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# Retitling Title IX

Matthew F. Marino
*Seton Hall University*, matthew.marino@shu.edu

# RETITLING TITLE IX

Matthew F. Marino

Dissertation Committee

Eunyoung Kim, PhD, Mentor
Robert Kelchen, PhD
Sarah McMahon, MSW, PhD

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## APPROVAL FOR SUCCESSFUL DEFENSE

**Matthew Marino** has successfully defended and made the required modifications to the text of the doctoral dissertation for the Ph.D. during this ~~**Fall Semester 2019.**~~ Spring 2020 ok

**DISSERTATION COMMITTEE**
(please sign and date beside your name)

Mentor:
Dr. Eunyoung Kim _____ 4/15/2020

Committee Member:
Dr. Sara McMahon Sarah McMahon 4/13/2020

Committee Member:
Dr. Robert Kelchen _____ 4/11/2020

The mentor and any other committee members who wish to review revisions will sign and date this document only when revisions have been completed. Please return this form to the Office of Graduate Studies, where it will be placed in the candidate's file and submit a copy with your final dissertation to be bound as page number two.

# DEDICATION

I dedicate this dissertation to everyone who has helped me get this far: my family, my friends, my instructors, my colleagues, and anyone else who put up with my busy schedule over the last few years.

In addition, I dedicate my work to anyone and everyone working in the Title IX field. This field has been challenging to say the least, and I know personally how hard people have worked, and are working, to improve the well-being of so many in higher education: students, faculty and staff, and colleges and universities as a whole. My study may not be groundbreaking, but I hope it illustrates how, with a focus on collaboration, we can restore a positive mindset to Title IX.

ACKNOWLEDGMENTS

I could not have completed this study without the help of a few very important people, all of whom never lost faith in me.

First, I would like to thank Dr. Eunyoung Kim, who mentored me throughout the entire dissertation process. Even when distance might have meant less frequent communication, Dr. Kim always responded to my inquiries and provided valuable insight and feedback that truly inspired me to push myself even harder to complete the study. I cannot thank you enough.

I also am very appreciative of my dissertation committee members, Dr. Robert Kelchen and Dr. Sarah McMahon, for giving me important food for thought at both my proposal defense and my dissertation defense. Their expertise and practical advice really helped me fill in gaps that I know I would not have seen with my own eyes.

Finally, I want to thank everyone who encouraged me to finish my doctoral program. After I stopped in 2012, I thought that was the end of the road and that I would never complete my coursework and write a dissertation. So many people I know told me that I owed it to myself to finish. (They also wanted to call me “doc,” but that’s beside the point.) I took their words to heart and went back in 2017, and here I am.

Thank you all.

ABSTRACT

Title IX, a federal education policy put into place in the early 1970s, has been under the microscope for its perceived failure to protect students from sexual misconduct. Since 2011, and especially since 2017, conflict has existed among higher education, the judicial system, and the Department of Education (ED), resulting in little clarity as to proper Title IX response. However, little research exists that attempts to examine court cases for both commonalities and divergence in how higher education institutions respond to Title IX incidents of sexual misconduct and whether those procedures mesh with how the courts view proper Title IX incident response. The purpose of this study is to examine what court opinions reveal about how institutions of higher education (IHEs) are responding to Title IX and how those responses align with courts' interpretations of proper Title IX response. To discover the answers to the research questions, a document analysis was conducted of more than 30 appellate court decisions, looking at the major themes and trends that illustrate how IHEs responded to Title IX incidents of student sexual misconduct and whether those responses were reasonable in the eyes of the appellate courts. The appellate court opinions reveal that while IHEs have responded consistently to Title IX incidents of sexual misconduct, institutions have had issues with Title IX personnel holding conflicting roles and with avoiding gender bias. In addition, the opinions show that while IHEs are aware of their constitutional protections of due process and immunity, a lack of alignment existed between IHEs and the courts as to whether IHEs were entitled to constitutional protections as part of their Title IX response processes. This study contributes to the dialogue regarding federal Title IX policy and how IHEs are seeking to evaluate and, as needed, improve institutional Title IX policies, procedures, and responses to student incidents of sexual misconduct.

*Keywords*: Title IX, higher education, deliberate indifference, due process

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# CHAPTER 1: INTRODUCTION

What do *My Cousin Vinny*, the United States gymnastics team, and Twitter hashtags all have in common? The answer: In some way, they all connect to what is known in higher education as Title IX. Title IX, a federal education policy put into place in the early 1970s, recently has been placed under the microscope by the federal government and the justice system for its perceived failure to protect students from sexual harassment and sexual violence. As readers will learn in this study, a seemingly straightforward one-sentence policy is now the subject of ongoing debate and court battles, pitting three major groups— the U.S. Department of Education (ED), institutes of higher education (IHEs), and the judicial system— against one another, even though they share the goal of fixing a broken policy. The overall goal of this study is to examine what court opinions reveal about how IHEs are responding to Title IX and the extent to which those responses align with courts' interpretations of proper Title IX response.

## The Foundations of Title IX

In 1972, President Richard Nixon introduced Title IX of the Education Amendments, which became known simply as Title IX. Title IX mandated, "No 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" (U.S. Department of Education, 2015, para. 2). While Title IX initially was associated with gender discrimination in intercollegiate athletics, it later became part of a broader effort to protect all students, faculty, and employees from sexual harassment or sexual assault in higher education settings. All institutions are required to have institutional Title IX policies and mandates and must adjudicate Title IX matters and "not wait for resolution of any associated

criminal investigation or proceeding" (Schuh et al., 2017, p. 116). If a school is found in violation of Title IX, that school could lose federal funding and face additional penalties.

The introduction of Title IX was part of a broader revision of the Higher Education Act (HEA) of 1965. The HEA, enacted by President Lyndon Johnson, marked a significant change in how the federal government viewed the importance of higher education and how, according to policy makers, more Americans should be enrolled in universities. For example, while attending a higher education institution was costly, the HEA provided more financial assistance in the form of federal student loans for students who sought to better themselves in college (Loonin & Morgan, 2019). In addition, colleges that required more financial assistance, usually the colleges with fewer students, now would receive more financial assistance (Hegji, 2018) and would be able to provide more program and extracurricular options to their students.

Even though the HEA was largely successful in expanding access to higher education, Congress decided in 1972 to expand and amend the HEA. Much of the Education Amendments of 1972 consisted of adjustments to and codifications of the original HEA language. However, several new policies were introduced, one of which was called Title IX. While today's iteration of Title IX chiefly is associated with prevention of sexual harassment and sexual violence, the original purpose of Title IX— subtitled "Prohibition of Sex Discrimination"—was to provide equality in college admissions for women, who were showing interest in receiving the same education as men had been receiving for decades, centuries even. By providing for equal "participation in any education program or activity receiving federal financial assistance" (U.S. Department of Education, 2015, para. 1), the government finally recognized that women should have the same access to educational opportunities that previously had been limited to men. As a result, no longer would college admissions policies turn away women in favor of men. Congress

may have felt the policy was clear, but little did it know that the vagueness of "education program or activity" would result in a seismic shift in college athletics. As will be discussed in greater detail in Chapter 2, Title IX evolved even further when an aspiring college student first sued Brown University for damages under Title IX, claiming gender discrimination.

While the Title IX policy itself is quite brief, it provides for a variety of protections, including, most notably, guarding against sexual harassment and sexual assault on college campuses. All colleges and universities are required to abide by Title IX, including the enacting of institutional Title IX policies. While institutions were more or less compliant with the requirement, they still lacked specific details as to what should be in their policies. Thus, on April 4, 2011, the U.S. Office for Civil Rights (OCR), a sub-office of the ED, issued a 19-page set of guidelines that came to be known as the Dear Colleague Letter (DCL). The DCL gave clear advice to IHEs as to how they should address Title IX on their campuses, such as having clearly established fair and impartial investigation and hearing processes, and educational, training, and counseling options for students and employees:

> This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence. […] This letter supplements the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. (U.S. Department of Education, 2011, p. 2)

## Changes and Consternation

The 2011 DCL seemed quite comprehensive in scope and provided significant guidance to schools in their policy creation. However, in September of 2017, the ED, under the leadership of Betsy DeVos, withdrew the 2011 DCL and replaced it with a new Dear Colleague Letter, which modified the prior letter's policy direction and, in the process, led to confusion and consternation on the part of institutions. According to DeVos, issues with potential procedural due process violations and unequal rights for both the accusers and the accused meant that, "Everyone [was losing]" (U.S. Department of Education, 2017a, para. 91) under the 2011 DCL's parameters. That necessitated, in her view, weighty changes in federal Title IX policy, changes that, as of this writing, have not been formally adopted.

One of the most significant proposed changes, for example, stated that IHEs offering appeals can allow either both sides to appeal or just the accused to appeal. This was different from the current appeals process that allows for an appeal by both the accused and the accuser. Another proposed change came in the timeframe to complete an investigation: The previous guidance mandated a 60-day completion, but the ED proposed eliminating that window, with the OCR "evaluat[ing] a school's good-faith effort to conduct a fair, impartial investigation in a timely manner" (U.S. Department of Education, 2017c, p. 3) with no official time limit. The ED also proposed a change to the evidentiary standard in Title IX hearings. IHEs had been using the preponderance of the evidence standard (often referred to as 50 percent and a feather) to determine whether a respondent was more likely than not to have committed the Title IX offense. However, the ED now allowed IHEs to use a higher standard, referred to as clear and convincing evidence. With that standard, IHEs would need more evidence to demonstrate that the respondent committed the offense in question (U.S. Department of Education, 2017b). One other

change: IHEs would have the option of forgoing formal investigations and hearings and instead using informal resolutions such as mediations to resolve disputes, as long as all parties agreed to the informal process (U.S. Department of Education, 2017c).

DeVos referred to the 2017 Dear Colleague Letter as interim guidance and added that more permanent measures would arrive within the next several months, which became one year. All of this meant that institutions would have to review and modify their own Title IX policies again.

Not everyone in the federal government, however, agreed with the ED's interim guidance. The Congressional Bipartisan Task Force to End Sexual Violence, co-chaired by Representatives Jackie Speier (CA), Annie Kuster (NH), Patrick Meehan (PA), and David Joyce (OH) convened a panel discussion in October of 2017 to discuss the rescinded guidance and, in their eyes, the threats posed by the 2017 interim guidance. Panelists included Assistant OCR Secretary Candice Jackson, Association for Title IX Administrators (ATIXA) Vice-President Daniel Swinton, American Association of University Women (AAUW) Interim Vice-President Anne Hedgepeth, and Foundation for Individual Rights in Education (FIRE) Legislative and Policy Director Joe Cohn.

One of the chief issues with Title IX, as will be discussed later, is the presence of multiple perspectives regarding effective policy guidelines. Thus, a goal of the panel was to bring together representatives of the larger interest groups in the hopes of finding common ground with the ED and legislators. After the initial introduction and general discussion regarding the OCR's September 2017 rescinding of the previous Title IX guidance and the issuance of the new guidance, the panelists took questions from the legislators. Representative Speier commented that when the OCR rescinded the previous Title IX guidelines, no official replacement guidelines came out. She asked about a timeline for further changes, but OCR

representative Jackson first sidestepped the question and then stated that no timeline for further changes was available at that time (Bipartisan Task Force, 2017). Hedgepeth faulted Jackson's response, stating that institutional guidance regarding Title IX was essential to ensure the schools are enforcing their own standards (Bipartisan Task Force, 2017).

Rep. Speier then asked Jackson about the new appeals process in which, depending on an IHE's preference, only the accused, and not the accuser, can appeal. Jackson stated that schools can choose the appeal process, but Representative Speier still found that problematic (Bipartisan Task Force, 2017). Jackson was then asked about the accused's rights for further education following violation of the policy, specifically, why accused students should have the right to expect an opportunity for education when they have violated the policy. Jackson did not answer directly but instead noted that all cases should be handled separately.

