be gained from looking at compliance reviews for messages regarding power is that OCR priorities reflect those of complainants. OCR compliance review topics seem to mirror those of socio-political agendas. The compliance reviews start at the time societal expectations for IHE prevention and response to gender discrimination were growing. OCR and societal agendas clearly expected IHEs to be much more proactive in addressing sex discrimination and sent the message IHEs could help prevent it. Socio-political efforts of the time focused on instilling in IHEs they had a responsibility to intentionally create environments free of sex discrimination rather than just react problems. Basically, the pressure for IHEs to take a holistic approach to addressing gender discrimination was growing. This is reflected in the compliance reviews as the reviews themselves began to address more issues. Likewise, socio-political agendas made it clear during this time that gender discrimination was not something that occurred due to individuals' poor choices, but that environmental factors

played a large role permitting various forms of gender discrimination to occur. The focus was shifting from blaming the victim to holding the IHE responsible for creating environments free from sex discrimination. This focus meant IHEs had increased responsibilities to not only address the problem, but prevent it from occurring. This also meant IHEs carried much of the burden in solving the problem and supporting victims. This was reflected in compliance reviews as topics such as hostile environment, policies and response practices were the focal points of the reviews. These issues were also commonly cited by complainants regarding alleged Title IX violations. Those topics OCR chose to review were those that society said were the most important.

OCR seemingly takes the stance of an ally in regards to compliance reviews allying with both the institution by allowing the IHE the opportunity to sign a Voluntary Resolution Agreement as well as allying with society by reviewing those topics society deems the most important.

Investigating Complaints

Starting in the late 1990's issues citing inadequate investigations became increasingly prevalent and consistent. This meant that the complainant specifically stated the IHE did not investigate appropriately. In these instances the complainant desired OCR conduct an investigation as the complainant said the IHE's investigation was not adequate. Issues about power and expectations in the OCR and IHE relationship become apparent by looking specifically at the interactions that take place between IHEs and OCR in investigating complaints. Routinely, before OCR will intervene and conduct its own investigation, the opportunity is given to the IHE to resolve the issue. Several examples follow.

The 1998 University of Southwestern Louisiana, 1999 Florida State University and 2006 Wright Business School letters all state that OCR will not proceed with the investigation because the complaint was filed before the IHE's own investigation, which was following a reasonable timeline, was concluded. When a complainant has filed with the IHE's internal grievance procedures, OCR's response is to close the complaint and allow the IHE process to run its course. Complainants are advised they may re-file their complaints after the IHE's internal grievance procedures close provided the filing takes place within sixty days of the procedures' completion (University of Southwestern Louisiana, 1998). Furthermore, the 1998 University of Southwestern Louisiana letter explains that in these instances of re-filing, OCR conducts a de novo review of the case, meaning they review the information gathered by the IHE without conducting a second investigation and do not take into account the decision made by the IHE. OCR works under the assumption that the IHE's internal proceedings were similar to that which would have been conducted by OCR, unless the complainant specifically states otherwise with allegations of an inadequate investigation. Reports of the internal proceedings are requested and OCR determines if the IHE provided the complainant with comparable resolution to that of OCR's in addressing the allegation.

In addition, there are numerous instances where OCR refuses to initiate an investigation because the time allotted for the IHE to run its own process has not finished. Likewise, if an IHE's investigation process is still going on (and it is taking place in a reasonable time frame) the OCR will refuse to initiate an investigation and allow the IHE the opportunity to finish its own. OCR has a timeline to which complainants must adhere in filing a complaint. This is referenced on multiple occasions. The 2002 letter to

Vatterott College and 2003 letter to Morgan State University explain that complaints must be filed within one hundred eighty days of the alleged discrimination. The 2003 Morgan State University letter goes on to explain an exception to the one hundred eighty day timeline. It says that when the problematic act takes place in what appears to be a systemic and patterned discriminatory practice, OCR may make an exception to the one hundred eighty day filing rule because it is not reasonable to expect the complainant could know the act was discriminatory at the time. In these instances however, the complainant must file with OCR within sixty days of becoming aware of the alleged discrimination. OCR sticks to this timeline as well as indicated in their refusal to investigate complaints filed after the one hundred eighty or sixty day timelines as shown in the 2003 Morgan State University letter.

In investigating complaints it appears that OCR respects and defers heavily to the IHE. OCR allows for freedom of institutional process in complaint investigation procedures, will not intervene on or prematurely investigate a complaint and when possible relies on information presented in the IHEs own investigation rather than conducting one of their own. While the contexts in which gender discrimination could occur and IHE responsibilities for addressing it expanded, OCR has kept the authority and governance in the hands of the IHE. IHEs have been given greater responsibility, but not lost their level of autonomy or seemingly been subject to punitive actions by OCR.

