

Title IX and Gender Stereotype Theory: Protecting Students from Parental Status Discrimination

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INTRODUCTION

Students who are parents are being discriminated against on the basis of their parental status by educational institutions.¹ Mothers face stereotypes that being committed students or employees makes them bad mothers and conversely, that being committed mothers makes them bad students and employees.² Fathers face different stereotypes, including that they are uncommitted students and employees when they take family leave, because childcare is still regarded as a feminine role.³ However, despite these co-occurring stereotypes, a cultural bias exists against mothers, with employers rating “fathers as the most desirable employees” but holding “mothers to harsher performance standards.”⁴ This cultural bias can result in a “motherhood penalty,”⁵ particularly in the education context, where pregnant and parenting women face discrimination, harassment, and other barriers that make it hard for them to succeed.⁶

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1. When referring to “students,” this Comment includes students in high schools, universities, colleges, and professional schools. Parental status discrimination is rampant throughout educational facilities as a whole, often impacting both post-doctoral students and employees as well. See Colleen Flaherty, *Helping Postdocs with Children*, INSIDE HIGHER ED (June 22, 2017), <https://www.insidehighered.com/news/2017/06/22/survey-parent-postdocs-reveals-lack-access-paid-parental-leave-pressures-return-work> [<https://perma.cc/Y6V5-SEUY>].

2. Zócalo Public Square, *What Single Policy Could Ease Americans' Time Crunch?*, TIME (May 29, 2014), <http://time.com/106778/what-single-policy-could-ease-americans-time-crunch/> [<https://perma.cc/4JN9-YEHZ>].

3. *Id.*

4. Claire Cain Miller, *The Motherhood Penalty vs. the Fatherhood Bonus*, N.Y. TIMES (Sept. 6, 2014), <https://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html> [<https://perma.cc/MA4K-QKDC>].

5. *Id.*

6. See generally NAT'L WOMEN'S LAW CTR., LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO ARE PREGNANT OR PARENTING 1 (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf [<https://perma.cc/BGT8-TQGQ>].

Research has shown that when Title IX of the Education Amendments of 1972 (Title IX) is not enforced, unlawful discrimination surrounding pregnancy and parenting can cause dire effects on students' education.⁷ Student parents experience parental status discrimination when they are denied admission to educational institutions based on their status as parents,⁸ excluded from national honor society organizations after becoming pregnant and having children outside of wedlock,⁹ kicked out of school upon becoming pregnant,¹⁰ threatened with detention due to violating dress code requirements out of necessity related to their pregnancy,¹¹ and prevented from participating in school activities because they have "too many excused absences" due to their child's illness or hospitalization.¹²

Moreover, the motherhood penalty can manifest in structural barriers and discrimination that prevent parenting women from realizing their potential and can force parents to reluctantly leave school.¹³ Young women who drop out of school due to pregnancy report that they would have remained in school if they had received greater support from adults.¹⁴ Indeed, women who return to school while parenting do everything they can to balance the responsibilities of parenting and education, despite being told by others that "it just won't work."¹⁵ While federal regulations are slowly establishing stronger rights for working mothers, these protections are not being implemented in the world of academia.¹⁶ The burden falls on the student to find some way around parental status discrimination, rather than on the institution to implement policies to prevent parental status discrimination from happening in the first place.¹⁷

7. See, e.g., Linda Mangel, *Pregnant and Parenting Students Are Still Being Pushed Out of School*, ACLU WASH. (Mar. 31, 2011), <https://www.aclu.org/blog/mass-incarceration/pregnant-and-parenting-students-are-still-being-pushed-out-school?redirect=blog/womens-rights/pregnant-and-parenting-students-are-still-being-pushed-out> [https://perma.cc/9BGD-YSVA].

8. E.g., *Tingley-Kelley v. Trs. of Univ. of Pa.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010).

9. See generally *Chipman v. Grant Cty. Sch. Dist.*, 30 F. Supp. 2d 975, 979 (E.D. Ky. 1998).

10. NAT'L WOMEN'S LAW CTR., *supra* note 6, at 1.

11. *Id.* at 3.

12. *Id.*

13. *Id.* at 1.

14. Mangel, *supra* note 7.

15. *Id.*

16. Ariane Panzer, *The Maternal Wall Bias*, SYNAPSE (Mar. 27, 2017), <https://synapse.ucsf.edu/articles/2017/03/27/maternal-wall-bias> [https://perma.cc/JUN2-QVJK].

17. See *id.* (writing that post-doctorate students and graduate students put pressure on themselves when "there isn't a policy to tell them what sort of leave to expect or what sort of accommodations can be made in exceptional circumstances [The] burden falls on the postdoc to find some way

Title IX, a federal civil rights law, protects parenting students from sex-based discrimination; however, very few court decisions relating to the rights of parenting students exist.¹⁸ As a result, many students are unaware of the scope of Title IX's protections.¹⁹ Specifically, "[a]fter giving birth, few students seek to enforce their Title IX protections since very few of them even know they can complain on those grounds. At many colleges and universities, there are no published procedures on filing complaints and no Title IX coordinators to handle them."²⁰ The protections provided by Title IX, although minimal,²¹ are crucial.²² The equal treatment and support that Title IX mandates is critical to ensure that women have equal access to education and that young fathers can remain engaged in their child's life while pursuing their education.²³ However, despite Title IX's prohibition on sex discrimination, educational institutions continue to discriminate against student parents.²⁴

Evidence of gender stereotypes has been useful in establishing claims under Title VII of the Civil Rights Act of 1964 (Title VII), the federal employment discrimination statute.²⁵ Parental status discrimination is not

around this discrimination rather than putting the onus on the institution to ensure that this isn't happening to begin with.").

18. See generally NAT'L WOMEN'S LAW CTR., *supra* note 6.

19. See NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 40: WORKING TO ENSURE GENDER EQUITY IN EDUCATION 55 (2012), <http://www.ncwge.org/TitleIX40/TitleIX-print.pdf> [<https://perma.cc/Q3MD-W56W>]; Mangel, *supra* note 7 ("[T]he pregnant and parenting students aren't the only ones empowered by this information . . . teachers, nurses, social service providers and others are always shocked to hear that the law actually is in place to protect the pregnant and parenting student.").

20. Mary Ann Mason, Opinion, *Title IX and Babies: The New Frontier?*, CHRON. HIGHER EDUC. (Nov. 29, 2012), <https://www.chronicle.com/article/Title-IXBabies-The-New/135936> [<https://perma.cc/5REJ-HMTW>].

21. See generally Elizabeth M. Hady, *The Absence of Parenting Students' Rights: How and Why Title IX Tolerates Discriminatory Attendance Policies*, 21 CARDOZO J.L. & GENDER 95 (2014).

22. See U.S. DEP'T OF EDUC., SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, at 4 (June 2013), <https://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf> [<https://perma.cc/ZMN2-X5CQ>] ("Since the passage of Title IX, sex discrimination—including discrimination on the basis of pregnancy, child birth, and parental status has been prohibited. Encouraging pregnant and parenting students to stay in school will have a positive effect on their lives and their children's lives. The nation as a whole will benefit from having a generation of young adults who are better educated and more economically self-sufficient.").

23. NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 19.

24. NAT'L WOMEN'S LAW CTR., *supra* note 6, at 4–14.

25. See generally *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (May 23, 2007), <https://www.eeoc.gov/policy/docs/caregiving.html#background> [<https://perma.cc/82V6-GYB5>].

a claim in itself, but is instead considered a “sex-plus” claim.²⁶ These sex-plus claims under Title VII can be established by evidence of gender stereotypes.²⁷ A gender stereotype “is a generalized view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by men and women.”²⁸ Gender stereotypes are pervasive within the education system and, as this Comment asserts, result in parental status discrimination.²⁹

Gender stereotypes that are common within both the employment and education context are often subtle. In the academic arena, educators and institutions risk violating Title IX when they stereotype parenting students as low academic achievers.³⁰ For example, in the medical school context, female students have been told that “they should not go into some surgical specialties if they want to have a family,” and that surgical careers are “too stressful—[they] looked more like a family doctor—and besides that [they] might be a ‘distraction’ in the operating room.”³¹ The legal profession and legal academia are not immune from gender stereotypes.³² In fact, law students themselves have been found to hold implicit gender biases that associate men with legal careers and women with the home and family.³³ Implicit biases work to fuel the unconscious stereotypes,³⁴ including the gender stereotypes surrounding parenting women that can result in Title IX violations.

26. *Infante v. Ambac Fin. Grp.*, No. 03 CV 8880 (KMV), 2006 WL 44172, at *5 (S.D.N.Y. Jan. 5, 2006) (stating that allegations that the plaintiff was “discriminated against on the basis of presumed conformity to a gender stereotype that she would stay home with her children can be evidence in support of a so-called ‘sex plus’ claim on the basis of gender discrimination under Title VII”).

27. See generally *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, *supra* note 25.

28. *Gender Stereotyping*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx> [https://perma.cc/8RX8-GPM6].

29. See generally, NAT’L WOMEN’S LAW CTR., *supra* note 6.

30. NAT’L WOMEN’S LAW CTR., *supra* note 6.

31. Jessica Leeder, *Investigator Finds Culture of Disrespect, Harassment at MUN Medical School*, GLOBE & MAIL (July 16, 2018), <https://www.theglobeandmail.com/canada/article-investigator-finds-culture-of-disrespect-harassment-at-mun-medical/> [https://perma.cc/8XNQ-NU54] (discussing an internal report regarding sexual harassment concerns at a Canadian medical university).

32. Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 2 (2010) (“Scholars have argued that due to negative stereotypes portraying women either as workplace cutthroats or, conversely, as secretaries or housewives, decision-makers continue to subordinate women to men in the highest levels of the legal profession.”).

33. *Id.* at 32.

34. *Implicit Bias*, PERCEPTION INSTITUTE, <https://perception.org/research/implicit-bias/> [https://perma.cc/CKP8-X2UZ].

Similarly, in the employment sector, employers risk violating Title VII when they deny promotions or opportunities to parents based solely on their status as a parent.³⁵ Particularly, research shows that pregnant and parenting women may be denied opportunities based on the assumption that they are caregivers first and employees second.³⁶ For example, the discrimination may materialize in a lack of proper facilities to pump breastmilk or in comments about whether parenting women should be home with their children.³⁷ Supreme Court Justice Ruth Bader Ginsburg encountered the effects of these stereotypes when she found herself “shut out” from job opportunities upon her graduation from law school: “I was Jewish, a woman, and a mother. The first raised one eyebrow; the second, two; the third made me indubitably inadmissible.”³⁸

This Comment asserts that students who experience discrimination on the basis of parental status have a cause of action under Title IX by using the gender stereotyping theory that is common in Title VII analysis as illustrated by *Tingley-Kelley v. Trustees of the University of Pennsylvania*. Part I will first provide an overview of the applicable law surrounding Title IX and Title VII. Part II will briefly summarize application of the gender stereotype theory and the applicable case law that provides the legal framework for this proposition. Part III will detail how the Title VII framework can be followed to allow students to bring a claim under Title IX using gender stereotype theory. Part IV will conclude this Comment with specific recommendations and examples for how educational institutions and governing bodies can protect and advocate for the rights of parenting students.³⁹ Much of this Comment will focus on the discrimination that mothers face, due in part to the motherhood penalty

35. NAT'L WOMEN'S LAW CTR., EMPLOYMENT FACT SHEET SEX STEREOTYPES: HOW THEY HURT WOMEN IN THE WORKPLACE—AND IN THE WALLET 3 (Jan. 2013), https://www.nwlc.org/wp-content/uploads/2015/08/suits_fact_sheet_-_sex_stereotypes_01.30.2013.pdf [<https://perma.cc/GC79-ZNJU>].

36. *Id.* at 2.

37. Melissa Locker, *Discrimination Against Working Mothers Is Alive and Well*, FAST CO. (Nov. 15, 2017), <https://www.fastcompany.com/40494089/discrimination-against-working-mothers-is-alive-and-well> [<https://perma.cc/W9EY-9C9V>]. For more examples of discrimination based on parental status in the work place, see Katherine Sellgren, *'I Don't Want to Give up My Career to Be a Parent'*, BBC (Oct. 31, 2017), <http://www.bbc.com/news/education-41817268> [<https://perma.cc/W9EY-9C9V>] (quoting a mother and founder of Pregnant Then Screwed: “I realized it [discriminatory behavior] was happening all the time—sackings, redundancies, demotions, bullying, harassment”).

38. Lila Thulin, *The True Story of the Case Ruth Bader Ginsburg Argues in 'On the Basis of Sex'*, SMITHSONIAN (Dec. 24, 2018), <https://www.smithsonianmag.com/history/true-story-case-center-basis-sex-180971110/> [<https://perma.cc/4DZS-BPXZ>].

39. *Tingley-Kelley v. Trs. of Univ. of Pa.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010).

that females experience in academia and the workplace; however, this is not to discredit or minimize the discrimination that fathers face.

I. AN OVERVIEW OF TITLE IX AND TITLE VII

A. *Title IX of the Education Amendments of 1972*

Title IX prohibits institutions from discriminating against students based on sex.⁴⁰ Title IX was originally designed to be a comprehensive legal measure that would protect women from the “persistent, pernicious discrimination” that perpetuates second-class citizenship for women,⁴¹ but it now explicitly prohibits discrimination against both genders.⁴² Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁴³ All educational institutions, including colleges, universities, elementary and secondary schools, and training programs that receive federal financial assistance are required to abide by Title IX.⁴⁴ Recipients of federal funds are required to recruit, admit, counsel, and educate students in a nondiscriminatory manner.⁴⁵ The scope of Title IX is vast, and it prohibits discrimination in relation to financial assistance, athletics, sex-based harassment, discipline, employment, single-sex education, and pregnant and parenting students.⁴⁶ Title IX regulations are enforced by the United States Department of Education Office for Civil Rights.⁴⁷

40. Note that courts often use the terms “sex” and “gender” interchangeably in written opinions.

41. NAT’L WOMEN’S LAW CTR., *DLA PIPER: BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX AND ATHLETIC OPPORTUNITIES* 14 (2007).

42. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *TITLE IX RESOURCE GUIDE 1* (Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> [<https://perma.cc/PM6X-48S8>] (“All students . . . at recipient institutions are protected by Title IX—regardless of their sex, sexual orientation, gender identity . . .”).

43. *Title IX and Sex Discrimination*, U.S. DEP’T EDUC. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [<https://perma.cc/PM6X-48S8>].

44. *Title IX Legal Manual*, U.S. DEP’T JUST. (Aug. 6, 2015), <https://www.justice.gov/crt/title-ix#1.%20Overview%20of%20Title%20IX:%20Interplay%20with%20Title%20VI,%20Section%20504,%20Title%20VII,%20and%20the%20Fourteenth%20Amendment> [<https://perma.cc/4CVB-SHWB>].

45. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 42, at 8.

46. *Id.*

47. *About OCR*, U.S. DEP’T OF EDUC. (Oct. 15, 2015), <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> [<https://perma.cc/7XFU-S82H>].

Title IX prohibits three general types of discrimination: “(1) disparate treatment, (2) disparate impact, and (3) retaliation.”⁴⁸ This Comment will focus on how gender stereotype theory can be used to allow for a cause of action under Title IX against educational institutions in disparate treatment cases, as generally this is where parental status discrimination is most likely to arise.⁴⁹ To bring a disparate treatment claim under Title IX, the student must establish three elements: (1) that they were excluded from participation in, denied benefits of, or subjected to discrimination in an educational program; (2) that the program receives federal financial assistance; and (3) that their exclusion, denial, or subsection to discrimination was on the basis of gender.⁵⁰ The student must prove that the discrimination they faced occurred because of their gender.⁵¹

While the gender stereotyping theory is most often applied to Title VII employment discrimination cases, this theory has also been used in Title IX cases.⁵² The United States Department of Education’s Office for Civil Rights states that:

[G]ender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity.⁵³

In relation to parenting students, Title IX requires schools to “give all students who might be, are or have been pregnant (whether currently parenting or not) equal access to school programs . . . and to treat . . . parenting students in the same way that they treat other students who are [similar].”⁵⁴ The implementing regulations of Title IX that apply

48. *Title IX Legal Manual*, *supra* note 44.

49. Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping Is Sex Discrimination*, 5 PSYCHOL. PUB. POL’Y & L. 665, 667 (1999) (“Such discrimination generally takes the form of disparate treatment, in which women who violate prescriptive stereotypes of femininity are punished, either through hostile environment harassment or through the devaluation of their performance.”).

50. *Tingley-Kelley v. Trs. of Univ. of Pa.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010).

51. *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 780 (3d Cir. 1990).

52. Gender stereotyping theory was applied in *Tingley-Kelley* as discussed earlier.

53. *Carmichael v. Galbraith*, 574 Fed. Appx. 286, 293 (5th Cir. June 19, 2014) (citing U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001)).

54. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 19, at 56.

to parenting students state that no educational recipient of federal funds shall apply “any rule concerning a student’s actual or potential parental, family, or marital status which treats students differently on the basis of sex.”⁵⁵ Therefore, this regulation states that discrimination is only prohibited on the basis of parental status if the school treats students differently on the basis of sex.⁵⁶ Unfortunately, this allows for the interpretation that schools can discriminate against parents as long as they discriminate against both male and female parents in the same manner.

Although the regulations include the prohibition of discrimination based on parental status, they provide greater protection to pregnant students than to parenting students⁵⁷ by enumerating specific protections for students relating to pregnancy but not to parenting students.⁵⁸ Due to the precise enumeration of these protections, educational institutions are subsequently more informed about the rights of pregnant students and are more likely to provide resources for pregnant students—often ignoring or forgetting about the rights of parenting students.⁵⁹

Problematically, a lack of case law also exists regarding the rights of parenting students under Title IX.⁶⁰ This lack of case law should not be interpreted to mean that educational institutions are complying with Title IX and respecting the rights of parenting students because there are many other explanations for this lack of case law: (1) students and educational institutions may be unaware that the law protects parenting students, (2) students may avoid lawsuits due to the financial and emotional costs, and (3) students may be unwilling to pursue claims.⁶¹ Students often do not realize that Title IX prohibits discrimination against parenting students,⁶² and, relatedly, the number of Title IX cases that address the rights of

55. 34 C.F.R. § 106.40 (2018).

56. *Id.*

57. Elizabeth M. Hady, *The Absence of Parenting Students’ Rights: How and Why Title IX Tolerates Discriminatory Attendance Policies*, 21 *CARDOZO J.L. & GENDER* 95 (2014).

58. These protections include “prohibiting discrimination against any student, or exclusion of any student from educational programs, classes, or extracurricular activity based on pregnancy, prohibiting requiring pregnant students to attend a specific program not required by nonpregnant students, and requiring schools to treat pregnancy and related conditions like childbirth or termination as any other temporary disability ‘with respect to any medical or hospital benefit.’” 34 C.F.R. § 106.40 (2018).

59. *See, e.g.*, Hady, *supra* note 57, at 103 (“Title IX has not been robustly enforced in part because the regulations are an ineffective enforcement tool.”).

60. Michelle Gough, *Parenting and Pregnant Students: An Evaluation of the Implementation of the “Other” Title IX*, 17 *MICH. J. GENDER & L.* 211, 216 (2011).

61. NAT’L WOMEN’S LAW CTR., *supra* note 6.

62. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 19.

parenting students is “disproportionately small to the number of students that . . . are having their rights violated.”⁶³

Due to the lack of case law, and also because Title IX does not provide an analytical framework for evaluating gender discrimination claims, courts consult Title VII case law for guidance.⁶⁴ As illustrated in *Tingley-Kelley v. Trustees of the University of Pennsylvania*, the District Court in the Eastern District of Pennsylvania used Title VII’s analytical framework to assess a student’s claim of gender discrimination based on her parental status when she was denied admission to veterinary college.⁶⁵ The court found that the plaintiff alleged facts sufficient for a gender discrimination claim under Title IX by using the gender stereotype theory.⁶⁶

B. Title VII of the Civil Rights Act of 1964

As mentioned, courts will look to Title VII for guidance on analyzing Title IX claims.⁶⁷ Using Title VII for guidance in Title IX analysis opens the door for courts to apply legal theories that are applicable in Title VII cases to Title IX cases. Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.⁶⁸ It is important to note that a provision to Title VII, added by the 1978 Pregnancy Discrimination Act, expanded Title VII to include a prohibition of discrimination on the basis of pregnancy, childbirth, or related medical conditions.⁶⁹ Moreover, under Title VII, parental leave that is granted for child care purposes must be provided on an equal basis to both men and women.⁷⁰ Title VII’s standards and regulations apply to Title IX as well.⁷¹

Further, Title VII has been expanded to include a prohibition against sex-based disparate treatment of parents and caregivers.⁷² While Title VII

63. Gough, *supra* note 60, at 218.

64. *E.g.*, *Tingley-Kelley v. Trs. of Univ. of Pa.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010); *see, e.g.*, David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 226 (2005).