In addition, there was the issue of the accused now having the ability to cross-examine the accuser, which contradicts the rape shield law, a law that protects victims from, among other things, having to face their accused attackers in court. The previous Title IX guidance allowed a third party to conduct cross-examination or cross-examination through the submitting of pre-approved questions, but the proposed guidance may alter that process. Jackson stated that fairness for both the accuser and the accused led to that decision, though she did not directly address the rape shield issue (Bipartisan Task Force, 2017). Because OCR may consider allowing the accused to confront the accuser, higher education institutions will monitor those changes closely, especially since allowing cross-examination could violate the rape shield laws in states. Should a violation of the law occur, in theory, the accuser could then sue the university for failure to adhere to the law, even though the federal guidelines would allow for confrontation during a Title IX hearing.

Lastly, the evidentiary issue posed a problem for the panel co-chairs. Under the prior guidance, institutions would apply the preponderance of the evidence standard (51%) to determine whether the accused violated the policy. However, the new guidelines called for clear and convincing evidence, which does not have a defined percentage. While Joe Cohn of FIRE indicated his organization's support for the new standard, Speier commented that a higher standard may cause fewer people to come forward, since those coming forward would have more difficulty proving a violation occurred (Bipartisan Task Force, 2017). In addition, Representative Kuster stated that sexual assault cases deserve the civil-rights-based process of preponderance of the evidence (Bipartisan Task Force, 2017). While the overall panel discussion proved informative, it also revealed, through the contrasting opinions of Representative Speier and Assistant Secretary Jackson, how not everyone in the federal government shares the same opinion regarding proper Title IX response procedures.

In short, since 2014, major revisions to Title IX policy have occurred, and more revisions will likely be forthcoming. Following the 2017 rescinding of the 2011 DCL, higher education institutions had to wait until November of 2018, when the ED finally released the new proposed Title IX guidance. The guidance document was approximately 150 pages and brought several significant changes to Title IX, including a redefining of the term sexual assault. As planned, the cross-examination process also was changed to allow for live cross-examination at the hearing by representatives of the complainant and respondent rather than by submitting questions before the hearing (U.S. Department of Education, 2018). As is customary with all proposed legislation, the ED allowed a 60-day public comment period for people to submit their comments about the various components of the new guidance. As of February 14, 2020, there were 124,196 comments ("Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs or

Activities Receiving Federal Financial Assistance," 2019), all of which were required to be reviewed by the ED.

Many colleges and universities, along with professional organizations such as ATIXA and Student Affairs Educations in Higher Education Administration (NASPA), offered lengthy commentaries about how and why the proposed changes would severely damage the Title IX process while not addressing every facet of student sexual harassment or sexual violence. Rutgers University, for example, unequivocally stated that the new regulations, while seemingly comprehensive, lack a very significant proviso that reflects a behavior not widely seen (and thus not addressed) in the previous guidance: "The proposed regulations are silent on how the Department will apply Title IX to cyber harassment. Cyber harassment is a serious problem, both in our society in general and for college students in particular" (Rutgers University, 2019, Section 2, para. 3).

As will be demonstrated in subsequent chapters, the changes to Title IX policy through the multiple DCLs have led to variations in the way higher education institutions respond to Title IX incidents of sexual misconduct. While one might expect all universities to have similar Title IX policies and procedures, that has not been the case at all. Those inconsistencies, in turn, have resulted in substantially more lawsuits being filed by parties claiming unfair application of institutional Title IX policy.

## What is the Problem?

While the purpose of Title IX cannot be questioned, actual compliance with Title IX policy has been problematic for many institutions, especially in recent years with the changes— and proposed changes— to federal policy. Both students and faculty/staff who have become victims of sexual harassment and sexual assaults have found it difficult to have their cases

resolved. In addition, there have been situations where accused parties have been found responsible, only to be cleared later when new information surfaces. Those clearances by courts of law have led the students to sue their institutions for, among other things, due process violations, expulsion from their programs, and breach of contract.

In addition, the changes to the Title IX protocol have resulted in substantial uncertainty among Title IX coordinators, student affairs professionals, and even top lawmakers. Most of the concern applies to the investigation and adjudication processes, both of which were significantly affected by the new guidance. In a letter to Secretary DeVos and OCR Acting Assistant Secretary Jackson, several United States Senators opined that the changes to Title IX measures have resulted in "vague and often contradictory [guidance], and [have] caused confusion among college administrators, teachers, and students across the country" (U.S. Senate, 2017, para. 1). The American Bar Association's (ABA) Daiquiri Steele, also a law professor at the University of Alabama, bluntly stated, "Just about anything a school does will be subject to Title IX" (American Bar Association, 2018) at the ABA 2018 meeting.

However, little research currently exists that attempts to examine court cases for both commonalities and divergence in how higher education institutions respond to Title IX incidents of sexual misconduct and whether those procedures mesh with how the courts view proper Title IX incident response. While the ED oversees all higher education institutions and sets the federal policies (such as Title IX) with which all IHEs must abide, the courts have the power to determine whether an IHE has or has not complied with the federal policy and whether a lack of compliance should result in a penalty, such as damages or other legal relief for a plaintiff. An IHE that fails to comply with Title IX and is sanctioned by a court may serve as an example to other IHEs as to how to respond properly to Title IX incidents. Also important is how, through

the court commentaries, judges might help IHEs strengthen or, in some cases, replace their existing response procedures. None of the current literature appears to answer those important questions; those answers could help colleges and universities, especially with Title IX compliance both now and in the future.

If universities truly seek to improve their Title IX policies and procedures while protecting themselves from costly litigation and potential defunding, they need to be much more proactive and, as best they can, anticipate long-term issues that might arise in the field. Institutions must learn how to abide by the rules rather than flout them. To do that, Title IX administrators may be able to look at how courts have interpreted Title IX response protocol, since those same courts ultimately have the final say in whether a university complied with Title IX policy. The interim guidance is expected to become permanent sometime this year. The expected legal challenges to the new policy (Sokolow, 2020) means that IHEs will have even more time to strengthen their policies before the new federal policy takes effect.

That said, and will be discussed later, universities have been adversely impacted and have been forced to review and revise their Title IX policies to ensure full compliance with limited understanding of how the courts view their response procedures. The aim of my dissertation is to examine the variations in higher education institutional response to Title IX incidents as well as the degree of alignment between higher education and the courts with respect to Title IX responses.

## Purpose Statement and Research Questions

The overall purpose of this study is to examine how the judicial system has revealed areas of concern for IHEs with respect to their responses to Title IX incidents of sexual misconduct and whether the judicial system's interpretation of proper Title IX response parallels

how IHEs view proper Title IX response. That parallel also is revealed when examining how the courts have highlighted universities' competence, or lack thereof, to deal with Title IX matters. Specifically, I seek to answer the following research questions:

1. What common themes and trends emerge from appellate court opinions that illustrate similarities and differences among institutions of higher education in institutional responses to Title IX incidents of student sexual misconduct?
2. Based on court opinions, in what ways are appellate courts and higher education institutions aligned in the perceptions of proper procedures for addressing Title IX incidents of student sexual misconduct?

My hope is that with this study, Title IX coordinators and other university administrators will have a better understanding of how to create more robust institutional Title IX policies that will both ensure maximum protection for their students and stand up to the strict scrutiny of the federal government and the judicial system.

## Research Approach

I chose to review appellate court judicial opinions from March of 2017 to May of 2019. Like university policy documents, court opinions are available to the public for review and, in this case, for research purposes. While I could have compared university Title IX policies to the court opinions, I wanted to delve deep into the courts' perspectives on the conflicts surrounding Title IX policy. Court opinions are complex documents, often consisting of a court's meticulous thought process and sprinkled with legal jargon and myriad references to other cases. However, court opinions, while binding, also are instructional in nature, providing opinions and perspectives that may differ with traditional educators but nonetheless offer important and insightful policy guidance. Unlike institutional Title IX policies, the court opinions almost

always include a narrative, or statement of facts, about the case; the narrative often provides important context as to how and why a court ruled the way it did. University Title IX officials would benefit from reading the narratives and looking at the sequence of events from a different perspective.

Regarding my chosen timespan, interim revised Title IX policy was introduced by ED Secretary Betsy DeVos in September of 2017, so I sought to examine opinions rendered both before and after her announcement to account for any significant shifts in judicial opinion.

**The Appellate Court System**

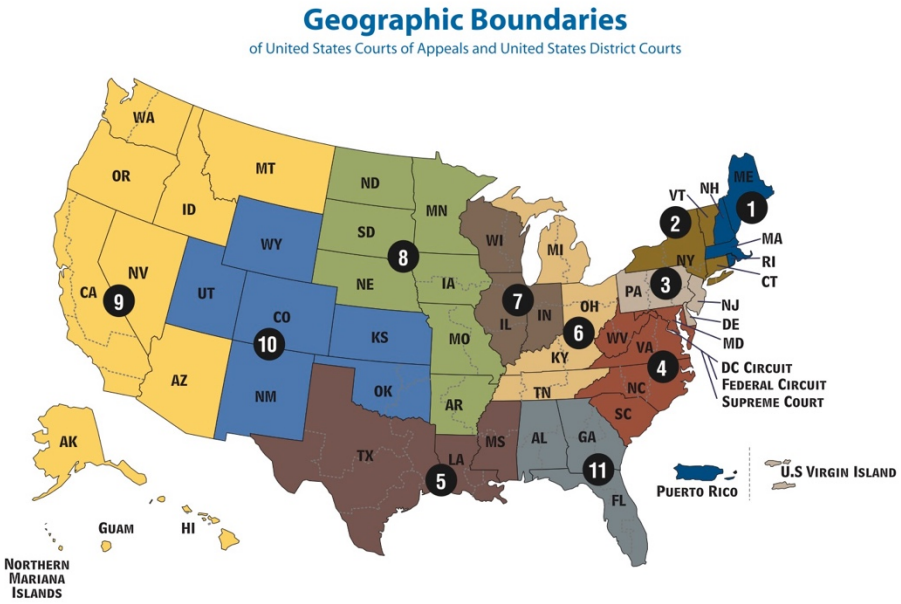


*Figure 1*. Map of appellate court circuits (United States Courts, n.d.-b).

As Figure 1 demonstrates, the United States Appellate Court system consists of 13 circuits, including the DC Circuit and the U.S. Court of Appeals for the Federal Circuit. When a party (the plaintiff) wants to sue another party (the defendant), and the issue involves federal law, the suit is filed in federal district court. A jury hears the case and decides whether the defendant has committed the alleged misconduct. Parties who lose district court decisions may appeal the jury's decision; that party then becomes the appellant, with the other side referred to

as the respondent. Appellants appeal district court decisions for many reasons, with most common reasons being accusations of an unfair trial, belief in the judge's misapplication of the law, or federal or state constitutional violations (United States Courts, n.d.-a).

An important point to make about appellate court judges: Like all federal judges, they are tasked with ruling on matters impartially, but they also are appointed largely for political reasons. For example, since 2017, President Donald Trump nominated two eventual Supreme Court justices, Brett Kavanaugh and Neil Gorsuch, to fill two vacancies on the highest court in the United States. While both have prior experiences as appellate court judges, they also have conservative leanings that made them attractive to President Trump (Liptak, 2019). In the case of Gorsuch, the Republican-controlled United States Senate confirmed him in 2017 after blocking President Barack Obama's nomination of Judge Merrick Garland, the Chief Judge of the District of Columbia Court of Appeals, the previous year (Elving, 2018). Judge Garland had received approval from both Republicans and Democrats for his somewhat moderate viewpoints, but Senate Majority Leader Mitch McConnell prevented Garland from even receiving a hearing, essentially nullifying Obama's nomination altogether (Hulse, 2019).

While appellate court judges do not have to go through the same long nomination and hearing process as Supreme Court justices do, they still are political appointments and require Senate confirmation (United States Courts, n.d.-c). As a result, their party affiliation obligates them to follow their party lines when ruling on judicial matters. President Trump long complained about California's Ninth Circuit Court of Appeals (he called it the "Ninth Circus") as being too liberal because of its rulings against his travel bans. However, in 2018 and 2019, President Trump managed to confirm six Republican judges to that same court and, in the process, shifted the political leanings more toward him (Vogeler, 2019).

While a judge's political affiliation should not come into play in Title IX decisions (or any other decisions), it provides an interesting segue to the theoretical framework discussion in the next section.