Imposing Sanctions

It is likely that the most nerve-racking situation for an IHE to interact with OCR are those where sanctions (withdrawing federal funding at various levels) will likely be imposed. Thus, any of these resolution letters could be grounds for an interaction that

would result in a sanction being given to the IHE. Should the OCR find the IHE to have violated Title IX that could undoubtedly be a stressful interaction for the IHE. Viewing the OCR and IHE interactions through the lens of finding the IHE responsible and imposing sanctions provides interesting insight on their relationship.

As indicated in the compliance reviews, there are numerous occasions where OCR does not impose sanctions and allows the issue to be resolved by the IHE. This is clearly stated in the 1999 letter to Santa Clara University. In this instance OCR does not investigate because the University signed a Voluntary Resolution Plan. In these instances the IHE agrees to resolve the deficiencies on their own accord. OCR generally indicates they will check in with the IHE at a later date, and there are some letters indicating such follow up occurred, but no sanction is imposed on the IHE.

There are several unique cases that provide insights into OCRs interactions with IHEs in this lens. The 2000 California Polytechnic State University, San Luis is one example. In this instance a female student at California Polytechnic State University filed a complaint with OCR in 2000 saying that the institution failed to take immediate and appropriate action to investigate her allegations of sexual misconduct and implement corrective action. On October 14th, 1999 the complainant wrote a letter to the University President and reported she had been sexually assaulted and sexually harassed from 1997-1999 by another student. Eight days later on October 22nd, the Coordinator of Judicial Affairs contacted the student via telephone and arranged a meeting. The two met twelve days later on November 3rd. Two days later on November 5th the Coordinator of Judicial Affairs contacted the accused student via letter and asked that he schedule an appointment with her to discuss the allegations. No response was received so the

Coordinator made several other attempts. A little over a month and a half later on December 21st the accused student met with the Coordinator of Judicial Affairs. Roughly three weeks after the meeting with the accused, the Coordinator of Judicial Affairs met with the complainant on January 7th, 2000. In this meeting she discussed the results of her investigation with the complainant and explained there was insufficient evidence to support the allegations. Likewise the Coordinator for Judicial Affairs informed the University President that she would not proceed with disciplinary action against the accused. The unique element of this case is that the allegation was very severe, sexual assault and ongoing sexual harassment, but despite taking over two months to make contact with the accused after the complainant filed her report, OCR found that California Polytechnic State University responded promptly. While the delay in follow up between meeting with the accused on December 21st and informing the complainant of the outcome on January 7th can be explained by term break, the two month time period to make contact with an individual who was allegedly continuously engaging in sexual harassment would seem to meet the criteria for a hostile environment. However, OCR said the IHE acted promptly. While OCR guidance on Title IX implementation at the time did not provide specific timeframes on how long and IHE should take to resolve complaints, it was said that it should be prompt. Likewise, upon receiving notice of harassment IHEs carry a responsibility to end the harassment, prevent its recurrence and remedy its effects. Surprising, potentially allowing the alleged issue to continue for over 2 months was considered a prompt response and OCR found in favor of the IHE.

Another example demonstrating OCR's interactions with IHEs is the 2003 Boston University letter. In 2003 a female Boston University student filed complaint with OCR

saying the IHE's processing of her sexual assault was unfair and she was retaliated against because she was sanctioned for alcohol use. The student reported she was sexually assaulted by another student in his room. After reporting the incident the complainant received a letter saying Boston University was sanctioning her for alcohol use and making a false report of sexual assault. The letter explained that no sexual assault charges or allegations were currently under review as there was insufficient evidence and interviews with the accused said it was consensual.

The complainant had a medical exam done that showed there were two rips or tears in her vaginal area and that some sort of sexual contact had occurred. Boston University Judicial Affairs administrators asked the complainant and her attorney twice for medical records, but did not receive them. So no medical evidence was considered in making a determination. Importantly, OCR noted that the administrator handling the case was a "trained investigator" and so without medical evidence turned to interviews. Having insufficient evidence he was forced to make a determination on incomplete information. OCR stated they did not substitute their own judgment for that of the IHE investigator's, but rather reviews the process to ensure it was adequate. In this circumstance, they found it was. OCR also determined that the complainant was not retaliated against by being sanctioned for alcohol use because Boston College had been consistent historically in applying that policy. While OCR questioned that practice and that it could deter reporting, the decision was ultimately up to the IHE. In addition, OCR guidance at the time clearly stated that the complainant and accused must be notified of the outcome in writing. Boston University did notify the complaint of the outcome in writing, but it was in November 2001, a year after her initial filing. Boston

University said they had notified her attorney of the outcome in April, 2001. While OCR said there was room for improvement in their practices that notifying the attorney did still count as providing notice. This letter in particular demonstrates multiple instances where OCR chooses to support the IHE even though they themselves seem to be in disagreement with the IHE practices.