65. *Tingley-Kelley*, 677 F. Supp. 2d at 775.

66. *Id.* at 776.

67. *See, e.g., id.* at 775; *Rey v. Univ. of Pitt. Sch. of Dental Med.*, 182 F. Supp. 3d 282, 294 (W.D. Pa. 2016).

68. *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> [<https://perma.cc/H86W-LX2U>].

69. BARBARA S. GAMBLE, *SEX DISCRIMINATION HANDBOOK* 73 (1992).

70. *Id.* at 78.

71. *Id.* at 89.

72. *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (May 23, 2007) [hereinafter *EEOC*].

itself does not explicitly prohibit parental status discrimination, parental status discrimination is recognized as a “sex-plus claim.”⁷³ The labeling of these claims as a sex-plus claim is “simply a heuristic . . . [A] judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against.”⁷⁴ Title VII prohibits decisions against employees that are based on sex “regardless of whether the employer discriminates more broadly against all members of the protected class.”⁷⁵ Title VII does not allow employers to treat female employees differently based on the gender stereotype that a female employee’s parental responsibilities will interfere with her performance.⁷⁶ These gender stereotypes directly violate Title VII and therefore, by implication, violate Title IX.⁷⁷

Under Title VII, a plaintiff may demonstrate a sex discrimination claim using two frameworks: the burden-shifting framework or the mixed-motives theory.⁷⁸ The burden-shifting framework allows a plaintiff to establish a claim of sex discrimination using circumstantial evidence.⁷⁹ The burden-shifting framework requires that the plaintiff initially carry the burden of proof.⁸⁰ Once the plaintiff establishes his or her prima facie case of discrimination, the burden shifts to the defendant, requiring the defendant to articulate a legitimate nondiscriminatory reason for the adverse action.⁸¹ If the defendant establishes a legitimate reason, the plaintiff then has the opportunity to establish that the defendant’s reason is merely pretext.⁸²

In contrast, the mixed-motives theory is applied when direct evidence exists of the alleged discrimination.⁸³ A defendant is found liable for discrimination under the mixed-motives test when the plaintiff proves that the adverse employment action was motivated by forbidden criterion,

Enforcement Guidance], <https://www.eeoc.gov/policy/docs/caregiving.html#background> [https://perma.cc/WA29-SUME].

73. *Infante v. Ambac Fin. Grp.*, No. 03 CV 8880 (KMV), 2006 WL 44172, at *5 (S.D.N.Y. Jan. 5, 2006).

74. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004).

75. *EEOC Enforcement Guidance*, *supra* note 72.

76. *Id.*

77. *Id.*

78. *Burns v. Johnson*, 829 F.3d 1, 8 (1st Cir. 2016).

79. *Id.*

80. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973).

81. *Id.*

82. *Id.*

83. *Tingley-Kelley v. Trs. of Univ. of Pa.*, 677 F. Supp. 2d 764, 776 (E.D. Pa. 2010).

even if other, permissible factors were present.⁸⁴ However, this test can be more difficult for plaintiffs to satisfy because it requires the plaintiff to demonstrate that the employer substantially relied on an impermissible criterion when acting.⁸⁵ The Title IX analysis uses the Title VII framework by first assessing whether the disparate treatment claim falls under the burden-shifting framework or the mixed-motives test.⁸⁶

II. GENDER STEREOTYPE THEORY AND ITS APPLICATION IN LAW

A. Gender Stereotype Theory

One theory for litigating employment discrimination under Title VII is to allege disparate treatment under the gender stereotype theory.⁸⁷ The gender stereotype theory argues that “an adverse employment decision was made because of the operation of stereotypes associated with a protected class.”⁸⁸ Gender stereotypes cause unequal treatment because of a person’s gender. These stereotypes are harmful when they limit a person’s capacity to “develop their personal abilities, pursue their professional careers and make choices about their lives.”⁸⁹ Such stereotypes can be categorized into four types: personality traits, domestic behaviors, occupations, and physical appearance.⁹⁰ These stereotypes, particularly those about women, “are used to justify and maintain the historical relations of power of men over women as well as sexist attitudes that hold back the advancement of women.”⁹¹ However, it is important to emphasize that these gender stereotypes are also applied to men, particularly in the areas of caregiving.⁹²

84. *Id.*

85. *Id.*

86. *See id.*

87. Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 937 (2016).

88. *Id.*

89. *Gender Stereotyping*, *supra* note 28.

90. *What Are Gender Roles and Stereotypes?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/gender-gender-identity/what-are-gender-roles-and-stereotypes> [<https://perma.cc/X49A-LB7S>].

91. *Gender Equality Glossary and Thesaurus: Gender Stereotypes*, EUR. INST. FOR GENDER EQUALITY, <http://eige.europa.eu/rdc/thesaurus/terms/1222> [<https://perma.cc/YLS5-F9R6>].

92. *See, e.g.*, Lenora M. Lapidus & Vania Leveille, *Why Trump’s Newest Parental Leave Proposal Still Doesn’t Cut It*, ACLU (June 1, 2017), <https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/why-trumps-newest-parental-leave-proposal> [<https://perma.cc/JT2P-K8DZ>] (discussing how gender stereotypes against men were being promoted by the Trump administration when the original proposed family leave program limited the benefits of family leave to married birth mothers); Derek Rotondo, *I Want to Be My Child’s Primary Caregiver, but My*

Gender stereotype theory originated under the Equal Protection doctrine,⁹³ and it was first applied in the Title VII context in the landmark Supreme Court case *Price Waterhouse v. Hopkins*.⁹⁴ Gender stereotyping is the “practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men.”⁹⁵ Under Title VII, a worker experiences gender stereotyping when, because of her gender, her employer assumes that she will behave in a certain way, be less committed to her job, or produce a lower quality of work.⁹⁶

The Supreme Court has identified gender stereotyping as an impermissible form of sex discrimination.⁹⁷ The Court further held that the stereotype that a woman will perform worse based on her presumed family obligations constitutes sex discrimination.⁹⁸ “The essence of Title VII in this context is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities.”⁹⁹ Under Title VII, “treating a woman worse at work based on assumptions or stereotypes about her behavior because she is a mother is, itself, evidence of sex discrimination *regardless* of how other workers are treated.”¹⁰⁰ Essentially, in Title VII claims, evidence of gender stereotyping can establish a cause of action without comparative evidence that shows the parenting employee was treated differently than members of the opposite sex.

In *Price Waterhouse*, the Court found that the plaintiff was denied a promotion due to her failure “to conform to stereotypes about how she

Employer J.P. Morgan Chase Treats That as a Woman’s Job, ACLU (June 15, 2017), <https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/i-want-be-my-childs-primary-caregiver-my> [<https://perma.cc/9HE3-XR5V>] (writing that the author, a father, was unable to be his child’s primary caregiver without going through an additional application process for family leave benefits).

93. Bornstein, *supra* note 87, at 925 (citing to Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1306–09 (2012)).

94. *Id.*

95. *Gender Stereotyping*, *supra* note 28.