## Theoretical Framework

As noted previously, this study examines appellate court decisions. However, the broader discussion of Title IX incorporates three distinct yet interconnected organizations: higher education, the judicial system, and the ED. Each organization has a specific set of guiding principles when it comes to Title IX legislation, but they share the same goal: to ensure that students, faculty, and staff at educational institutions do not experience any behavior prohibited under Title IX. The organizations are individual actors with a collective purpose; thus, I have chosen organizational social action theory, a variation of social action theory, as the first part of my theoretical framework. As will be discussed in subsequent chapters, organizational social action theory treats organizations like human beings working at organizations who are both agents and receptors of change (Powell & Brandtner, 2016). According to the theory, the organizations themselves seek to enact changes both within and outside of their environments, and they usually experience conflict when trying to do that. Besides environment, factors such as relationships and empowerment affect an organization's desire for social action (Horvath, 1999).

However, just as organizations should work together to accomplish a common goal, so do they often experience conflict. Consequently, I have chosen conflict theory as the second part of my theoretical framework. As will be discussed in Chapter 2, conflict theory demonstrates the dysfunction existing within and among different organizations, especially those tasked with collaborating for a greater purpose. In the present case, the judicial system, higher education, and the ED all have the same goal in mind: to protect students better through reforms to Title IX

policy. In theory, all three organizations should have some form of collaboration, but as will be shown here, the level of conflict among them is quite substantial and has created much tension in the realm of Title IX.

## Definitions

While each chapter will have specific terms and phrases defined, what follows are a few general terms/phrases that will appear throughout this study. With the exception of *Title IX Coordinator*, all legal definitions come from Black's Law Dictionary (Garner & Black, 2019), and I have provided context and explanation for each legal term.

*Due Process*. The idea of due process comes from the Fifth and Fourteenth Amendments of the Constitution. Under the notion of due process, no person can be deprived of life, liberty, or property in both substance and procedure. Substantial due process, for example, means that a person has the right to work, to marry, and to live without undue interference by the government. Procedural due process goes one step further and protects a person against punishment without a proper notification and a hearing (trial). Both aspects of due process apply to Title IX hearings; accused students have sued their universities for depriving them of educational opportunities, for failure to provide notification of charges and, for failure to conduct appropriate hearings.

*Preponderance of the Evidence* standard. The preponderance of the evidence standard means that the evidence to find a party liable must be greater than 50% against the party. Civil courts of law use this standard when deciding the liability of a defendant. Some have used the "50 percent and a feather" approach to determining liability. For the purposes of this study, the standard applies to institutional hearing boards in their examination of the evidence against an accused sexual assaulter or harasser and was first introduced in the 2011 DCL.

*Clear and Convincing Evidence* standard. Unlike the previous standard, the clear and convincing evidence standard calls for a higher degree of certainty regarding the evidence brought against the accused. In this scenario, the evidence must show that the accused more likely than not committed the act in question. Some scholars have interpreted this to mean two thirds of the evidence demonstrating liability; others have suggested three fourths. Still, the standard is considerably higher than preponderance of the evidence. This standard, used by both civil and, in certain cases, criminal courts of law, has been promoted by the OCR as the preferable standard when schools are deciding an accused student's fate.

*Deliberate Indifference.* Deliberate indifference is defined as: "The careful preservation of one's ignorance despite awareness of circumstances that would put a reasonable person on notice of a fact essential to a crime" (Garner & Black, 2019b, para. 1) Deliberate indifference by institutions and those employed within them is a major focus of the courts.

*Qualified Immunity.* For the purposes of this study, qualified immunity means that an administrator or employee of the university, so as long as that person makes a policy judgment that does not violate the Constitution or other statutes, cannot be held liable for the judgment.

*Sovereign Immunity.* Sovereign immunity, very closely related to qualified immunity, protects a government or any part of the government (including state schools) from being sued without providing consent to the litigation.

*Title IX Coordinator*. The Title IX Coordinator is the supervisor of all Title IX cases at a higher education institution. The coordinator manages the process from start to completion, from the initial notification of a violation to the formal or informal resolution of the case. As will be discussed, many Title IX coordinators hold other positions at a university and thus are not totally dedicated solely to Title IX. In addition, conflict of interest prevents coordinators from serving as

investigators, though at many universities (particularly those using the single investigator model), a coordinator may also hold both the investigator and the hearing officer roles.

# CHAPTER 2: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

## Introduction

Melnick (2018) stated the following about the Title IX policy: "Like many statutes, it combines ill-defined substantive mandates with multiple constraints, exceptions, and procedures" (Chapter 3, Section 1, para. 1). An examination of the literature concerning Title IX supports Melnick's interpretation, revealing myriad issues that have led to major discrepancies among the ED, IHEs, and the judicial system, particularly about proper responses to Title IX incidents of sexual misconduct. Procedurally, IHEs are required to defer to the ED and the courts. However, as will be discussed in Chapter 2, Melnick noted the lack of consensus as to whether the ED or the courts should have final authority on Title IX policy. Many of the discrepancies stem from the complex history of Title IX legislation itself, from the original 1972 policy to the numerous Dear Colleague letters to the proliferation of Title IX lawsuits. In order to make sense of the major themes in the literature, it is important to understand how Title IX evolved from a seemingly benign (but important) piece of legislation to the complex policy that exists today.

In this chapter, I first will discuss the origins and evolution of Title IX from an admissions-only policy to the current policy protecting against sexual misconduct. Understanding the history of Title IX policy is important, especially in terms of linkages to the theoretical framework. Next, I will talk about several of the major issues conveyed by the literature, such as the presence of both criminal and civil law elements in Title IX; issues with Title IX policies and procedures; and constitutional issues. While much of the Title IX-related literature discusses each of the issues previously mentioned, very little literature looks at all issues in a single setting. My logic for examining multiple issues within the literature is to begin

making issue connections that will become more useful as my study proceeds. Following that will come an exploration of the different perspectives of the three organizations in charge of enforcing Title IX: higher education, the ED, and the judicial system. The latter discussion will lead into an explanation of my theoretical framework, incorporating both organizational social action theory and conflict theory. I will conclude the chapter by offering several assumptions and by addressing the potential for researcher bias.

## The History of Title IX

The 1972 Title IX policy reads as follows: "No 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" (U.S. Department of Education, 2015, para. 2). Naturally, a casual observer might wonder how that single sentence pertains to sexual assault; that connection would not come until 2011. While the Office for Civil Rights (OCR) had provided Title IX guidance since the policy's inception, the policy itself had, until 2011, primarily applied to college admissions and athletics and was not used significantly in litigation involving sexual misconduct, at least in higher education.

### The 1970s and 1980s: Title IX and College Athletics

As noted above, Title IX initially applied to intercollegiate athletics. The original goal was to ensure that women had equal opportunities to participate in college sports. For example, if a school (high school or college) offered 10 male sports, that school also would need an equal number of female sports. Over time, though, the law soon grew in its scope; the U.S. Supreme Court decided several cases in the 1990s and 2000s that expanded Title IX to its current parameters to include harassment and discrimination violations.

Hunt (1999) stated that Title IX's original intent was to provide broad protection against gender discrimination in college admissions. Some scholars have suggested that the brevity of the policy itself suggested a lack of seriousness on the part of legislators toward the problem of gender inequality in higher education (Sigelman & Wahlbeck, 1999); it was almost as if Congress performed a purely perfunctory act to satisfy its own needs. However, the vague language of Title IX created more nuisances for both pro- and anti-Title IX advocates, since "education program or activity receiving federal financial assistance" (U.S. Department of Education, 2015, para. 2) could apply to a host of university programs including, most notably, athletics (Zaccone, 2010). The NCAA, which at the time was made up solely of male sports, vehemently opposed Title IX legislation, likely because the introduction of female sports would change its entire funding structure. Fierce debate about the athletic proviso raged for several years until 1991, when, in a case entitled *Cohen v. Brown*, the courts firmly established Title IX's policy role as that of providing equal opportunity for women to compete in intercollegiate athletics (Hunt, 1999), asserting that such prohibition was tantamount to discrimination.

**The 1990s: Courts Begin to Redefine Title IX**

Based on the above, it seems clear that courts were considering just how broad of a scope Title IX really had and whether discrimination went beyond admissions and athletics. Kuznick and Ryan (2008) noted how the Supreme Court, in a 1992 case entitled *Franklin v. Gwinnett County Public Schools*, established that students could sue for damages under Title IX and that Title IX violations could include sexual harassment as a form of gender inequality. In that case, Christine Franklin filed a Title IX complaint in a federal district court against her school district for damages, alleging that her teacher, Andrew Hill, had sexually harassed and sexually assaulted her over a period of time while she was in high school (*Franklin v. Gwinnett County*, 1992). The

district court dismissed her complaint, stating that damages were not covered under Title IX. She appealed, but the appellate court affirmed the district court's decision (*Franklin v. Gwinnett County*, 1992). However, the Supreme Court reversed the appellate court's decision, opening the door for a wider interpretation of Title IX.

Five years later in 1997, the OCR put forth a document called "Sexual Harassment Guidance" which, in part, established a stronger connection between Title IX and sexual harassment. One could look at that document as a precursor to later legislation, but a closer inspection demonstrates a more limited definition of sexual harassment. For example, the 1997 guidance states,

> [I]f students heckle another student with comments based on the student's sexual orientation (e.g., 'gay students are not welcome at this table in the cafeteria'), but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. (U.S. Department of Education, 1997, Applicability of Title IX section, para. 4)

While that might have been the case in 1997, the same would not be true in 2011 and definitely not in 2018, since Title IX now protects against any and all forms of gender-based harassment. The OCR revised the "Sexual Harassment Guidance" in 2001 due to two additional court decisions that further clarified sexual harassment of students (Kuznick & Ryan, 2008).

In *Gebser v. Lago Vista* (1998), a former student (Gebser) in the Lago Vista Independent School District sued that district under Title IX, claiming that the district knew about her inappropriate sexual relationship with a teacher yet failed to take appropriate action. The Supreme Court, in affirming the appellate court, noted that

> the only official alleged to have had information about [teacher] Waldrop's misconduct is the high school principal. That information, however, consisted of a complaint from parents of other students charging only that Waldrop had made inappropriate comments during class, which was plainly insufficient to alert the principal to the possibility that Waldrop was involved in a sexual relationship with a student. Lago Vista, moreover, terminated Waldrop's employment upon learning of his relationship with Gebser. (*Gebser v. Lago Vista*, 1998, Section 4, Para. 3)

The *Gebser* decision, in essence, established the parameters for deliberate indifference under Title IX, which, as this study will discuss, would become a significant issue for IHEs.

In *Davis v. Monroe County,* the mother of a fifth-grade student sued the Monroe County Board of Education for what she said was continual sexual harassment of her daughter by another student. The school district claimed that Title IX did not pertain to student versus student conflicts, but the Supreme Court clearly disagreed. In its decision, the court expanded the limits of Title IX by establishing that "student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under [Title IX]" (*Davis v. Monroe County*, 1999, Section B, para. 1).

Dayton (2015) noted that collectively,

> Franklin, Gebser, and Davis teach us that school officials should: 1) Have a reasonable policy in place for the prevention and correction of sexual harassment; 2) Promptly and fairly investigate reports of alleged sexual harassment; and 3) Take reasonable remedial actions when appropriate to assure that no one is excluded from educational opportunities because of sexual harassment or other differential treatment based on gender. (p. 357)

However, despite the important developments in the judicial arena, much of the 1997 guidance remained intact with very few changes.

**The 2000s: Title IX Truly Changes Course**

In 2011, the OCR under President Barack Obama's direction released the first Dear Colleague Letter (referred to forthwith as 2011 DCL), which called for institutions to be more proactive in responding to Title IX complaints and to provide better training for their employees to help them deal with incidents of harassment or assault (U.S. Department of Education, 2011). Three years later, the OCR supplemented the 2011 DCL with a document entitled "Questions and Answers on Title IX and Sexual Violence" (U.S. Department of Education, 2014). Among other things, the 2014 Q/A "suggested" that schools aim for a 60-day goal for resolution of Title IX cases unless more time is warranted, that respondents (accused) be barred from cross-examining complainants (accusers), and that schools abide by the preponderance of the evidence requirement used in civil rights cases in decisions (U.S. Department of Education, 2014).