Similarly in the 2003 letter to San Jose City College OCR explicitly stated “Though OCR may have reached a different conclusion, the college conclusion is reasonable”. The OCR standards for imposing sanctions and investigating complaints demonstrate important philosophical foundations on which OCR bases its approach. In regards to imposing sanctions, these letters repeatedly demonstrate OCR routinely provides IHEs the opportunity to rectify problems on their own rather than OCR imposing a sanction. In fact, in some instances if the IHE agrees to sign a Voluntary Resolution Plan to resolve the deficiencies on their own, the OCR even says they will not conduct an investigation.

These and numerous other letters describe instances where OCR could have potentially chosen to impose a sanction on the IHE by withdrawing funding. However, that was not done. Instead, the OCR offered guidance or even deferred to the IHE process, even though OCR stated they questioned the practice or would have found differently. It would seem this would be ideal grounds should OCR choose to take a punitive response and impose sanctions. However, the interactions here do not demonstrate a punitive relationship. OCR philosophically seems to align more with being a teammate and offering assistance to IHEs vs. being a sanctioning imposing and/or punitive body. Despite the OCR’s power and ability to withdraw funding, this is not the

approach that is shown in these letters. OCR shows a willingness to practice what they preach and offer IHEs assistance and guidance in implementing the law. OCR provides IHEs with the benefit of the doubt that they are willing and trying to use best practices in applying a complicated and sometimes subjective law.

Findings from Power Theme

Analysis of the interactions surrounding compliance reviews, investigating complaints, and imposing sanctions all provide insight into the power relationship between OCR and IHEs. To begin, it seems OCR is listening to societal agendas in determining priorities in Title IX implementation as it looks to assess those areas of compliance. Second, OCR grants IHEs the room to conduct and create their own processes thereby deferring to their authority. When complaints arise OCR seemingly handles each on an individual basis taking the unique elements of that case and institution into account. Furthermore, it does not appear OCR is quick to take a punitive stance and impose punishments.

Summary

The data analysis structure aided in identifying four themes to provide an organized approach to extracting valuable information answer the research questions of the study. The theme of context demonstrates that while definitions used for describing gender discriminatory behaviors have remained constant, the settings in which those definitions could be applied has expanded greatly. The theme of priorities demonstrates that the socially constructed definition of gender discrimination on IHE campuses says instances of gender discrimination are not necessarily a reflection of an individual's choices. Rather, the responsibility for gender discrimination is shared, very heavily, by

the IHE. The theme of responses demonstrates that IHEs have seen growth in the areas for which they are responsible in addressing gender discrimination and also a deepening in the required response mechanisms. The theme of power demonstrates that OCR tends to act as an ally to IHEs by not taking punitive action and also to society by ensuring IHEs implement those elements of Title IX deemed to be the most significant. Interestingly, while the themes of context, priorities and response have all reflected expansion, the theme of power has not. While IHE responsibilities have increased on many fronts, OCR has not taken away individual IHE governance or authority. This has remained constant.

As this study aims to answer questions about changes in Title IX over time, Chapter Five will organize, further analyze and condense the findings from the four themes to answer the research questions posed in this study.

Chapter 5: Findings and Implications

Introduction

This chapter offers a review of the study, make meaning of the analysis to discover findings and offer conclusions to answer the research questions. Analysis of the themes brings to light some important elements that flow throughout the research questions. Gender discrimination has expanded in numerous ways including what behaviors constitute gender discrimination, responsibilities carried by IHEs in addressing and preventing its occurrence and expectations in IHE response practices. Gender discrimination has seemingly been an expanding issue. However, despite the ever growing responsibilities and scrutiny, OCR's interaction with IHEs has been one that has kept the power of authority and governance over institutional practices in the hands of the IHE. It appears OCR takes a supportive approach to aiding IHEs in addressing gender discrimination rather than punitive. Arguably that is a good thing. Is important to understand this so IHEs can interact most successfully with OCR and also maintain the positives of the current relationship. Implications for how the findings can be used and suggestions for further research are discussed.

Summary of Study

This study aims to understand the socially constructed definition of gender discrimination by analyzing how Title IX is implemented in practice at institutions of higher education. Specifically, resolution letters from the OCR to IHEs were read, coded and analyzed for themes to identify social forces that drove expectations for IHEs implementation of Title IX. These themes were then overlaid with a socio-political

timeline of major developments pertaining to Title IX and viewed through a social constructionist lens to answer the following research questions.

1. How have the types of conduct determined to be gender discrimination changed over time?
2. How have expectations of IHE responsibilities for gender discrimination issues changed over time?
3. What gender discrimination issues have surfaced as priorities in the implementation of Title IX, as reflected in OCR resolution letters?

Findings

Question 1: How have the types of conduct determined to be gender discrimination changed over time?