96. U.C. HASTINGS COLL. OF LAW, CTR. FOR WORK LIFE LAW, CURRENT LAW PROHIBITS DISCRIMINATION BASED ON FAMILY RESPONSIBILITIES & GENDER STEREOTYPING 1–2 (2006), <http://worklifelaw.org/publications/IssueBriefFRD.pdf> [<https://perma.cc/P4FS-2K5A>].

97. *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 44 (1st Cir. 2009).

98. *Id.* (citing to *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003)).

99. *Id.* at 45.

100. U.C. HASTINGS COLL. OF LAW, CTR. FOR WORK LIFE LAW, CAREGIVER DISCRIMINATION UNDER TITLE VII 1 (2011) (emphasis added), <http://worklifelaw.org/publications/FRDUnderTitleVIIIBrief.pdf> [<https://perma.cc/T4V7-3QNF>].

should appear and behave because she was a woman.”¹⁰¹ The Court noted that for a Title VII violation to be actionable, the plaintiff must establish that the employer relied on the plaintiff’s gender in making the adverse employment decision.¹⁰² The Court found that the plaintiff established this by proving that her employer’s assessment of her work performance was “impermissibly influenced by her failure to conform to sex stereotype[s].”¹⁰³ Further, in *Back v. Hastings on Hudson Union Free School District*, a plaintiff argued that comments made about a woman’s inability to effectively work and parent at the same time are direct evidence of discrimination.¹⁰⁴ The court found that stereotyping women as caregivers is evidence of an impermissible sex-based motive.¹⁰⁵

In contrast, one court found that comments that a male employee was “arrogant,” “rude,” “aggressive,” and “violent” did not rise to the level of invidious gender stereotypes because the terms did not have any inherent gender-specific meaning and no reasonable jury could determine that the employer treated females more favorably than males based on these purported gender stereotypes.¹⁰⁶ Based on case law, the key to successfully arguing the gender stereotype theory is providing evidence of gender-specific comments in order to establish proof of disparate treatment.¹⁰⁷

B. Application of Gender Stereotype Theory

Gender stereotype theory has been most often used in Title IX cases to assert sex discrimination claims based on sexual orientation or sexual harassment in relation to transgendered students.¹⁰⁸ Lower federal courts

101. Bornstein, *supra* note 87, at 938 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

102. *Id.*

103. *Id.*

104. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004).

105. *Id.* at 122. Further, courts have continually held that employment decisions based on gender stereotypes are impermissible and are evidence of discrimination within the Title VII context. *E.g.*, *Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721, 727 (8th Cir. 1982).

106. *Kahan v. Slippery Rock Univ. of Pa.*, 50 F. Supp. 3d 667, 690–91 (W.D. Pa. 2014).

107. *See, e.g.*, *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 44 (1st Cir. 2009); *Kahan*, 50 F. Supp. 3d at 690–91; *Back*, 365 F.3d at 118; Bornstein, *supra* note 87, at 938.

108. *See, e.g.*, *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *K.S-A ex rel. Franklin v. Haw. Sch. Dist.*, No. 16-00115 ACK-KJM, 2017 WL 6452417 (D. Haw. Dec. 18, 2017); *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, No. 3:17-CV-391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017); *Videckis v. Pepp. Univ.*, No. 15-cv-00298 DDP (JCx), 2017 WL 3995113 (C.D. Cal. Sept. 11, 2017); *Prescott v. Rady Child. Hosp.*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017); *Reed v. Kerens Indep. Sch. Dist.*, No. 3:16-CV-1228-BH, 2017 WL 2463275 (N.D. Tex. June 6, 2017). Note, this is not an exhaustive list, but rather a smattering of recent cases.

have applied the theory to discrimination based on parental status in the Title VII context; but, as stated, it is most commonly applied in the Title IX context.¹⁰⁹ This gender stereotype theory has been labeled “the social roles framework” by legal scholars.¹¹⁰ Reva B. Siegel wrote that “deciding when different treatment, or same treatment, is wrongful requires making a judgment about the larger social world in which the challenged practice occurs. At bottom, then, the wrong discrimination concerns the social roles and relations it perpetuates.”¹¹¹ In evaluating sex-discrimination claims, it is “crucial to consider the social-roles account.”¹¹² Below is a brief summary of how the theory is applied in both Title IX and Title VII cases.

Tingley-Kelley provides the analytical structure for evaluating Title IX sex discrimination claims based on parental status. In *Tingley-Kelley*, a prospective veterinary graduate student was denied admission based on her status as a parent.¹¹³ The court considered the case in the context of a summary judgment issue and ultimately held that the plaintiff presented sufficient evidence to support an inference of gender discrimination under Title IX after being subjected to gender stereotypes.¹¹⁴ The admissions committee in *Tingley-Kelley* made notes on the plaintiff’s application’s review forms that included “concerns about how she’ll do in school esp. w/family, etc.” and it “will be a tough row to hoe,” referring to being “at school [with two] young children.”¹¹⁵ The court found that these comments demonstrated that the committee discriminated against the plaintiff on the basis of her gender by “stereotyping her as a busy mother of young children who would have a difficult time handling both graduate school and her childcare responsibilities.”¹¹⁶ The court looked to Title VII cases to support its holding, stating that this type of gender-based stereotyping, without evidence of how similarly situated males were treated, was sufficient to support an inference of gender discrimination.¹¹⁷

109. See, e.g., *Chadwick*, 561 F.3d at 44; *Back*, 365 F.3d at 118; *Rey v. Univ. of Pitt. Sch. of Dental Med.*, 182 F. Supp. 3d 282 (W.D. Pa. 2016); *Kahan*, 50 F. Supp. 3d at 690–91; *Saleski-Shingara v. VNA Health Sys.*, No. 4:14-CV-00085, 2014 WL 5702928, at *8 (M.D. Pa. Nov. 5, 2014); *Tingley-Kelley v. Trs. of the Univ. of Pa.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010).

110. See generally Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 969, 974 (2018).

111. *Id.* at 975.

112. *Id.* at 996.

113. *Tingley-Kelley*, 677 F. Supp. 2d at 775.

114. *Id.*

115. *Id.* at 777.

116. *Id.*

117. *Id.* at 778.

In *Ray v. University of Pittsburgh School of Dental Medicine*, the plaintiff's claim of Title IX sex discrimination failed because the court found that the alleged stereotypical statements were stray remarks that did not constitute direct evidence of discrimination, and the case failed as a matter of law.¹¹⁸ In *Ray*, a professor made comments that the plaintiff "could start a family now that she was not in dental school," and discussed the plaintiff's wedding.¹¹⁹ However, the court found that these comments were made *after* she was dismissed from the dental school program.¹²⁰ The court stated that these comments were nothing more than stray remarks that were unrelated to the decision-making process and held that the plaintiff failed to fulfill the prima facie case of gender discrimination.¹²¹

In *Saleski-Shingara v. VNA Health Systems*, the plaintiff asserted a discrimination claim on the basis of parental discrimination.¹²² The defendant moved for the case to be dismissed on the grounds that Title VII did not prohibit discrimination related to parenting.¹²³ The court stated that parental status was not a protected characteristic under Title VII, but that the plaintiff was arguing a form of sex-plus discrimination.¹²⁴ The plaintiff asserted in her pleading that she was being discriminated against on the basis of her sex and that the defendants complained to the plaintiff about her being pregnant while having other children.¹²⁵ The court stated that her claim was a sex-plus discrimination claim and merely a form of gender discrimination.¹²⁶

The court in *Saleski-Shingara* laid out a framework for the prima facie analysis based on familial responsibility,¹²⁷ requiring the plaintiff to demonstrate that: "(1) she was a woman with young children; (2) she [was] qualified for the position; (3) she suffered an adverse employment action; and (4) the circumstances of her termination give rise to an inference of discrimination such as might occur when the position is filled by a person not of the protected class."¹²⁸ The court held that the plaintiff failed to establish the fourth element of her claim and that she did not plead

118. *Ray v. Univ. of Pitt. Sch. of Dental Med.*, 182 F. Supp. 3d 282, 293 (W.D. Pa. 2016).