**2015: Title IX Goes Public**

Until 2015, Title IX cases did not get much attention from the general public. However, a series of high-profile cases and one groundbreaking movement brought Title IX into full public view and, in the process, put all educational institutions on high alert.

In 2015, Stanford University elite swimmer Brock Turner was accused of committing sexual assault at a college party by an unnamed female. Turner denied that any assault had occurred, instead claiming that his accuser had consented to sexual intercourse. A California jury disagreed with his contention and found Turner guilty of three counts of criminal sexual assault. Judge Aaron Persky could have imposed a sentence of as many as 14 years, but he instead chose to sentence Turner to 6 months in county jail (of which he served 3 months) along with 3 years

of probation (Vitiello, 2018. Many in the public believed that Turner's athletic prowess played a significant role in his reduced jail time. A public outcry erupted over the apparent light sentence and became so powerful that Judge Persky was removed as Superior Court Judge in Santa Clara County (Kebodeaux, 2017). While Turner's case was not the first instance of college sexual assault, the trial and subsequent sentencing spread quickly over social media and, in the process, introduced many outside of higher education to Title IX.

If Turner's case unlocked the public's door to Title IX, the Baylor University football scandal opened the door even further. In 2016, ten anonymous female students filed a Title IX lawsuit against Baylor and claimed they had been subjected to a hostile educational environment over the span of several years (Jaschik, 2016a). In the lawsuit, the plaintiff students asserted that Baylor knew of the many Title IX violations on campus but, in the interests of its well-known football program, chose to ignore those violations, a pattern that apparently had developed at Baylor both prior to and after the 2016 lawsuit was filed (Whitford, 2018). In addition, one of Baylor's administrators, Matt Burchett, was accused of trying to manipulate student activists as well as report the activists' activities to Baylor's administration (Bauer-Wolff, 2018a). Further, the evidence suggested that the Waco police department concealed evidence to protect the university's reputation. The expansive nature of the case eventually led to Baylor President Kenneth Starr and football head coach Art Briles losing their jobs and also led to the resignation of Title IX Coordinator Patty Crawford, who later stated that Baylor's culture did not include an emphasis on following Title IX protocol (Jaschik, 2016b). In addition to bringing more attention to the penalties for improper Title IX response, the Baylor case illustrated what could happen when intra-organizational tension and conflict arise, a topic that will be discussed with my theoretical framework later in this chapter.

**“Me Too” becomes #metoo**

The Stanford and Baylor lawsuits may have opened the door to Title IX in mainstream media, but the #metoo movement, beginning in 2017, brought more attention to Title IX issues. The phrase *Me Too* was first conceived by prominent activist Tarana Burke, who created the Me Too campaign slogan in 2007 as a way to unite female victims of sexual assault (Tippett, 2018). Little did Burke – or anyone else on Twitter – know how far her work would extend. Before #metoo, Harvey Weinstein was known as one of the most influential figures in Hollywood, producer of countless films and co-president of his own production company. However, on October 5, 2017, *The New York Times* reported that Weinstein had paid off multiple women accusing him of sexual assault and that the assaults stretched back more than 30 years (Kantor & Twohey, 2017). At first, Weinstein released differing statements that both acknowledged inappropriate behavior yet blamed the *Times* for what he called false reporting. New accusations soon followed Weinstein, with former employees and celebrities such as Ashley Judd and Rose McGowan, making claims about Weinstein’s past sexual harassment incidents. While the statute of limitations had passed on many of the assaults, Weinstein still faced multiple lawsuits from women who alleged he had assaulted them in various instances. The Weinstein case led to other high-profile celebrities such as Kevin Spacey and Richard Dreyfuss having similar accusations put toward them.

In 2017, Alyssa Milano used #metoo to promote awareness of sexual assault. Within hours, the metoo hashtag spread throughout the world and bridged the gap between Title IX cases in higher education and the general population. Mangan (2017) discussed how, in many universities, students, faculty, and staff committed sexual assault or sexual harassment yet were never held accountable due to the university seeking to “protect” itself and to avoid being found

liable for permitting the behavior to occur. No longer was that an option with the #metoo movement continuing to grow. Whether such an act was committed long ago, any act that violated Title IX now called for renewed focus on identifying sexual violence in academia and improving its climate, which would lead to a greater sense of welcome, regardless of one's gender, race, culture, or creed (Lawhon, 2018).

While many higher education Title IX cases did emerge as a result of the #metoo movement, the most expansive case clearly was when Michigan State University became engulfed in several Title IX issues involving Dr. Larry Nassar, its former doctor and the official team physician for USA Gymnastics. Nassar was accused by more than 150 women of sexual abuse and ultimately pleaded guilty to seven counts of criminal sexual abuse, receiving a sentence of 40 to 175 years in prison (Kelderman, 2018). Michigan State came under intense scrutiny for what was perceived as hiding Nassar's alleged crimes against Michigan State students by the administration and athletic director. President Lou Anna K. Simon and Athletic Director Mark Hollis, who both originally denied any sort of cover-up, resigned as a result of mounting pressure applied by the NCAA and the FBI. The NCAA investigated Michigan State but did not find the university at fault for how it responded to complaints against Nassar (Bauer-Wolf, 2018b). However, the OCR commenced its own investigation in February of 2018; as of this publication, the investigation remains ongoing. Had the #metoo movement not become as well-known as it did, one might wonder how much attention, or to what degree, people would have given the Michigan State situation.

Colleges and universities, though, now had an even more difficult task: how to cope with sudden exponential growth in an educational policy that, for many years, went undetected both within and outside of educational circles. Students who had been the subject of sexual

harassment and sexual assault but who may have not known of the existence of Title IX now did and would be seeking restitution, even if that restitution consisted of nothing more than an apology from the university. Schools, meanwhile, were tasked with examining their own policies to determine what changes needed to be made in order to both serve the student populations while protecting themselves against potential lawsuits. As will be seen below, the problems became very complex.

## Policies, Procedures, and Problems

With the existence of governmental and judicial perspectives on Title IX, it seems that Title IX administrators have had significant challenges managing Title IX policy at their institutions. Administrators might prefer to handle everything in-house with comprehensive policies and basic trained professionals, but as the literature indicates, conflicts in ideologies often make that difficult to achieve.

Because institutions have sought all-encompassing policies to account for any and all instances of misconduct they have relied on broad terms to account for any examples of sexual assault or sexual violence. However, as Koss et al. (2014) noted, the terminology in the DCL was problematic because of the sheer number of interpretations of the wording. Koss et al. examined the results of two surveys, the Sexual Experiences Survey (SES) and the Sexual Experiences Questionnaire (SEQ) and uncovered "42 specific acts and organized them within the DCL sexual violence/sexual harassment framework" (p. 243), which to the researcher meant "that the [2011 DCL] guidance represents a controversial and arguably inappropriate expansion in the type and severity of acts to which Title IX applies" (p. 244). Likewise, Carle (2015) argued that the overly broad definition of assault in the DCL did not seem particularly effective in preventing assault from occurring, since it conceivably could lead to a case of differing opinions between

complainant and respondent. Silbaugh (2015) also faulted the DCL with too much of a focus on post-assault discipline and not enough attention toward preventative measures. Because of the federal guidance, institutions created policies that dealt more with the "crime and punishment procedures" than they did with how to create more positive, non-aggressive college campuses (Silbaugh, 2015).

However, the policies were inconsistent and, as discussed by Streng and Kamimura (2015), lacked key components that the federal government felt should be part of every Title IX policy. Streng and Kamimura conducted a study looking at university Title IX policies and whether they contained 10 areas of sexual assault prevention identified by *NotAlone*, an initiative that the White House created in 2014 to promote greater awareness of campus sexual assault. Streng and Kamimura listed the 10 policy components as follows (reformatted here for a better view of the list):

1. an introduction;
2. scope of the policy;
3. options for assistance following an assault;
4. identification of the Title IX coordinator;
5. definitions of various forms of assault;
6. reporting policies and protocols;
7. investigation procedures and protocols;
8. grievance and adjudication procedures;
9. prevention and education policies; and
10. finally, how the staff and faculty involved are trained. p. 66

The researchers found that while some schools such as the University of Oregon and the University of North Carolina-Chapel Hill had strong policies, other schools including the University of Georgia and the University of Massachusetts-Amherst had no policies at all (Streng & Kamimura, 2015).

In order to have substantive policy, institutions need to employ knowledgeable Title IX policymakers. One concern is the challenge of having properly trained Title IX personnel:

coordinators, trainers, and especially investigators. Organizations such as the Association of Title IX Administrators (ATIXA) now provide regular training and professional development for Title IX professionals, but for many in the field, such opportunities did not exist when they first came into their roles. However, as the research indicates, most current Title IX coordinators originally worked (and still do work) in other administrative capacities and were thrust into Title IX positions when the OCR guidance shifted (Wiersma-Mosley & DiLoreto, 2018). In a study of 700 Title IX coordinators from both two- and four-year colleges with regards to the coordinator role, the responsibilities associated with it, and the backgrounds and experiences of each coordinator, the researcher found that approximately 18% of coordinators had less than one year of experience at their jobs, while only six percent had more than 10 years of experience, with much of their other experience being in human resources, diversity, and other student affairs work (Wiersma-Mosley & DiLoreto, 2018).

Training, however, is not just reserved for Title IX personnel. The DCL also requires that faculty, staff, and students know their responsibilities under Title IX. As dictated in the ED Title IX guidance, all university personnel—anyone employed by the university, with the exception of health officials, counselors, and chaplains—are considered mandatory reporters. That means, if a student goes to a faculty member and reports an incident of sexual assault, that faculty member must report the incident to the appropriate Title IX officer. The assumption always has been that university employees know their responsibilities under Title IX. Holland and Cortina (2017) studied 305 undergraduate resident assistants (RAs) at a Michigan school to determine whether RAs knew about reporting procedures, whether they believed in said procedures, and how the RAs interpreted mandatory reporting. The results indicated that most RAs lacked the knowledge when it came to reporting procedures. Given that the RA is the most obvious point of contact for

undergraduate students living in residence halls, the fact that RAs do not know the reporting process could jeopardize the very nature of Title IX reporting procedures.

### Investigations and Hearing Boards: Conflicts in Procedures

The investigation and hearing processes set up by the DCL also have been questioned by scholars. One concern has focused on who exactly would conduct the investigation and coordinate the hearing. Rubenfeld (2016) commented that because all cases required impartiality, anyone affiliated with the university, especially the college president, should not participate in the investigation process. However, the president has a vested interest in the outcome of a hearing, so complete detachment from the procedure seems not too realistic. Ellman-Golan (2017) contended that many experts, including the University of California President Janet Napolitano, feel that schools should not investigate sexual assault due to a lack of resources (financial and personnel), the criminal nature of the assault, and the potential for bias. As will be discussed later, Napolitano's opinion relates to the conflict that exists between the institution's investigation and the criminal trial process.

Procedurally speaking, colleges could (and, even under the proposed guidance, still can) choose from one of two investigative models: the single investigative model and the hearing board model (U.S. Department of Education, 2011). Under the 2011 DCL and expanded in a document entitled "Questions and Answers on Title IX and Sexual Violence" (U.S. Department of Education, 2014), it was up to the school to determine which model it would follow, but there were clear discrepancies between the two models (Koss et al., 2014), most notably with the number of people involved. The hearing board model would consider the interpretations of multiple people. Hearing boards are preferable for some colleges because such boards often consist of various roles: administrators, faculty, board members, and so forth. Because multiple

people would be involved in the decision-making process, the chances of any bias would be slim. However, as evidenced by the case of *Korf v. Ball State University* (1984), hearing boards are not always guaranteed to function efficiently, especially when other leadership groups become involved.

Students of Professor William Korf, a tenured professor of Music History and Musicology, claimed that Korf promised to reward them academically if they accepted his sexual advances. The students went to Dean Lloyd Nelson, who immediately investigated the accusations while asking Korf to resign. Korf remained, so the investigation continued, and in April of 1981, the college president, Dr. Robert P. Bell, told Korf that termination proceedings would occur but that Korf would have his chance to explain at a hearing in May of 1981.