OCR definitions of types of gender discrimination, such as sexual harassment, hostile environment and retaliation have actually remained relatively stable throughout the decades. Likewise, the behaviors determined to be gender discrimination have stayed fairly consistent. What has changed however, are the contexts in which gender discrimination can take place. The definition of gender discrimination expanded in such a way that it can occur in a wider range of settings. Gender discrimination can occur in the classroom, off campus, in the events occurring after an allegation, between employees and students, between students, in grading and testing procedures, in athletics and absolutely any educational activity including the application of the policy. Gender discrimination evolved from something that could occur only in limited controlled settings to something that can take place in virtually any setting. The behaviors or elements necessary for an issue to be considered gender discrimination stopped being

connected to the context in which they occurred. A behavior came to be considered sexually harassing if it limited or denied a student's opportunity to benefit from any educational program or activity. The context in which the harassment occurred stopped being a defining factor if the behavior constituted gender discrimination. Gender discrimination can now occur in any context and IHEs have responsibilities regardless of the context in which it occurred. All the while, though the contexts for gender discrimination and its application expanded, the core definitions of types of gender discrimination remain the same. In addition, OCR keeps a great deal of power in the hands of the IHE and takes intentional actions to provide the IHE with the first opportunity to investigate and rectify problems. This practice of keeping power in the hands of the IHE is demonstrated consistently over the history of the letters.

Question 2: How have expectations of IHE responsibilities for gender discrimination issues changed over time?

The expansion of the contexts in which gender discrimination can occur was mirrored in expectations of IHE policies and procedures. The context in which the behaviors can be considered gender discrimination widened and IHE realms of responsibility correspondingly increased. Policies grew as they had to be more easily accessible, readily available and able to be applied to more scenarios. Policies for on-campus activities, off-campus activities, classroom and academic issues, student on student, employee on student, third party on student, retaliation, and many others had to be created and in place.

The need for expansion of policies and procedures however did create a new focus for gender discrimination. The growth in settings where gender discrimination could occur

combined with an increased willingness to talk about it was met with students more eager to apply the law. This meant the expectation that IHEs have policies in place was much more important now than ever before and that importance continues to grow. OCR compliance reviews became much more expansive as they looked at IHE policies much more holistically.

One of the focal points for IHEs in addressing gender discrimination that has seen the most growth revolves specifically around issues of hostile environments. OCR has disseminated several guidance documents to define hostile environments and students have readily applied them. The focus on hostile environment has shifted IHE responsibilities from simply reacting appropriately to issues of gender discrimination, but to taking steps to ensure healthy, non-discriminatory environments exist. IHEs are now responsible for creating and maintaining environments free from gender discrimination, not just responding to violations. In effect, IHEs have shouldered a bigger burden and have been required to take more ownership in proactively ensuring gender discrimination does not take place. The message is clear that gender discrimination happens often on IHE campuses and IHEs must be prepared and preventive.

Interestingly though, OCR has historically and continues to take the stance that it is not necessarily out to punish IHEs. Rather, OCR very frequently allows and encourages IHEs to seek voluntary resolution for potential violations. OCR defers frequently to the findings of the IHE investigation rather than imposing their own. In some instances OCR even states it may have found differently, but supports the IHE decision. OCR regularly gives IHEs the opportunity to rectify issues without sanction. This was followed by several guidance documents and effort to clarify expectations. OCR has demonstrated it

too understands the struggles with the evolving law. OCR has very much taken the stance as a partner, supporter and teammate of IHEs vs. a punishing body.

In summary, IHEs have grown to carry a larger responsibility for the occurrence of gender discrimination as the expectation IHEs create environments free for gender discrimination has continued to grow in terms of the contexts and the IHEs recognition of the potential for gender discrimination to occur. In addition, IHEs response requirements have grown as they are expected to address instances on gender discrimination with greater supports to complainants, increasingly through investigations and greater precautions to prevent retaliation. This responsibility is not being imposed in a punitive way however as OCR continues to keep a great deal of power in the hands of the IHE. While the definitions of gender discrimination and IHE responsibilities have expanded, IHEs have maintained the same level of governance and authority over their institutional processes.

Question 3: What gender discrimination issues have surfaced as priorities in the implementation of Title IX, as reflected in OCR resolution letters?

One thing that has been clear is society's stance that gender discrimination happens often, in many settings and needs to be a priority for IHEs. IHEs must be prepared to react to instances of gender discrimination, but also take measures to prevent its occurrence. Expectations for preventive measures, education for both students and administrators, investigations and response practices continue to increase. IHEs are responsible for creating environments where gender discrimination is less likely to exist. Furthermore, IHEs are to be familiar enough with their own institutional cultures so they recognize issues where gender discrimination may be occurring or likely to occur, even

without being given formal notice. Pressure for IHEs to “do something” about the prevalence of the many forms of potential gender discrimination on their campuses continues to increase.