119. *Id.* at 293.

120. *Id.* at 294 (emphasis added).

121. *Id.*

122. *Saleski-Shingara v. VNA Health Sys.*, No. 4:14-CV-00085, 2014 WL 5702928, at *8 (M.D. Pa. Nov. 5, 2014) (asserting parental discrimination claim on basis of having small children).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. This is analogous to a parental status discrimination claim.

128. *Saleski-Shingara*, 2014 WL 5702928, at *9.

evidence establishing that she was terminated because of her parental status.¹²⁹ The court dismissed her claim, but gave her leave to amend the claim to allege that the circumstances surrounding her termination did indeed create an inference of discrimination.¹³⁰

III. USING TITLE VII FRAMEWORK AND GENDER STEREOTYPE THEORY IN TITLE IX

The pervasive discrimination faced by parenting students makes it harder for those students to stay in school or to obtain an education.¹³¹ While the Supreme Court has not spoken on this issue, and while there is a lack of case law surrounding the rights of parenting students, the rights of these students are being infringed upon drastically.¹³² Specific findings on parenting students include that only fifty-one percent of teen mothers earned their high school diploma by age twenty-two; fewer than two percent of teen mothers attain a college degree before age thirty; and fifty percent of female dropouts cited parental responsibilities as one factor of many in their decision to leave high school, while thirty-three percent of male students also cited parental responsibilities as a factor.¹³³

Arguably, when students are discriminated against on the basis of parental status, that discrimination is almost entirely based in gender stereotypes. For example, if women are denied admission to university because of their parental responsibilities, the denial is based on deeply wrought stereotypical notions that women are unlikely to be successful students because they are committed caregivers to their children, as illustrated by *Tingley-Kelley*.¹³⁴ However, discrimination based on parental status can also be less visible. For example, comments about time management, or placement in a different class—such as a home-economics class rather than a science class—can stem from impermissible gender stereotypes. As stated, while parental status discrimination itself is

129. *Id.*

130. *Id.*

131. Alexandra Smith, *You Have a Right to an Education: Breaking Down the Barriers Facing Pregnant and Parenting Teens in School*, ACLU (Mar. 22, 2012), <https://www.aclu.org/blog/reproductive-freedom/you-have-right-education-breaking-down-barriers-facing-pregnant-and?redirect=blog/reproductive-freedom-womens-rights-lgbt-rights-religion-belief/you-have-right-education> [<https://perma.cc/M74G-KUXD>].

132. See *supra* pp. 1–4.

133. NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 19, at 57.

134. See *Tingley-Kelley v. Trs. of the Univ. of Pa.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010).

not a legal claim,¹³⁵ discrimination based on parental status is a “sex-plus” discrimination claim, first identified in a Title VII case.¹³⁶

Gender stereotype theory can allow a plaintiff to bypass this regulatory element.¹³⁷ Typically, under a Title IX disparate impact analysis, in order to establish a prima facie case a student first must establish that a rule disadvantages female students in a statistically significant manner.¹³⁸ However, appellate courts have found gender stereotypes sufficient to overcome summary judgment in gender discrimination cases and have not required additional evidence that the female was treated differently from similarly situated males.¹³⁹ Specifically, the First Circuit has held that a reasonable jury could find that gender stereotyped comments indicated that sex discrimination was behind the adverse action.¹⁴⁰ If a student experienced discrimination based on parental status, the first step in the analysis would be to identify any possible gender stereotypes because “stereotyped remarks can certainly be evidence that gender played a part” in an adverse action.¹⁴¹ Gender stereotypes are direct evidence of discrimination, thus the mixed-motives analysis discussed above is applied.¹⁴² The mixed-motives test finds a defendant liable for sex discrimination “upon proof that a forbidden criterion ‘was a motivating factor for any employment practice, even though other factors also motivated the practice.’”¹⁴³

By using the gender stereotype theory borrowed from Title VII case law, students have a cause of action for parental status discrimination without needing evidence that an educational institution purposefully applied a rule differently based on gender—no comparative evidence is necessary.¹⁴⁴ However, as illustrated by *Rey v. University of Pittsburgh*

135. Jon Hyman, *Parental Status Discrimination is NOT a Thing. But Should It Be?*, WORKFORCE (Nov. 6, 2017), <https://www.workforce.com/2017/11/06/parental-status-discrimination-not-thing/> [<https://perma.cc/LRC5-YM7V>].

136. *Tingley-Kelley*, 677 F. Supp. 2d at 775.

137. *See, e.g.*, *Rey v. Univ. of Pitt. Sch. of Dental Med.*, 182 F. Supp. 3d 282 (W.D. Pa. 2016); *Tingley-Kelley*, 677 F. Supp. 2d at 775.

138. Elizabeth M. Hady, *The Absence of Parenting Students’ Rights: How and Why Title IX Tolerates Discriminatory Attendance Policies*, 21 CARDOZO J.L. & GENDER 95, 109–10 (2014).

139. *Tingley-Kelley*, 677 F. Supp. 2d at 775.

140. *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45–48 (1st Cir. 2009).

141. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 (2d Cir. 2004) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

142. *See Price Waterhouse*, 490 U.S. at 251; *Tingley-Kelley*, 677 F. Supp. 2d at 775.

143. *Tingley-Kelley*, 677 F. Supp. 2d at 775.