At that hearing, after listening to student testimony, Korf denied offering good grades for sexual favors but confessed that he had been in a consensual relationship with one student. The hearing board found that he did not promise high grades for sex but that he had violated the ethical policies stated in the faculty handbook and, as a result, put him on 3 years of probation. At the time, the hearing board did not terminate him because members felt he did not have "ample warning and opportunity for behavioral change" (*Korf v. Ball State University*, 1984, Section 1, para. 5). Ball State's Board of Trustees perceived a lenient sentence and ordered the hearing board to review the punishment. After a review, Korf was removed as professor at Ball State.

Following his termination, Korf filed suit in Indiana's district court in 1982 against Ball State University, the Board of Trustees, Dr. Bell, and each Board member individually, alleging that, among other things, the defendants violated his federal rights of due process, privacy, and free speech and that they committed breach of contract and inflicted emotional distress upon

him. Ball State moved for summary judgment against Korf, stating that both the Eleventh Amendment and the doctrine of "good faith" immunity afforded the university protection (*Korf v. Ball State University*, 1984). In addition, Ball State submitted an affidavit signed by Dr. Bell along with evidence and exhibits from Korf's disciplinary hearing, all of which explained the university's rationale for firing Korf. In March of 1983, the district court granted Ball State's motion for summary judgment, which meant that the court did not find any issues of material fact that would warrant a trial.

Korf appealed the district court's decision, contending that genuine issues of material fact existed that could only be decided with a trial. One of Korf's contentions was that the ethical policies relied upon by Ball State did not identify explicitly the parameters for faculty–student "consensual sexual relationships" and that he did not know a professor–student sexual relationship was unethical because no other professor had ever been disciplined for that type of relationship. The appellate court faulted his logic and stated that Korf should have known that

> his conduct could and would be cause for termination. One cannot be heard to complain that it is somehow unfair to be the first one disciplined under a particular law, rule or regulation since, if that were the case, no new law, rule or regulation could ever be enforced. (*Korf v. Ball State University*, 1984, Section 3, para. 2)

The Korf case sheds important light on how courts view the higher education institutional hearing board process and the different levels of involvement in determining whether or not a college employee committed sexual harassment and the punishment that should result if a violation was committed. The Ball State hearing board originally recommended a 3-year probationary period for Korf, but the Board of Trustees believed that the punishment was too lenient. Interestingly enough, the trustees did not overrule the hearing board but instead asked

that committee members closely re-examine the university's ethical policies. One wonders what would have happened had the hearing board stood with its original decision. Would the trustees have had the authority to terminate Korf regardless of the committee's review of the original decision? This raises the question why the trustees, if believing Korf should have been fired, did not fire him. Perhaps the trustees realized that they, too, would have to provide Korf a disciplinary hearing and did not want to risk tainting the process. In any case, the above situation serves as an example of several issues with hearing boards.

Unlike the hearing board model, a single investigative model would rely on one person to make the decision of responsible or not responsible. In essence, a trained investigator would supervise the evidentiary and interview process from beginning to end and then make the determination as to whether an accused party is likely to have violated the institution's Title IX policy. Ellman-Golan (2017) commented that the single investigator model seems legitimate because one person gathering the evidence likely would prevent conflicting information from tainting the investigation. As mentioned before, ATIXA provides formal investigator training and certification, as well as ongoing professional development opportunities. Still, most trained investigators do not get a chance to practice their training until presented with an actual case, so there exists the potential for a flawed investigation due to inexperience. However, in order to avoid bias, an investigation center consisting of people with different areas of expertise could work even more judiciously. Rather than schools having in-house investigations, they would hire the centers to perform the investigations (Ellman-Golan, 2017). However, that likely would be costly for institutions, so most have chosen to employ the traditional in-house investigator. Dudley (2016) pointed out that in many cases, investigators have had no formal training or certification and thus are unfamiliar with the types of questions they should and should not ask

parties involved in a Title IX matter. Johnson (2015) added that regardless of the chosen model, the colleges' lack of subpoena power would limit how much evidence investigators could collect, since there would be no legal threat of punishment should a witness fail to cooperate with an investigation. An institution could involve a licensed attorney in the investigative process, but that often is not the case, mainly due to financial constraints (Johnson, 2015).

Following the release of the DCL, Title IX experts argued that institutions needed to collaborate better with law enforcement and the judiciary. Even though institutional proceedings differ significantly from legal proceedings, the outcome in one case could affect, positively or negatively, the outcome of the other. To that extent, Koss et al. (2014) stated that colleges should work with the police and with criminal prosecutors in coordinating evidence collection and review. The involvement of law enforcement also might strengthen institutional fact-finding, which Carle (2015) claimed was virtually non-existent following the 2011 DCL. That said, many scholars argued that institutions feared undue influence by outside parties and thus conducted most of their hearings secretively (Rubenfeld, 2016), with law enforcement having little to no involvement in the proceedings. From the institutional point of view, responsible or not responsible differed significantly from guilty or not guilty, so there was no need to involve the justice system in determining the fate of a respondent. That, however, often led to complainants declining to have the respondents charged criminally, thus sparing them from jail (Wies, 2015). Schools viewed proceedings as educational hearings, not criminal proceedings.

Yet another issue with the procedural obstacles comes in how hearings are resolved. Ideally, both the complainant and the respondent would have thorough yet efficient investigation processes, with an official resolution within the 60-day timeframe strongly recommended by the OCR (Dudley, 2016). However, a 2-month process is extremely unlikely due to a variety of

factors such as lack of personnel or formal procedures, difficulty in procuring evidence and interviews, conflicts with formal court hearings, and so forth. For example, a Tufts University student had to wait 4 years before receiving any sort of compensation resulting from her initial Title IX complaint (Peterson & Ortiz, 2016). It seems quite obvious that without a strong policy, clearly defined procedures, and adequately trained personnel, universities may experience significant delays in resolving their Title IX cases, also resulting in possible due process issues.

## Criminal? Civil? Both? Neither?

Higher education institutions are not law enforcement authorities, nor are they courts of law. The same holds true for the Department of Education itself: The ED's job is to oversee the federal educational system, not to create policy that forces universities to "arrest" students or conduct trials. However, an examination of Title IX guidance illustrates the issues schools have faced in attempting to comply with federal policy while not overstepping their responsibilities as educational institutions. The main challenge is this: Having to choose between criminal and civil procedure could conflict with how appellate courts interpret Title IX incidents.

One such issue focuses on the quasi-criminal justice focus of the guidance. Wies (2015) affirmed that institutions considered themselves separate from the judicial system in their policy enforcement and adjudication of cases. However, critics have noted the presence of too many criminal justice procedures in the DCL, especially with regard to resolving grievances (Koss et al., 2014). Even the use of the terms *complaint*, *investigation*, and *alleged perpetrator*—all contained in the DCL—are akin to criminal law terminology (U.S. Department of Education, 2011). This, in turn, has led institutions to function in the same way as a court would function, even though no personnel involved in the proceedings likely have a legal background. Carle (2015) referred to the "legal" proceedings as unprofessional and cited the lack of legal

experience of investigators and hearing officers, resulting in questionable decisions being made in determining the fate of students accused of sexual violence. Likewise, Rubenfeld (2016) questioned whether schools should conduct their own hearings at all, or at least without the involvement of law enforcement. If someone were killed on campus, for instance, the school would not investigate the murder but instead would call the police to conduct the investigation (Rubenfeld, 2016).

Title IX investigations can be conducted simultaneously with police investigations, and the two investigations are similar in nature, even if they rely on different personnel and procedures. Both are designed for equality for all parties, including the allowance of advocates/attorneys; expediency, so as not to delay the hearing and inevitable decision; and comprehensiveness, so that no fact or evidence is left uncollected. Ideally, the institutions and law enforcement would collaborate on their investigations, sharing evidence and resources along the way. However, Dudley (2016) remarked that colleges' attempts to integrate police investigative procedures may do more harm than good. For example, police officers are trained to conduct interrogations of suspected criminals; such training often involves strong-arming suspects to get a confession. Institutions, on the other hand, are equipped to interrogate suspects but are more concerned with sanctioning potential offenders to maintain campus safety. Thus, their investigations are not likely to consist of the same questions or evidence gathering techniques, which could result in conflicting information with what law enforcement gathered.

Another change came when the DCL implemented the preponderance of the evidence standard for schools to use when deciding cases. That standard has been customary in civil, not criminal, cases. Under that evidentiary standard, only 50.01% (or "50 percent and a feather") of the evidence needed to demonstrate a respondent's guilt. Carle (2015) stated that the change, in

turn, would lead to more innocent people being punished. While the evidentiary standard by itself might not have been problematic, the presence of the criminal justice language seemingly contradicted the use of a civil case evidence standard. The preponderance standard also was noticeably weaker than the clear and convincing evidence (approximately 80%) standard previously used by schools in their procedures (Johnson, 2015).

With the inclusion of both criminal and civil procedures in federal Title IX policy and hearings, it is no wonder that Title IX administrators are confused with regard to how to proceed with their institutional Title IX processes. To be sure, university disciplinary hearings are civil proceedings (Dayton, 2015), but one cannot overlook the presence of criminal law that permeates the investigation process. Further, Title IX administrators are not criminal investigators, but some of their procedures overlap with law enforcement. They also are not civil litigators, but they share the same evidentiary standards in their determination of responsibility as do civil court cases.

## Constitutional Conundrums

The issues surrounding Title IX policy extend far beyond the walls of higher education institutions, all the way to the Constitution. The First Amendment guarantees, among other things, the freedom of religion, while the Fourteenth Amendment acknowledges a person's right to a due process of law. While many within education may fail to see the connection between Title IX and the aforementioned amendments, scholars have pointed out how those failures have manifested themselves in higher education.

### Freedom of Religion? Not So Much.

Freedom of religion has been one of the cornerstones of American policy since first enacted in the Bill of Rights in 1791. In essence, the First Amendment preserves the separation

of church and state and protects religious organizations from the undue interference of government in religious matters. However, as will be shown here, religious institutions have used the First Amendment to keep the Department of Education at arm's length when it comes to Title IX policy enforcement.

As discussed before, the actual Title IX policy itself is quite brief in length. However, the Department of Education (ED) published additional language based on two federal statutes that clarified which schools are subject to Title IX enforcement:

> Title IX's prohibition on discrimination in admissions applies only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education. 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15. The prohibition on discrimination in admissions does not apply to private undergraduate colleges. All other programs and activities of private undergraduate colleges (including single-sex colleges) are governed by Title IX if the college receives any Federal financial assistance. (U.S. Department of Education, n.d., Private Undergraduate Colleges section)

In short, the ED states that, due to federal regulations, religious institutions are exempt from the discrimination portion of Title IX if those institutions apply for a religious exemption (U.S. Department of Education, n.d.). Further, 34 C.F.R. § 106.12(b) states the following:

> An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest-ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization. (Nondiscrimination on

the basis of sex in education programs or activities receiving federal financial assistance, 1972)

In other words, according to the regulation, if an institution wishes to claim religious exemption from Title IX, that school must provide specific evidence to the ED as to how an individual religious principle conflicts with a part of Title IX guidance. While that might appear daunting on the part of the school, the opposite actually is true: Schools have almost always gained religious exemptions from the OCR, with very little pushback from the department (Augustine Adams, 2016). Augustine-Adams noted that as of 2016, there had been 2085 exemptions granted, with zero denials. While the OCR does have a control test to determine whether an exemption should be granted, Duchene (2017) pointed out that the test has not been updated since 1977, which suggests that the test could be outdated. If a school claims a religious exemption, it likely is exempt.

The religious exemption, on its face, seems to contradict one of the very reasons for Title IX in the first place: preventing unfair discrimination under any circumstances. The religious exemption becomes even more difficult to understand when paired with the First Amendment. Bryk (2015) argued that if religious schools found guilty of a Title IX violation decided to sue the Department of Education under the First Amendment, those schools likely would win due to the current policy.