Also evident, is that gender discrimination is far more than the easily identified issue of sexual assault. In fact, very few Title IX complaints revolve around issues where assault or even touching were cited. Most commonly, students cite faculty-on-student sexual harassment as the context in which gender discrimination occurred. Issues where a power imbalance exists is where students have tended to lean more heavily on Title IX rather than using it to afford them supports after student on student issue. This was true for both male and female student reports. Furthermore, students want to be able to report alleged violations freely as they commonly cite retaliation as an instance where they feel their IHE failed to respond appropriately to their concern. Whether or not their allegations are justified, valuable information can be gathered here to help IHEs in training and preventive measures to avoid Title IX violation.

Overall issues of sexual harassment appear to be those which society pivotally defines gender discrimination and this has been true through the history of Title IX. Gender discrimination has been defined as an act that affects a group of people rather than a single individual. The focus is on the rights of all to benefit from educational opportunities without the barriers of gender discrimination. Priorities also demonstrate IHEs must be prepared to respond extremely thoroughly to allegations of gender discrimination. However, priorities appear to say IHEs have responsibilities beyond just thorough responses, but also to intentionally create environments free of gender discrimination.

Implications

Title IX continues to gain attention. Likewise the application of the law continues to expand. Support for ending sexual misconduct and gender discrimination is a powerful bi-partisan political platform and sets an easy foundation for advocate movements. Gender discrimination issues get increased attention while encouraging students to speak out more and more, however the incidence of the problem does not appear to be decreasing. With all these factors at play, it is likely Title IX issues will continue to rapidly gain momentum and expansion in application and IHE responsibilities is seemingly inevitable.

The findings of this study illustrate in many ways it is the victim's experience that defines gender discrimination. It is this experience that sets societal priorities, sets the stage for implementation of the law and that in turn drives institutional responses. While the written law may dictate certain expectations and requirements for IHEs in implementing Title IX, an IHE's best attempt at enacting the expectations in ways the public wants is to pay close attention to societal priorities. Oftentimes the law in practice looks much different than the law makers' original intent when writing it. Policy in practice is very much a democracy. Priorities and intentions of the law makers are not always in line with those of society. IHEs need to pay close attention to issues brought forth by their campus community in the implementation of Title IX. The frequency at which issues arise and the subsequent spurring of court cases and activist movements indicate society's true priorities and expectations for policy in practice. The outcome of conflicts such as court cases or OCR resolution letters is in many ways not as important as the issues brought forth. Whether the IHE was found at fault is only a piece of the

guidance that can be gathered from these proceedings. Stopping there is merely scratching the surface. Instead, great attention should be paid not to the outcome, but to the nature of the incident. Questions need to be asked regarding what societal priorities were brought forth in this dispute and what issues continue to surface. Most recent media attention addresses student-on-student incidence of sexual misconduct. This topic seems to be the driving force behind Title IX momentum, even though the past OCR resolution letters focused mostly on faculty-on-student harassment. IHE's need to expand their focus beyond policy implementation and dispute outcomes. IHEs need to include attention to messages sent by society about their expectations on how gender discrimination issues should be prioritized and addressed on their campuses.

It is evident that the expectations for IHE responses to gender discrimination are expansive. It may be wise for IHEs to air on the side of caution and put great emphasis on offering remedy and support to complainants as well as documenting the steps taken to address the complaint. IHEs are expected to not only be prepared to respond to a wide range of potential types of gender discrimination, but should create environments in which it cannot, or at least is unlikely to occur. IHEs shoulder a responsibility for not only addressing the problem, but preventing it.

However, there are several inherent problems with relying on Title IX and IHEs to fix the problems of gender discrimination, specifically sexual misconduct. Laws are reactionary by nature. They are created to address the tentacles of an existing social problem. Students come to campus with pre-existing views on gender, power and behaviors surrounding sexual relationships. Title IX is reactionary and addresses a symptom of the social problem, but not the root cause of the issue. It cannot fix what

created the problem in the first place, it can merely address the symptoms. One of the most recent expansions in Title IX (as well as other laws addressing sexual misconduct on IHE campuses) is the expectation that IHEs take preventative measures. Expecting IHEs to be the starting point for decreasing sexual misconduct is in many ways setting them up for failure. The cause of the problem is not necessarily the IHE environment, after all sexual misconduct occurs in situations beyond higher education. IHEs alone did not create the issue and cannot eradicate it. However, the liability at stake continues to grow. IHEs have greater pressure to address, investigate, react to and remedy instances of gender discrimination with ever-growing public scrutiny. With this in mind it is likely IHEs will rely on legal aid more and more. This in turn puts a strain on already tight resources. Many IHEs will likely find themselves in a situation where they have to cut other programs and stretch already thin resources further to keep up with the Title IX demands.

Case Study

The lessons learned from this study can be applied to a speculative analysis of a recent and unfolding alleged Title IX violation. What follows are the details of a recent Title IX case and suspected subsequent actions that may unfold based on the findings to the research questions posed in this study.