144. However, it is important to note that circuits are split on the issue of comparators. For example, “the Sixth Circuit has not directly addressed the issue . . . [T]he district court was persuaded by those cases ‘that require the comparator to be outside of the protected class.’” *Spink-Krause v.*

School of Dental Medicine, students will need to provide more evidence of gender stereotypes than a stray remark.¹⁴⁵ That is when comparative evidence becomes helpful—however, not necessarily gender comparative evidence. For example, if a student provides direct evidence of gender stereotypes and evidence that non-parenting students are treated differently than parenting students (rather than evidence that mothers are treated differently than fathers), they can likely meet their burden of proof.¹⁴⁶

The gender stereotype theory has recently allowed plaintiffs to be “more successful in converting what might otherwise be considered ‘stray remarks’ into valuable circumstantial evidence from which to infer discrimination,” broadening the lens of probative discrimination.¹⁴⁷ Title VII cases show that proof of gender stereotypes help identify second-generation discrimination¹⁴⁸ and they show that courts should stop discounting the value of this type of evidence.¹⁴⁹ Similarly, as Title VII is often used as a framework for Title IX analysis, courts should seriously consider evidence of gender stereotypes as indicators of sex discrimination, allowing a student to enforce her rights under Title IX. Gender stereotype theory allows a plaintiff to eloquently and successfully

Medtronic, No. 16-12148, 2017 WL 4778730, at *10 (E.D. Mich. Oct. 23, 2017) (holding that the plaintiff’s claim of sex-plus discrimination failed because she was unable to show that she was treated less favorably than men). *But see Back*, 365 F.3d at 118 (holding that stereotyping of women as caregivers by itself is evidence of an impermissible, sex-based motive); *Tingley-Kelley*, 677 F. Supp. 2d at 775.

145. *Rey v. Univ. of Pitt. Sch. of Dental Med.*, 182 F. Supp. 3d 282, 294 (W.D. Pa. 2016); *see also Spink-Krause*, 2017 WL 4778730 at *10 (holding that statements by an employer about an employee’s status as a single mother were not direct evidence of discrimination because the comments did not require the conclusion, without any inferences, that the employer took adverse actions because the employee was a female with children).

146. *See Back*, 365 F.3d at 118; *Tingley-Kelley*, 677 F. Supp. 2d at 775.

147. Bornstein, *supra* note 87, at 957.

148. First generation discrimination is the “blatant, easily detectable form of discrimination” that was common prior to the passage of the Civil Rights Act of 1964. Sonia Goltz et al., *University Women’s Experiences In Bringing Second Generation Sex Discrimination Claims: Further Support for Adoption of a Structural Approach*, 18 TEX. J. WOMEN & L. 145, 147 (2009). First generation discrimination can be easily recognized by the “[s]moking guns . . . the rejection explained by the comment that ‘this is no job for a woman.’” *Id.* at 147 (quoting Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001)). In contrast, second generation discrimination is more subtle and is based on the structural barriers that exist within a workplace. *Id.* at 148. Second generation discrimination “may consist of undermining women’s perceived competence . . . or sanctioning behavior that departs from stereotypes about gender[.]” Sturm, *supra*, at 468–69.

149. Bornstein, *supra* note 87, at 959.

assert a claim of parental status discrimination because it equates to sex discrimination.¹⁵⁰

To succeed on a general claim of sex discrimination under Title IX, a student must establish three elements: (1) there was an adverse action taken against her; (2) the program received financial assistance; and (3) her exclusion was based on her gender.¹⁵¹ However, as courts will use a Title VII framework to evaluate claims of parental status discrimination via gender stereotype theory, that analysis becomes more complicated. A court would follow a framework similar to that laid out in *Saleski-Shingara*: “(1) she was a woman with young children; (2) she [was] qualified for the position; (3) she suffered an adverse employment action; and (4) the circumstances of her termination give rise to an inference of discrimination such as might occur when the position is filled by a person not of the protected class.”¹⁵² Because courts have held that gender stereotypes can be direct evidence of discrimination, the student is not required to show comparative evidence of males being treated differently.¹⁵³ In the high school context, a student could likely succeed on a parental status discrimination claim under Title IX if, for example, a teacher removed her from a specific class because the teacher stated the student could not handle the rigors of the class while parenting. Absent comparative evidence, the student would likely succeed under a Title IX claim based on the gender stereotype theory borrowed from Title VII.¹⁵⁴

IV. RECOMMENDATIONS FOR ADVOCATING AND PROTECTING PARENTING STUDENTS’ RIGHTS

To address the issue of parental status discrimination in academia, this Comment asserts three general recommendations. First, educational facilities, teachers, and lawyers should be educated on gender stereotypes and how they interact with Title IX violations. Second, schools should draft their Title IX policies to include specific protections for parenting students, and States should consider writing protections for parenting students into state law. Third, the language of Title IX’s regulations should

150. Hyman, *supra* note 135.

151. *Tingley-Kelley*, 677 F. Supp. 2d at 775.

152. *Saleski-Shingara v. VNA Health Systems*, No. 4:14-cv-00085, 2014 WL 5702928, at *9 (M.D. Pa. Nov. 5, 2014).

153. However, lower circuit courts are split on this. The Supreme Court has not definitively spoken on this issue.

154. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004) (holding that stereotyping of women as caregivers by itself is evidence of an impermissible, sex-based motive); *Tingley-Kelley*, 677 F. Supp. 2d at 775.

be reconsidered to make it clear how gender stereotypes and parental discrimination can be a violation of Title IX.

Contributing to this discrimination is a general lack of knowledge of the law.¹⁵⁵ Universities, colleges, schools, administrators, and teachers should be educated on gender stereotypes and how they interact with Title IX violations. Improved knowledge is crucial because “a student may suffer irreparable harm in the form of denied educational opportunities before even being aware that anything the school or its agents did was wrong or discriminatory.”¹⁵⁶ One author, after analyzing case law regarding pregnant and parenting students, found that five out of eighteen cases did not allege Title IX violations despite fact patterns that supported Title IX allegations.¹⁵⁷ Lawyers should be aware of the interplay between gender stereotypes and Title IX in order to competently and diligently represent their clients. Increased education on the scope of Title IX and gender stereotype theory can ensure that both students and individuals with authority understand the law, broadening the available protections for students. Education is the foundation of our society and while education is not a fundamental right under the United States Constitution, all students have a right to equal access to education.¹⁵⁸

Second, schools should draft their Title IX policies to encompass specific strategies to support parenting students and to protect their students from parental status discrimination. For example, the Nebraska State Board of Education approved a policy that requires local school boards to design and adopt a written policy to accommodate pregnant and parenting students.¹⁵⁹ The purpose of the policy is to ensure that pregnant and parenting students remain in school by mitigating the hardships and inconveniences that may arise, while simultaneously prohibiting discrimination against them.¹⁶⁰ Nebraska’s policy is a model policy that strongly communicates to students that they have a right to education and that they will be supported in pursuing that right. The policy specifically

155. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 19, at 55–56.

156. David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 316 (2004).

157. Gough, *supra* note 60, at 248.

158. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (holding that racial discrimination in public education is unconstitutional). While *Brown v. Board of Education* speaks specifically to racial discrimination, the principle is similar—equal access to education for all students.

159. Joe DeJka, *Nebraska Ed Board OKs Policy Requiring Local School Boards to Accommodate Pregnant and Parenting Students*, OMAHA WORLD-HERALD (Nov. 10, 2017), http://www.omaha.com/news/education/nebraska-ed-board-oks-policy-requiring-local-school-boards-to/article_4e4b7e9a-c58f-11e7-aaf9-9fac46ff87e0.html [<https://perma.cc/J7VB-R4JX>].