**(Un)Due Process Puts Universities in Legal Jeopardy**

In addition to the First Amendment issues, Title IX proceedings have also become problematic regarding due process, which is a key part of both the Fifth and the Fourteenth Amendments. In essence, due process means that an accused party cannot be stripped of life, liberty, or property without a chance to respond to the charges leveled against him/her. In

addition, the accused also has the right to a hearing (or trial) conducted by an impartial judge or arbiter. Due process is imperative in the justice system, especially with serious crimes. Due process was designed to protect against two significant dangers: decisions made in error and abuse of power (Dayton, 2015). While mainly associated with the judicial system, due process also applies to colleges and universities that hold formal disciplinary proceedings, such as Title IX hearings. It stands to reason that sexual assault would fall under the category of serious crime and that courts would afford the accused every opportunity for due process. Unfortunately, universities have not always followed suit.

One of the main issues with university due process stems from the involvement, or lack thereof, of legal representation in college Title IX proceedings. McGowan (2017) noted that unlike a court proceeding, university hearings often do not involve attorneys, since the hearings themselves are not legally binding. This means that an accused party found to have violated a college's Title IX policy might be expelled, but they would not be found guilty or liable unless a criminal or civil action was filed against the accused and went against their favor. However, sexual violence is a crime in the eyes of the law, so it would be in the best interests of the accused (and the accuser) to have personal lawyers guide them through the university investigation and hearing processes, especially since a court proceeding—a trial—could immediately follow the conclusion of the university's hearing. Unless either student party is skilled in the law, they likely would have no idea what to expect in a college hearing and may not even be aware of the notion of due process until it is too late. Students accused of or found responsible for sexual assault can be expelled from campus and have their academic and personal lives ruined (Heavilon, 2018). Under due process, had those students been more aware of the

consequences and had proper representation, they may have at least been able to prepare themselves for both university hearings and formal trials in courts of law.

One issue with students having attorneys: Who pays for the attorney services? As Dayton (2015) highlighted, student disciplinary hearings are civil proceedings (not criminal ones), so students must pay for their own attorneys. One can assume that family members would be willing to cover those costs, but for a prolonged hearing, those costs quickly could add up. While students are permitted representation, a study conducted by Brubaker (2018) of Title IX campus advocates indicated that the involvement of attorneys formalizes the investigation and hearing processes to the point where the focus deviates from the parties to the processes. In *Doe v. Baum,* (2018), the dissenting judge, Judge Ronald Lee Gilman, cited a number of cases that suggest students have no rights to counsel except in complex cases, if criminal charges are pending, or to protect due process rights.

While it is to be expected that Title IX hearings involve some degree of standardization, Peterson and Ortiz (2016) critiqued that there was too much focus on the structure and system of Title IX, rather than on the individuals, especially the complainants. Pappas (2016) criticized the overabundance of formality in Title IX, arguing that an incorporation of more informal procedures—counseling, education, and so forth—would benefit both the complainant and the respondent in seeking out their personal welfares while the formal procedures unfold. One could argue that the absence of attorneys and formalities would impact due process negatively, since the students may not be receiving formal guidance that could benefit them if their cases reaches the courts.

Like the First Amendment religious issue, due process becomes even more complicated when contrasting public and private colleges. Public universities are, by nature, subject to any

and all federal and state regulations, including constitutional due process (Dayton, 2015). However, what about private universities? Are they bound to the same responsibilities? Rubenfeld (2016) discussed a case involving Brandeis University in Massachusetts in which a student found responsible for violating policy in 2016 sued Brandeis for, among other things, a due process violation because of Brandeis's lack of a hearing board. The court dismissed the complaint because Brandeis is a private college and thus not legally bound to due process, which technically is correct. However, the question then becomes: If Brandeis is obligated to comply with Title IX (it cannot claim a religious exemption), should it not also have to comply with due process? There seems no clear answer even though it seems logical for all private, secular schools to comply fully.

Bias also is a major concern of Title IX investigations, especially when it comes to due process. Title IX investigators must collect all information about an incident, and hearing boards must determine the fate of the accused, while remaining impartial as to the innocence or guilt of the accused. While the aforementioned Obama-era guidelines (the 2011 DCL and the 2014 Q/A) had been generally accepted by institutions, in September of 2017, Secretary of Education Betsy DeVos rescinded the Obama-era guidelines, asserting that no one would benefit from what she saw as a lose–lose system (U.S. Department of Education, 2017a). In the same month, the OCR also issued new interim guidelines to institutions and, according to a press release, affirmed its intention to overhaul the then-current Title IX guidelines (U.S. Department of Education, 2017b). As of this writing, the new guidance still has not been released, but a preview (called "interim guidance") was made available at the time of the press conference and issued in November of 2018 but, as of the date of this study (spring 2020), still has not been formally adopted. Of note, the new guidance likely will do away with the 60-day goal for completing

cases and also will allow for another standard of proof, clear and convincing evidence (U.S. Department of Education, 2017c), to be used by colleges when evaluating evidence against the accused. In addition, respondents (the accused) will now be permitted to cross-examine their accusers, setting up a potential conflict with the Violence Against Women Act (VAWA) of 1994.

The effect of new guidance, even though it is interim, has had an immediate effect on Title IX in the courtroom, especially with the focus on bias. In *Doe v. Baum* (2018), the Michigan Appellate Court held that cross-examination was a right under due process and that the university could have allowed Doe's representative to conduct the cross-examination. In addition, as seen in a case involving Rider University, a biased investigation or hearing likely will lead to legal troubles for a university. In *Doe v. Rider University* (January 2018) an expelled student sued Rider University for breach of contract, which directly connects to due process. While Rider sought to dismiss all of the charges, the student successfully established that the investigator, rather than following Rider's policy-established, formal evidence-gathering protocol, simply took the accuser's and her supporting witness's revised statements as fact without considering how both statements were significantly different from the previous versions (*Doe v. Rider Univ*., January 2018).

In addition, Rider's policy called for an impartial hearing board, but all three members of the board reported to the dean in charge of the investigation, who at one point indicated that he was looking to punish the student. Both biases impacted the accused student's ability to receive a fair Title IX hearing at Rider, and both ultimately led to the court finding against Rider and forcing the university to defend its actions. In a later decision, the court also forced the student to reveal his identity if he wanted to proceed with his case against Rider. The student was concerned about potential bias if he were to reveal his name, but the court was unmoved by that

argument. That said, the court allowed the accuser and the witnesses to maintain their anonymities (*Doe v. Rider Univ.*, August 2018), which some might argue is a case of bias. Nevertheless, the court cases demonstrate due process as a complex yet integral part of Title IX.

**Three Organizations, Three Approaches, One Problem**

It seems obvious that the ED, IHEs, and the judicial system have different perspectives on Title IX policy with lack of common ground. The inter-organizational tension likely began with the dual role of Title IX (in general) as both offering policy guidance and establishing parameters for legal proceedings (Yung, 2015). Melnick (2018) added that Congress, tasked with the responsibility to create new civil rights, wrote the Title IX policy in such a way that inadvertently both granted administrative authority to federal agencies (specifically, the ED and OCR) while simultaneously allowing the judicial system to enforce those rights, leading to the inter-organizational conflict and tension that continued occurring following the release of the 2011 DCL.

One important question has been whether the ED, an individual institution, or the judicial system is the proper venue for enforcing how Title IX investigations and/or hearings should proceed (Melnick, 2018). Swan (2015) noted that at a 2015 debate entitled "Courts, Not Campuses, Should Decide Sexual Assault Cases," two very divergent opinions emerged: Sexual misconduct is a civil rights violation that requires universities to use federal Title IX policy to handle all proceedings, but sexual misconduct also is a crime that requires the court to handle all aspects of a case from start to finish. From the perspectives of some legal experts, colleges have been ill-equipped to handle such serious matters as sexual assault: "Sexual assault is nothing like plagiarism or the other kinds of wrongs which universities normally deal with under honor codes and disciplinary procedures" (Swan, 2015, pp. 963–964).

That said, the OCR, and not the judicial system, is the agency charged with enforcing Title IX at every federally funded institution. Some scholars have used the concept of administrative law, defined as the "branch of law governing the creation and operation of administrative agencies" (Administrative Law, n.d., para. 1), to argue that most rights are created through Congress or the courts, but with the issuance of the DCLs, the OCR has played an important role in creating and articulating certain civil rights for students that neither the judiciary nor universities could have done themselves (Tani, 2017). Still, while the OCR has created those new rights to some degree, the agency itself cannot decide whether a student is responsible for violating an institution's sexual misconduct policy; that decision rests with the university itself (Tani, 2017).

Further, Yung (2015) questioned the actual legality of the DCLs, specifically stating that none of them had been examined to see whether they violated any legal precedents and that the judicial system could very well invalidate any and all DCLs, allowing colleges to change how they deal with Title IX issues on an institutional basis. In fact, Melnick (2018) commented that until they released the 2011 and 2014 DCLs, the OCR had never critiqued the issues (procedural due process, for example) that ultimately became key focal points of the guidance. In that sense, the question has arisen whether any of the DCLs or other OCR guidelines had legal basis at all (Melnick, 2018). Table 1 clearly illustrates the divide between the judiciary and the OCR regarding proper interpretation of Title IX as far back as 2001. The Supreme Court has relied on two important decisions, *Gebser* (1998) and *Davis* (1999), in formulating its opinions on student, employee, and institutional responsibilities regarding sexual misconduct in higher education. The OCR, meanwhile, focused on its own administrative policies to shape its opinions on sufficient protections. Sometimes, the difference between the two entities comes down to a single word or

two. For example, and as shown in Table 1, the OCR in 2001 believed that a hostile environment resulted from "sufficiently severe, persistent, ***or*** persasive" conduct, but the Supreme Court opined that the conduct must be "severe, pervasive, ***and objectively*** offensive" (Melnick, 2018, Chapter 10, Section 13). Using *or*, as opposed to using *and*, significantly changes the interpretation of hostile environment.

Table 1

*OCR v. the Supreme Court*

| | OCR | Supreme Court |
|---|---|---|
| When is a school responsible for sexual harassment by an employee? | 2001: A school is responsible for quid pro quo and hostile environment harassment by an employee whenever that harassment occurs "in the context of the employee's provision of aid, benefit, or services to a student." In other words, the school is always responsible, except in those rare circumstances where the harassment is unconnected to the employee's role and authority within the school. | In *Gebser*, 1998: A school district will *not* be held liable for teacher-on-student sexual harassment "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has *actual notice of, and is deliberately indifferent to, the teacher's misconduct."* |
| When is a school responsible for peer sexual harassment? | 2001: A school is responsible for responding to peer harassment whenever a "responsible employee" *either "knew or in the exercise of reasonable care should have known" about it.* | In *Davis*, 1999: A school district will not be held liable for the creation of a hostile environment by other students "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has *actual notice of, and is deliberately indifferent to" such peer harassment*. |
| When does conduct by a school employee or student create a "hostile environment"? | 2001: The conduct must be "sufficiently severe, persistent, or pervasive to *limit* a student's ability to | In *Davis*, 1999: "Such action will lie only for harassment that is so severe, pervasive, *and objectively* offensive that |

| | | |
|---|---|---|
| | participate in or benefit from the educational program." The conduct should be "considered from *both a subjective and objective perspective."* | it *effectively bars* the victim's access to an educational opportunity or benefit." It must be "serious enough to have the *systematic effect* of denying the victim equal access to an educational activity or program." |
| Can a single instance of harassment create a "hostile environment"? | 2001: "The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.… Indeed *a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment."* | In *Davis*, 1999: "Although, *in theory*, a single instance of sufficiently severe one-on-one peer harassment" could have the effect of denying students equal access to educational programs, "we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to *a single instance* of one-on-one peer harassment." |
| How much control should the federal government exercise over school officials? | 2001: Its thirty-seven pages of guidelines explained in detail how schools should handle various categories of harassment. | In *Davis*, 1999: Judges "should refrain from second-guessing the disciplinary decisions made by school administrators." |

*Note*. Table 1 adapted from *The Transformation of Title IX: Regulating Gender Equality in Education* by R. Shep Melnick. Copyright 2018 by The Brookings Institution. Reprinted with permission.