In the spring of 2015 James Madison University (JMU) came under lawsuit for an alleged Title IX violation. The complainant, Sarah Butters, is suing JMU for mishandling her report of sexual assault and thereby violating her Title IX rights. In the spring of 2014 Butters had filed a Title IX complaint with OCR, which resulted in JMU being placed under federal investigation for its handling of gender discrimination cases. The

details of the case are as follows. Butters stated she was sexually assaulted by three other JMU students during a spring break trip to Panama City Beach, Florida in March of 2013. The incident was recorded on video and that video was later passed around the JMU student body. Butters was intoxicated during the incident and does not remember it, but is shown on the video telling the men to stop. All three men were members of Sigma Chi fraternity and were immediately expelled from the fraternity. Butters also sought help from the JMU's student judicial system. However, Butters said she was discouraged from proceeding with the complaint by administrators. Butters reported administrators told her the judicial process takes time and effort on the victim's part and she would have to relive the event by explaining the facts of the case both in writing and in person. Butters also stated administrators informed her of the range of sanctions that could be imposed should the men be found responsible, but said expulsion was rare and highly unlikely. Butters asked JMU to handle the case without her involvement, but reported JMU said it would not investigate the case or handle it without her participation. Butters reported continuing to press JMU to address the situation. Three hundred and seventy two days after her report to JMU officials, a punishment was handed down to the men involved. All three were given post-graduation sanctions that allowed them to graduate from JMU, but banned them from returning to campus again post-graduation. Butters stated no efforts were made to prohibit interaction between her and the accused. Butters ultimately withdrew from JMU as she stated struggling emotionally and academically as a result of the assault. The Family Educational Rights and Privacy Act (FERPA) has prevented JMU from sharing details and its' side of the story, but with a lawsuit filed, more information should come to light.

Applying the findings of this study to this case there are several issues that have or are likely to take center stage. To begin with, this case exemplifies the contextual expansion of Title IX in terms of location. While the assault happened off campus, the effects of the assault were brought back to campus and JMU had control over the harassers. Very clearly, OCR resolution letters state IHEs do in fact carry responsibility in such instances. Secondly, very likely to be investigated will be the accessibility of the Title IX policies. Were these in place, well-advertised and were the administrators familiar with them? Policies will likely then be assessed on two levels; (1) did JMU follow its established policies and (2) were the policies themselves appropriate and in compliance? OCR will likely rely heavily on JMU's records and also conduct interviews with administrators to find their side of the story regarding why Butter's moving forward with a judicial process was seemingly discouraged. The third issue at hand may likely be investigating the response taken by JMU. The OCR investigation will likely attempt to assess thoroughness of the response. If it is as Butters said, that JMU said it would not conduct an investigation without her cooperation, JMU would likely be found in violation. OCR has clearly stated IHEs have a responsibility to investigate issues to ensure their environments are free from gender discrimination. The final element likely to take center stage, for both OCR and the legal case, will be the assessment of hostile environment. This topic in particular was a focal point of the letters of resolution. Furthermore, Supreme Court cases of the past have supported OCR's stance that IHEs have an obligation to create environments free from threat of gender discrimination. The fact that these three men were allowed to remain on campus may be a focal point of the

investigation. Their presence could be determined to have contributed to a hostile environment for Butters or even pose a threat to the rest of the campus community.

However, as JMU has not yet had the opportunity to share its side of the story, there are still many facts missing before too much speculation can be done. In summary, the issues likely to be most important are if the policies were in place and followed, if a thorough response was conducted (that included an investigation and supports for the victim) and if environmental concerns (such as hostility or threat) were addressed. If OCR's past behavior is indicative of the future, OCR will defer to JMU processes as long as they are in compliance. If not, OCR will work with JMU allowing the institution the opportunity to sign a voluntary resolution agreement and amend its policies and practices as needed. With the ever-increasing pressure and scrutiny on IHE campuses to address all forms of gender discrimination however, there is always the chance stances could change and JMU be made an example to teach other IHEs a lesson.

Future Research

Social issues surrounding Title IX are again in turmoil. Vice President Joe Biden and Secretary of Education Arne Duncan made sexual misconduct on college campuses one of their top agenda items. The April 2011 Dear Colleague letter, 2014 reauthorization and changes in the Violence Against Women Act and March 2014 updates to the Campus Sexual Assault Victims Elimination Act (Campus SaVE) all intertwine to establish new expectations and requirements for how Title IX will be implemented and enforced. In April 2015 OCR issued a new Dear Colleague Letter stating Title IX Coordinators should report directly to the President, be independent of other job responsibilities, have deputy coordinators, be very visible on campus and have

thorough training and support. This sets the stage for further expansion of the law. However, the true answer as to how this will impact college campuses the most will be evident in how students at IHE's choose to rely on the laws. The social pressure they create will drive the most drastic changes seen in the laws and their implementation. IHEs need to focus not only on the expectations set forth by the law of Title IX, but seek to understand the issues with which the campus community engages Title IX. Sociopolitical Phase Five is just now taking off with a great focus on victim-centered approach and student-on-student assault. To understand societal definitions of how that should be enacted a close look at these issues can help IHEs reach the most current definitions of gender discrimination and implement practices proactively. A continuing assessment of the sociopolitical scene including court cases, activist movements, political agendas and issues brought forth to the OCR will provide insight into how IHEs should mold their campuses and policies to best serve their community needs.