160. *Id.*

mandates that parenting students cannot be penalized when absent because of doctor appointments for their children, allows for parenting students to make up missed school work, and provides students with alternative means to complete course work, such as online work, tutoring, or home-based study.¹⁶¹

Similarly, the University of Kansas specifically prohibits discrimination based on parental status.¹⁶² The University of Kansas even defines parental status discrimination on its website, stating that parental status discrimination “involves treating an applicant, staff employee, faculty member, or student unfavorably for being the parents of young children, caring for elderly parents and sick significant others. This also includes violations of the Pregnancy Discrimination Act (PDA) which forbids treating a woman unfavorably because of pregnancy, childbirth”¹⁶³ By specifically naming parental status discrimination and defining it, the University of Kansas communicates to students that they cannot be discriminated against on the basis of their parental status.¹⁶⁴ All educational institutions can easily include parental status discrimination and a definition in their student handbook or on their Title IX website in order to be strong advocates for their students’ success. All educational institutions should adopt similar policies that will protect the rights of their parenting students.

States themselves can go one step further by reaffirming Title IX’s protections in state law. For example, California Education Code § 66281.7 provides that “all persons, regardless of their sex, should enjoy freedom from discrimination of any kind, including . . . pregnancy discrimination as described in Title IX . . . in the postsecondary educational institutions of the state.”¹⁶⁵ Section 66281.7 further requires educational institutions to allow graduate students “to take a leave of absence because she is pregnant or has recently given birth,” for “a period consistent with the policies” of the institution or for a period of twelve months, “to prepare for and take preliminary and qualifying examinations and an extension of at least [twelve] months toward normative time to degree while in candidacy for a graduate degree, unless a longer extension

161. *Id.*

162. *University of Kansas Non-Discrimination Policy*, UNIV. KAN., <http://ioa.ku.edu/policies/ku-non-discrimination-policy> [<https://perma.cc/PMA4-KY4Z>].

163. *Parental Status*, UNIV. KAN., <http://ioa.ku.edu/policies/definition/parental-status> [<https://perma.cc/L2Z7-9D3B>].

164. *See id.*

165. CAL. EDUC. CODE § 66281.7 (West 2018).

is medically necessary.”¹⁶⁶ Section 66281.7 continues to provide that a graduate student, in good standing, who chooses to take a leave of absence because she is pregnant or recently gave birth “shall return to her program in good academic standing following a leave period consistent with the policies of the postsecondary educational institution or of up to one academic year.”¹⁶⁷ Importantly, the law requires postsecondary educational institutions to have a written policy for graduate students on pregnancy discrimination.¹⁶⁸ California’s progressive regulation carries many benefits: (1) it puts educational institutions on notice that parental status discrimination will not be tolerated; (2) it provides clear rights to graduate students who are pregnant or parenting after recent childbirth; and (3) it firmly communicates to students that they have rights under Title IX.

Last, the language of the enforcing regulations of Title IX should be reconsidered to make clear that Title IX can protect students from parental status discrimination. The Department of Education Office for Civil Rights is the enforcing entity of Title IX and is responsible for evaluating, investigating, and resolving complaints of sex discrimination.¹⁶⁹ Further, the Office for Civil Rights provides information and guidance to educational facilities on how to comply with Title IX.¹⁷⁰ As the regulations are currently written and combined with the lack of case law regarding parenting students, it appears that discrimination based on parental status is only prohibited if a rule is applied differently against a female parent than a male parent. However, as federal case law has begun to establish, that is not the case.¹⁷¹

Further confusing this situation, critics have labeled Title IX as an ineffective enforcement tool because while Title IX broadly prohibits discrimination “on the basis of sex,” parental status is only specifically

166. *Id.*

167. *Id.*

168. *Id.*

169. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 42.

170. *Id.*

171. See *Tingley-Kelley v. Trs. of the Univ. of Pa.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010). *But see Gough, supra* note 60, at 252 (“‘[C]omparability’ is an area in which the scholars agree that there is little to no case law. Those who characterize the case law as little are correct; however, students seeking to assert claims are not without guidance. . . . [I]n the context of athletics, Title IX ‘involves a comparison of the availability, quality, and kinds of benefits, opportunities, and treatment afforded members of both sexes.’ . . . [A]lthough not in the specific context of . . . parenting students, the court in *Newberg v. Board of Public Education* . . . looked at ‘court offerings, type of degrees available, class size, teaching qualifications, academic and recreational facilities’”).

protected in the regulations.¹⁷² Courts then turn to other civil rights statutes to supplement their analysis, like Title VII, as discussed above.¹⁷³ While it is unlikely under the current supervision of Secretary Betsy DeVos that the Department of Education will increase protection under Title IX for students,¹⁷⁴ advocates should call for reform and increased protections. A revision of the law, combined with efforts from the Office for Civil Rights, will further protect the rights of parenting students. Specifically, Title IX regulations should explicitly state that comparative evidence is not necessary, that sex-based stereotyping is appropriate evidence of sex discrimination, and that parenting students are protected from discrimination for more than the duration of their pregnancy or the immediate period following the birth of their child.

CONCLUSION

As illustrated, gender discrimination is prevalent, and a subset of that discrimination is parental status discrimination. Under Title VII or Title IX, distinctions based on parental status are a violation if the impact is to discriminate on the basis of sex.¹⁷⁵ Gender stereotyping theory allows students to bridge that gap and illustrate that discrimination on the basis of parental status is sex discrimination.

Further, the Supreme Court has stated that “[b]ecause Congress did not list any specific discriminatory practices in Title IX, its failure to mention one such practice says nothing about whether it intended that practice to be covered.”¹⁷⁶ This interpretation leaves the door open for increased protections to parenting students under Title IX. However, compliance with Title IX and dissemination of information must be

172. Hady, *supra* note 138, at 103.

173. *Id.*

174. Secretary DeVos has rescinded Obama-era protections for sexual assault victims under Title IX on college campuses across the nation. Phil McCausland, *DeVos Rescinds Obama-Era Title IX Protections, Drawing Mixed Reactions from Advocates*, NBC NEWS (Sept. 22, 2017), <https://www.nbcnews.com/news/us-news/devos-rescinds-obama-era-title-ix-protections-drawing-mixed-reactions-n803976> [<https://perma.cc/J2RY-JEL9>]. Although, no guidance has been rescinded that specifically targets parenting students, this is an attack on Title IX protections all the same. While outside the overall scope of this Comment, protections for women and parents have been under attack by the Trump administration in general. See Lenora M. Lapidus & Vania Leveille, *Why Trump’s Newest Parental Leave Proposal Still Doesn’t Cut It*, ACLU (June 1, 2017), <https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/why-trumps-newest-parental-leave-proposal> [<https://perma.cc/F4RA-ZXRN>].

175. *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 (10th Cir. 1987).

176. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

transparent and accessible to students in order for Title IX to become a successful tool for students facing discrimination.¹⁷⁷ Educators, lawyers, and courts can help pull down these barriers that are currently in place and inhibiting many parenting students from obtaining an education. Applying the gender stereotype theory in disparate treatment claims under Title IX can help do just that.

177. Mary Ann Mason & Jaelyn Younger, *Title IX and Pregnancy Discrimination in Higher Education: The New Frontier*, 38 N.Y.U. REV. L. & SOC. CHANGE 269, 304 (2014) (writing about pregnancy discrimination under Title IX).