Administrative law may appear to be an important part of the OCR's authority in creating and enforcing Title IX policy, but from the judiciary's standpoint, administrative law has carried very little weight and is subject to overrule by courts, even though the OCR is a federal office and a subsidiary of the ED (Tani, 2017). Melnick (2018) stated that in its eyes, the Supreme Court's role as enforcer of the Constitution means that that the courts, not administrative agencies, are best served interpreting federal laws, including Title IX. Consequently, what has occurred is

what Melnick referred to as “institutional leap-frogging” (Chapter 1, Section 2, para. 9): one entity “jumping” over another to create what it thinks is stronger policy but that only adds another layer of confusion regarding proper policy compliance.

The above discussion illustrates only a few of the significant issues concerning Title IX: the change in focus from admissions to sexual misconduct, the challenges regarding policymaking, and the constitutional challenges that have arisen. In addition, the presence of three significant organizations—the ED, higher education, and the judicial system—has led to organizational confusion over who has Title IX’s best interests in mind. That conflict may become exacerbated with the release of the new federal Title IX policy guidelines.

In this study, I chose to use court decisions for several reasons. One chief reason is that the decisions contain the rationale that, until recently, has been underutilized by higher education not because of inaccessibility, but more due to a lack of understanding. Leon (2016) noted that the legal realm has preserved much of its independence by, in part, employing advanced logic and specialized jargon that only the most skilled person could understand. While those employed in higher education and the ED possess skills relating to their professions, the legal realm would see those skills as too simplistic with respect to interpreting case law and highly technical legal opinions (Leon, 2016). It is my hope that this study will help bridge the gap between the legal and the educational spheres and demonstrate how qualitative researchers can use their document analysis and research skills to study documents that might have seemed once inaccessible.

## Theoretical Framework

Higher education, the judicial system, and the ED function both independently and collectively as a single meta-organization. Each organization has its own set of rules and principles to guide their decisions, but they also rely on each other interdependently when it

comes to providing important public policy such as Title IX. In many ways, the organizations work as individuals within a single organization, aiming for a common organizational goal. However, as is the case with most individuals (and thus most organizations), different opinions, competing interests, and tensions among organizations can lead to conflict and tension. With this in mind, this study is informed by two theoretical perspectives: organizational social action theory and conflict theory.

**Organizational Social Action Theory**

Max Weber originated social action theory in the 1920s to describe human beings' potential to effect change within their organizations (Clegg, 1994). Powell and Brandtner (2016) applied Weber's theoretical perspective to their study of organizational behaviors, thus leading to organizational social action theory. Under this theory, organizations do not just function simply as groups of individuals working together but more of individual social agents of change, just like the human beings of which they are composed (Powell & Brandtner, 2016). Courts by design are tasked with righting wrongs that, in most cases, could have been avoided with more prudent judgment by one or both parties. In my dissertation, I sought to illustrate, through an examination of the court opinions, how the judicial system functions as an individual actor and how that function contrasts negatively with other actors, specifically higher education.

In addition to instituting intra-organizational changes, the organization also reaches inter-organizational conclusions that may affect directly and indirectly other organizations. While the goal of organizations is (or should be) to avoid bias or inequality when arriving at a decision, that may not always be the case (Powell & Brandtner, 2016). Using that idea, I consider to what degree the courts have looked to change university Title IX policy and, in doing so, positively impact the overall university climate and culture.

Powell and Brandtner (2016) noted that just like human beings, organizations serve as both locations and instigators of action that change based on their surrounding environments, sometimes traversing their internal processes to enter their external environments. In other words, just as humans have their comfort zones (internal environments) and the world that exists outside those zones, so, too, do organizations. Environment is very important to organizations, since that is where the movement from motivation to empowerment occurs (Horvath, 1999). The stronger the environment, the more likely an organization will achieve significant outcomes. Leon (2016) summed up the notion of law and the judicial system as follows: "Law has a peculiar hold on the social imagination, and extends its tentacles into social institutions in pervasive and tenacious ways" (p. 992). While the wording may seem rather blunt, the point is that the judicial system is not merely a bystander when it comes to policy enforcement; it plays an active role in determining what it sees as the soundest policy available, even if that means reaching outside its own environment. The court opinions revealed much about the judicial system's environment and to what degree it does—or does not—decide cases in consideration of an environment other than its own. For example, a judge conceivably may acknowledge an institution's difficulty with enforcing Title IX policy due to lack of personnel but then castigate the institution for not prioritizing the welfare of its students with better planning. The institution may lack the funds to hire more trained personnel, but to the court, that does not matter.

Among the many outcomes produced by organizations, Powell and Brandtner (2016) highlighted several organizational outcomes that connect very well to the present study. The first outcome, equality, is especially pertinent, since the federal government, the judicial system, and universities want to ensure balance and access across the board. Through data examination, my study intends to shed light on the degree of equality/inequality existing in Title IX judicial

opinions. Unfortunately, though, whether intentional or not, organizational equality has suffered from bias, unequal distribution, gender and racial prejudice, and discrimination (Powell & Brandtner, 2016). Organizations have attempted to combat the inequalities through anti-discrimination policies (e.g., equal opportunity regulations), but to no avail. When looking at the opinions in this study, I was curious to see how court decisions commented on diversity among student groups and whether all groups received the same consideration by judges. That also might reveal whether universities failed at equal protection when crafting their Title IX policies.

Another aspect of organizational social action theory focuses on the organization's dependence on long-held practices that impede its ability to rearrange hierarchically to reflect changes in the external environment (Powell & Brandtner, 2016). Once an organization comes into existence and relies on the same philosophies (unequal as they might be) for many years, it becomes very difficult to change them because too much time has passed. Soon, those philosophies influence the people within the organizations, leading to even greater organizational inequality at a micro-level. In higher education, for example, it was not until 1972 and the enacting of Title IX when women finally began to have truly greater access to education and, later, college athletics. Though women sought to attend college before 1972, the implicit organizational inequality prevented that from occurring, much of it due to unchanged admissions policies. The same holds true for protection against sexual violence; it was not until the organizational dynamics changed (in the form of alterations to Title IX guidelines and the introduction of the Clery Act and VAWA) when the ED put more attention toward handling complaints of sexual misconduct (Tani, 2017).

As mentioned before, organizations can function as agents of change. Ideally, higher education, the federal government, and the judicial system would coordinate their efforts for the

benefit of multiple parties, most notably the students. The political climate is such that, as Marin et al. (2018) suggested, higher education may view a move away from the government as the best way to enact any sort of change, but that seems to have backfired, as demonstrated in the strained organizational relationships between higher education and the courts.

One chief reason for such inter-organizational strain stems from the subjectivity of social actions themselves (Lawler & Bacharach, 1983). Theoretically, the actions and goals of the federal government, higher education, and the judicial system would mirror one another, leading to social harmony. Horvath (1999) noted that organizations find it much easier to work together if they have the same goals and take similar steps to achieve them. Because the focus always must go to the action and not the actor, organizations often have goals that are highly subjective and in the best interest of that organization. According to Lawler and Bacharach, within an organization, there may exist both cooperation and competition in terms of inter-organizational relationships, with the goals of each actor being to anticipate and to overcome potential opposition while simultaneously increasing the actor's authority on the issue. While one organization might desire harmony with other organizations, an organization often makes its decisions based on what will benefit that organization both short-term and long-term, even if those decisions negatively impact other organizations.

It is fairly clear that courts are making decisions not based on what colleges believe is right, but what they (the courts) believe is right. That goes with Vaughan's (1998) point about organizational decisions: They are made not with attention toward costs and benefits, but more because of rules and regulations. Both parties, along with the ED, may share the same goals, but shared goals do not always equate to common ground. That is where the consequences of organizational actions come into play. Horvath (1999) makes it very clear that predicting

outcomes and consequences should be part of any organizational action, even if the perceived outcome or consequence does not occur actually.

Vaughan (1998) further points to the presence of the "amoral calculator model" (p. 25) used by some organizations: An organization calculates how likely it is to be punished for taking action versus the possible benefit for taking that same action. In this case, one might wonder whether universities making Title IX decisions seriously considered the risks and possible punishment for their actions and whether they saw benefits to those actions. In that regard, as one might ask to what degree the individual organizations accounted for consequences and punishments, especially if decisions were made subjectively. As will be shown in the present study, lack of consideration toward consequences often has resulted in a high degree of conflict.

**Conflict Theory**

In his research, Pondy (1967) posited that the conflict experienced within and among organizations can be complex and proposed several characteristics of organizational conflict: episodic, functional and/or dysfunctional, and connected innately to organizational stability. In one sense, Pondy felt that conflict's complex nature made it more appropriate to define conflict with several definitions instead of with a single definition (Samantara & Sharma, 2016). An organization may not realize that its behavior conflicts with another organization's behavior until such conflict is brought to light (Morrill et. al, 2003). For example, when the ED announced the changes to the Title IX guidance and when the courts ruled against universities in Title IX lawsuits, conflict could have arisen as the tension with these three organizations.

A conflict consists of a series of episodes, with one episode different from the next. To better understand the episodic nature of conflict theory, Pondy (1967) considered five episodic stages of conflict: latent, perceived, felt, manifest, and conflict aftermath. Latent conflict focuses

on “1) competition for scarce resources, 2) drives for autonomy, and 3) divergence of subunit goals” (Pondy, 1967, p. 300). While IHEs, their employees, and the courts (and even the ED) experience conflict, I would not suggest that any of the actors is seeking any sort of autonomy or competing with one another. Manifest conflict involves “behavior which, in the mind of the actor, [consciously] frustrates the goals of at least some of the participants” (Pondy, 1967, p. 304), which implies that one or more organizational actors (or even organizations themselves) may have acted deliberately to aggravate another actor. Like with latent conflict, I did not detect any intentional aggravation on the part of any actor or organization. That left me with three applicable conflict stages: perceived conflict, felt conflict, and conflict aftermath.

In the perceived conflict stage, one organization may not comprehend that another organization’s position on an issue conflicts with the other organization’s position (Pondy, 1967). Thus, part of my analysis looked at how courts of law likely ruled against universities without even realizing that those rulings would impact university policy negatively. In that same respect, I examined whether higher education institutions crafted their Title IX policies based on their own organizational discussions and perspectives while not even considering that those policies went against federal guidance and judicial opinions.

Under the felt conflict stage, the conflict becomes personal because of the feelings and emotions that accompany the conflict (Samantara & Sharma, 2016). As discussed in the research analysis, Title IX conflicts are full of emotion, demonstrated in the narratives contained in the court opinions. As a result, I looked for evidence of emotional conflict (demonstrated in the court opinion) between the court and a particular university or student appellant, though such emotions may not manifest themselves on paper. Those emotions become magnified even more when the general public weighs in with its opinion, as was the case with the #metoo movement. In that

instance, Morrill et. al (2003) pointed to a shift from covert to overt conflict has occurred. In other words, a court could decide against a university (still in the perceived stage) without the public ever knowing. Once the ruling reaches the news media, however, the conflict becomes more significant due to people learning more about it. Thus, I searched the opinions for references to overt conflict between the two sides— for example, if the court acknowledges the media coverage, the #metoo movement, or a well-known Title IX case— and how, if at all, that reference affected the court's decision.

With conflict aftermath, one of two options may occur: Either the conflict is resolved amicably (or, at the very least, peaceful negotiations continue), or the conflict is concealed but continues to escalate until it can no longer hide and needs further treatment (Pondy, 1967). However, not every organization interprets the end result of conflict in the exact same way (Speakman & Ryals, 2009). The ED, for example, may look at the issuance of new Title IX guidance as the ideal solution, helping the higher education institutions strengthen their institutional policies. On the other hand, universities may see the ED's move as a threat to their ability to self-govern, similar to a superior–subordinate relationship with the absence of due process (Evan, 1969).