While in the past, OCR resolution letters indicate OCR has been an ally to IHEs, this could very well change. Future research should focus on the evolving relationship between OCR and IHEs. Studies surrounding IHE's most recent experiences and perceptions in working with OCR on complaint investigations could provide fruitful insight into what the future holds. Likewise, this study looks only at OCRs interactions with IHEs in regards to Title IX. However, there are other laws that touch on sexual misconduct issues and dating violence on IHE campuses such as the Campus Sexual Violence Elimination Act (part of the Jeanne Clery Act). Attention needs to be paid to how these laws are implemented by IHEs and how they are relied on by IHE students as they overlap and interact with Title IX. Finally, another avenue to better understand the

unique culture on IHE campuses would be to analyze OCR complaints in light of institutional demographic data such as location, size, type, etc. Such research could provide insight into differences and similarities between IHEs and institutional cultures thereby better preparing IHE response mechanisms and better informing preventative measures. Future research should focus on the current socio-political landscape, fleshing out the many other opportunities for understanding the OCR and IHE relationship, how other laws relating to sexual misconduct interact with Title XI, and better understanding specific IHE cultures.

Summary

The purpose of this study was to better understand how the socially constructed definition of gender discrimination has been enacted through Title IX and thereby impacted IHE practice. Overall it has been consistently apparent that issues related to gender discrimination will continue to grow, whether it is an expansion of the behaviors determined to be gender discrimination or an increase in IHEs ownership of the issue through more thorough response and preventive measures. Gender discrimination behaviors, contexts, responses, educational efforts and preventive measures continue to snowball. In the past, students have most readily looked for opportunities to apply Title IX in faculty on student interactions where there is a perceived power imbalance. OCR has in the past taken a role as an advocate to IHEs and offered assistance rather than taken a more punitive stance.

Most recent media coverage on gender discrimination and Title IX issues talks about supporting victims appropriately in responding to the initial report, conducting the investigation, administering accountability proceedings and creating supportive

environments. In addition it is generally issues of student-on-student sexual misconduct that get media attention. Perhaps this is signifying a new shift in Title IX focus. Socio-political efforts of current day indicate the next big focus will be on a victim-centered approach and addressing the student-on-student sexual culture. IHEs will likely benefit from looking at the current socio-political landscape and combining that momentum with the past knowledge that faculty on student interactions are where this interplay could also formally take place. Likewise, history has certainly demonstrated that regardless of media coverage, it will be important IHEs have solid policies in place for employee on student issues with a heavy focus on complainant supports. IHEs can hope, as has been true in the past, OCR will continue to offer guidance and support for IHEs to implement policy rather than imposing punishments as the next chapter in Title IX begins. At some point though, the time may come where an example is made of an IHE to send a message to others.

Appendix A

Title IX Socio-political Timeline

Phase 1: Development of Title IX

- 1960's – 1980's – The Civil Rights, Victim's Rights, Feminist and Rape Reform Movements all set the socio-political scene for the development of Title IX. Sexual Harassment is viewed as a violation of Civil Right and therefore a Federal Crime. Special attention to victim treatment, specifically, treatment of sexual assault victims emerges
- 1980s - Steps are taken to increase the enforcement powers of Title IX. Sexual harassment is no longer seen as a crime against an individual. Instead it is seen an act of discrimination against an entire group. Title IX becomes the avenue for addressing these issues in Higher Education. The definition of what constitute gender discrimination evolves and widens.

Phase 2: 1990's: Increase in Title IX Litigation and Gebser Criteria

- 1990's - Students started to rely on and use Title IX more in gender discrimination issues. Pressure to really pay attention to issues of sexual harassment on IHE campuses increases. Title IX sexual harassment cases see a huge increase in litigation.
- 1992 - *Franklin v. Gwinnett County Public Schools* Supreme Court case rules Title IX does allow for monetary damages to be awarded if an institution demonstrates deliberate indifference
- 1998 – *Gebser v. Lago Vista Independent School District* Supreme Court case establishes a strong ground work for institutional liability and Title IX. Three criteria are set for an institution to be responsible for a Title IX violation and potential monetary damages
 - 1. The institution must be given actual notice and this notice must have been given to an appropriate person, someone with the power and capacity to act to remedy the situation.
 - 2. Once actual notice is given to an appropriate individual, the institution must act with deliberate indifference and that deliberate indifference resulted in discrimination
 - 3. The discrimination must be so severe, pervasive and/or persistent that it denies an individual's access to an educational opportunity.
- 1993-2001 –The media chatter over sex issues is constant. Feminist activism during this time is prominent and spurred by both First Lady Hilary Clinton's agendas as well as presidential sex scandals.
- Late 1990's - Public awareness and concerns over sexual assault on college campuses becomes increasingly prevalent. Pressure for IHEs to respond and address the problem increases. Women's groups come together to say sexual harassment in schools is one of their top agenda items and say Title IX had done little to affect change in that arena. IHE policies pertaining to sexual assault are lacking. Institutions struggle to create gender discrimination polices that keep them in compliance, correctly interpret Title IX and account for recent court rulings.

Phase 3: OCR Guidance on Title IX

- 1997 OCR issues Title IX implementation guidance titled “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties”. 1997 Guidance says:
 - Sexual harassment is defined in 3 categories; “ 1) quid pro quo harassment, 2) creation of a hostile environment through an employee's apparent authority, or 3) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority
 - If sexual harassment occurs in any of these 3 contexts, the institution has Title IX obligations to take immediate action to remedy the harassment.
 - For a behavior to be considered sexually harassing it must be sexual in nature and sufficiently severe, pervasive or persistent enough to limit or prevent a student from participating in an educational program or activity
 - An institution can be held liable for a Title IX violation if a responsible employee (one with authority or opportunity to address the harassment) is made aware of the harassment or if they should have known based on reasonable care
 - Explains that once an institution had notice of the harassment, it is responsible for taking immediate and appropriate action to determine what occurred. Steps must be immediately taken to end the harassment, eliminate hostile environments and prevent the harassment from occurring again.
 - If the institution has knowledge of sexual harassment, it has a responsibility to respond in this way even if the harassed student has not made a formal complaint or asked that action be taken
 - Instructions for prompt and equitable grievance procedures are given
- 2001 - OCR again issues Title IX implementation guidance titled “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties”. 2001 OCR Guidance says:
 - An IHE can be held responsible for a Title IX violation even without actual notice. The actual notice and Gebser standards were only meant to say that criteria is necessary for private action and monetary damages. Not that it was the only way an IHE could be held responsible for a Title IX violation. IHEs still have a responsibility to recognize situations where sexual harassment was likely occurring, even without receiving actual notice.
 - The 3 categories of harassment laid out in the 1997 guidance are no longer the basis for defining harassment. Now, a situation could be defined as sexually harassing as long as it limited or denied a student’s opportunity to benefit from an educational program or activity on the basis of sex. The standard of severe, pervasive or persistent in determining the level of harassment still stood, however the context in which it could take place was much broader.

- A responsible employee was not just someone with a duty to report and/or the authority and power to act, it was also any individual a student could reasonably believe had such authority or responsibility.
- Training employees on how to respond to issues of sexual harassment was important
- The criteria the OCR would use to determine if an institution was in violation of Title IX would be:
 - 1. Does the school have a disseminated policy prohibiting sex discrimination and effective grievance procedures
 - 2. Did the school appropriately investigate or otherwise respond to allegations of sexual harassment
 - 3. Did the school take immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects

Phase 4: Title IX and Constructive Notice

- 2006 – In *Simpson v. University of Colorado* the Supreme Court rules that an institution can be held responsible for a Title IX violation on the basis of constructive notice – i.e. they knew or should have known the harassment was taking place/had the potential to take place even without being given actual notice.
- 2007 – In *Williams v. Board of Regents of the University System of Georgia* the Supreme Court affirms their ruling set in the Simpson case demonstrating the importance of constructive notice

Phase 5: Present Day and Victim Focus

- 2009 – Vice President Joe Biden’s interest campaign claims to combat an educational and workplace culture that is permissive of sexual harassment
- 2011 – The OCR issues Title IX guidance in the form of a Dear Colleague Letter. The 2011 Dear College Letter says:
 - Educational institutions should take a more aggressive stance in addressing sexual harassment issues while enhancing equity and preventing re-victimization.
 - institutions need to be more aggressive in investigating and adjudicating allegations of sexual assault and harassment
 - Heavy emphasis is placed on prompt and equitable procedures which allow both the accused and accuser equal opportunities in proceedings including witnesses and appeal rights.
 - Issues of sexual harassment should seek to be resolved in a 60 day time frame
 - Institutions need to take greater care to protect confidentiality
 - A victim’s desire for confidentiality does not alleviate and institutions requirement to investigate, end the harassment, prevent its recurrence or remedy its effects.
 - The appropriate standard of proof in gender discrimination cases is preponderance of the evidence

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