**Applicability of Theories**

Both organizational social action theory and conflict theory seem appropriate for this study, especially given the focus is on examining the difficult relationships between two organizations: the judicial system and higher education as a whole. The ED also has contributed to the tensions and conflicts that exist in Title IX. While this study primarily focused on the degree of alignment between the judicial system and higher education institutions, the ED's revisions to Title IX guidance has, through the higher education institutions, impacted the courts'

treatment of Title IX cases, especially with the number of cases increasing over time. The organizations' shared goal is to stop the increase in sexual violence incidents on college campuses, and they all appear to be taking steps to accomplish that goal. Further, conflict episodes are not always negative; Speakman and Ryals (2009) noted, for example, how acceptance and management of conflict can be beneficial to all involved parties. However, it will become obvious from this study that when courts operate as agents of change and render decisions on Title IX issues, the dysfunctional conflicts existing among the courts, the ED, and higher education become magnified, which is why this study is so vital in attempting to create more positive, functional relationships among the organizations.

## Where Are the Research Gaps?

Much of the literature focuses on the history, investigative procedures, constitutional conflicts, and potential pitfalls of Title IX policy at higher education institutions. Each of the aforementioned subcategories contains extensive research and critical analysis of a particular component of Title IX. It seems clear from the research that scholars recognize the importance of critiquing particular aspects of Title IX policy with the goal of encouraging reform. In the last few years, however, Title IX has become a major focus of all higher education institutions, and not necessarily by choice. While the majority of institutions always have had Title IX policies, it is not until recently that those policies became lightning rods for both the government and the judiciary. Through its "Title IX Tracker," *The Chronicle of Higher Education* reports that as of February 2020, 305 schools are currently under ED investigation for failure to conduct proper Title IX investigations. Even more alarming, many institutions are presently embroiled in lawsuits filed by current and former students as a result of subpar Title IX investigations. Every single day, ATIXA's "Title IX Today" (a daily email brief about important Title IX news and

cases) tells of a new school investigation or a judicial decision being handed down from a district or appeals court. Due to briefs such as “Title IX Today,” most institutions and Title IX personnel likely know of the uptick in Title IX litigation.

However, little research exists on examining court opinions for determining how higher education institutions respond to incidents of sexual misconduct and whether those responses line up with the courts. Examining those two questions could help higher education institutions achieve Title IX compliance proactively rather than reactively.

If universities truly seek to improve their Title IX policies and procedures while protecting themselves from costly litigation and potential defunding, they need to be much more proactive and, as best they can, respond appropriately to any and all Title IX incidents of sexual misconduct. This study not only could bridge the gap in response from one university to the next; it also could better align the judicial system with higher education as to Title IX response best practices.

As my intent was to unpack a cross-section of court opinions, I hope that IHEs will have a doorway into the judicial system’s treatment of Title IX and will glean important information and insight that will aid in stronger, long-lasting Title IX policies.

# CHAPTER 3: RESEARCH METHODOLOGY

As noted in Chapter 2, a disconnect has existed among the judicial system, the ED, and IHEs regarding Title IX. Each entity employs specific people for specific roles, but for the most part, those roles do not intersect with the other agencies. For example, unless a college is facing a Title IX lawsuit, it rarely considers courts' rulings on Title IX compliance. Likewise, though the ED oversees federal Title IX policy, few employees regularly interact with university personnel, other than giving notice of a university's potential violation. In this study, I examined what major themes emerge from the judicial opinions concerning institutional responses to Title IX incidents. The specific research questions that guided this study are as follows:

1. What common themes and trends do emerge from appellate court opinions that illustrate similarities and differences in institutional responses to Title IX incidents of student sexual misconduct?
2. Based on court opinions, in what ways are appellate courts and higher education institutions aligned with procedures for addressing Title IX incidents of student sexual misconduct?

## Data Source

### Document Analysis and the Value of Judicial Opinions

Bowen (2009) commented that while many experts viewed document analysis as one of a series of components of qualitative research studies, document analysis also exists quite well as its own process, since documents can be seen in the same light as interviews or transcripts are. Bowen makes it very clear that when analyzing documents, researchers must pay attention to the material in the documents and must ensure that the entire document is understood by the researcher. That could be difficult with court opinions, since a good portion of each opinion

contains references to other cases that support the court's opinion. For this study, Bowen's advice pertains largely to the opinion itself; in other words, the researcher must understand the facts of the case and the applicable laws. In addition, qualitative researchers should focus on "the quality of the documents and the evidence they contain, given the purpose and design of the study" (Bowen, 2009, p. 33).

Marin et al. (2018) discussed the idea of qualitative document analysis in a study of extra-legal sources (books, journals and news articles, etc.) in amicus curiae ("friends of the court") briefs submitted by attorneys in connection with specific Supreme Court cases involving universities. The primary goal of the researchers' legal document analysis was to find patterns among the documents that pointed to specific rationale for how courts make their decisions (Marin et. al, 2018). They compiled and coded a list of extra-legal source citations while also categorizing the briefs themselves (Marin et. al, 2018). Their process is very similar to my own, which focused on examining court opinions for specific terms and references. Court opinions, in some ways, are answers to legal (and societal) questions and, as such, provide important information to researchers and policymakers who seek to examine current trends and to enact policy changes. The availability and stability of documents make them important data sources for analysis, especially from a thematic standpoint (Bowen, 2009).

As shown in my analysis, judicial opinions (also referred to as legal opinions) are complex documents. However, each opinion also is a narrative about an individual or individuals that, in some way, have been (or are assumed to have been) wronged by someone or an organization of some sort. That ties in well with Bowen (2009), who noted that the document analysis in his grounded theory study addressed "the voices and views of ordinary people [that] must be heard" (p. 34). While neither party has a "voice" in the actual opinion, the court

functions as in independent observer, making sure the narrative is told accurately from the plaintiff's and defendant's viewpoints. The primary role of a court is not only to make the decision, but also it is to educate people reading the opinion who might be wondering what happened to bring the case to court in the first place.

**The Components of Judicial Opinions**

All data for this research came from the LexisNexis database. LexisNexis houses all legal opinions at both the state and federal levels. The legal opinions consist of court rulings including motions for summary judgment and dismissal. In general, court opinions tend to be long and often complex documents written by judges to explain their rationale for deciding the issues at hand. Coffey (2014) highlighted the importance of understanding the construction of legal documents, especially with respect to the organization and language used in court opinions, which usually consist of four parts: (a) an initial summary of both the case and ruling; (b) an extended presentation of the case facts and prior case history, including previous rulings; (c) a detailed discussion of the issue(s) at hand; and (d) the judge's, or in some cases, a group of judges' final ruling. These opinions generally include clear definitions of the legal issues in question and multiple references to prior case law both to support and to differentiate the judges' rationales.

A single opinion can contain one or more decisions pertaining to a single case. For example, a motion for summary judgment is filed when a plaintiff or defendant (usually the defendant) is seeking judgment on a count or counts contained in the initial complaint. The filing side argues that the facts, as presented, are not in dispute and therefore do not require a trial by jury (Rule 56: Summary Judgment, n.d.). In those motions, the judge listens to both sides' arguments and then decides whether the filing party's argument holds merit and whether the

motion should be granted (which could end the case) or denied (meaning the case would continue). Summary judgment also can be granted for a single count or for all counts. The more counts being addressed in a motion, the longer the opinion tends to be.

A court opinion's explanation includes a general examination of the applicable law(s) and how the law pertains to the case. For example, many Title IX cases involve due process violations, a constitutional issue. Therefore, a court simply cannot just note the presence of due process in the case; it must explain due process, the differences between substantive and procedural due process, and how due process is related to the particular issue.

Throughout the explanation, the court will refer to prior case law that, in this example, best connects to the due process issue currently being debated. Most courts use case law in different ways. First, the court examines the case law used by both parties in their filings to determine whether the law is on point or whether the cited law differs from the present case. As an example, a plaintiff might cite a prior case involving a due process violation at a university, but the court may find that the case's facts, or that court's rationale, differs from the present case. A court also relies on its own knowledge of case law in citing cases supporting its decision. An opinion's length also often depends on the complexity of the legal issues themselves and whether prior case law (and how much) exists upon which the judge will rely.

**The Methodology for Selecting Judicial Opinions**

The first step in the process of selecting legal opinions was to establish sufficient date and year parameters for document collection. Initially, my plan was to select cases 6 months after the December 2014 Q/A up until 6 months after the September 2017 DCL. After consulting with several individuals, including my dissertation committee, I decided to change the date parameters to 6 months before and 12 months after the September 2017 guidance because I

wanted to narrow my focus to a period of time marking the transition to new policy guidance. However, that change was before the ED released the latest proposed alterations to the Title IX policy in November of 2018. Further, in March of 2017, the Trump administration released its first planned budget; one of the budget's goals was to reform and, in some cases, to roll back the Obama administration's regulations and guidance (U.S. Office of Management and Budget, 2017). That same month, the then-newly constituted ED released a statement praising the proposed budget's focus on "eliminat[ing] hundreds of redundant, overlapping or ineffective programs" (U.S. Department of Education, 2017, para. 1). All of the aforementioned suggested that the ED would enact changes to its existing policies, including Title IX, so I set my legal opinion time parameters from March 1, 2017, to April 30, 2019. I also used what Patton (2015) referred to as purposeful sampling, or sampling that "focuses on selecting information-rich cases whose study will illuminate the questions under study" (p. 264). Given the timing and policy shifts in that 2-year period, I felt confident that I met the criteria for a purposeful sample.

Once the time parameters were established, I constructed my search criteria for the LexisNexis database. My initial search criteria were as follows:

- Search terms: Opinion must include *Title IX* AND *university*
- Filter: federal courts NOT state courts

I recognized that including *university* and not *college* might exclude institutions with the name *college* in them. At the same time, if the term *university* appeared anywhere in the opinion, then institutions with *college* in their names would appear in the search results. For example, the initial search results included cases where both terms appeared (see Appendix A: Legal Opinion Chart). In addition, because Title IX is a federal policy, any state cases were excluded. While state court cases might be more plentiful in number, they are less relevant to examining federal issues related to the Constitution.

Those two search criteria yielded 629 possible opinions. I then filtered for appellate court opinions and excluded district court opinions. I focused solely on appellate court opinions, since the decisions in those opinions would either affirm or overrule through reversal or vacating the lower district court rulings. Given the appellate courts have more authority in the judicial system than the district courts do, their opinions are more binding than the district court opinions. Unless a decision is appealed to the Supreme Court, both individuals and IHEs must abide by the appellate court decisions regardless of the outcome. There also are fewer appellate decisions than district court decisions, which allowed me to conduct in-depth analysis of individual cases and cross-case comparison. In addition, the number of Title IX appellate decisions is greater than those heard by the Supreme Court, which does not hear every case brought before it.

Next, I read carefully and thoroughly each of the 67 opinions' abstracts to determine whether they met the following three criteria:

- whether the case was a Title IX college/university opinion,
- whether the case was a student-focused Title IX incident, and
- whether the case was an admissions or athletic case.

Out of 67 opinions, 36 met the above criteria. The non-matching cases were as follows:

- Non-university cases: 8
- Non-student cases: 7
- Admissions/athletic case: 1
- Non-Title IX case: 8

I then reviewed the 36 opinions to determine whether there was sufficient information on the narrative and rationale for the decision in the opinion for meaningful document analysis and whether the significant issue was or was not a Title IX-related issue. Two opinions did not contain enough content for document analysis. Patton (2015) commented on how purposeful sampling relies on "selecting information-rich cases…from which one can learn a great deal

about issues of central important to the purpose of the inquiry, thus the term purposeful sampling" (p. 283). Thus, in order to conduct document analysis, there needs to be sufficient, pertinent content in a document to examine. As an example, one of the two brief decisions, *Hyman v. Cornell Univ.* (2018), consisted of a two-paragraph case review/summary and the following three-paragraph commentary:

> To withstand res judicata, Hyman points to two allegations in her complaint that concern events that post-date her first suit: her withdrawal from Cornell due to its failure to address her complaint of sexual harassment, and the decision of one defendant to ignore an email Hyman sent in 2012.[…] Hyman's complaint cannot be read as plausibly raising new claims based on these two additional allegations.
>
> Nor can Hyman avoid claim preclusion by naming additional defendants. While Hyman's second suit named sixteen defendants not named in her first suit, all of them are Cornell professors and administrators whose "interests were adequately represented" by Cornell in the first suit.[…] Res judicata applies not only to claims "between the same parties," but to claims such as these, involving parties "in privity with" parties to the original action.
>
> We have considered Hyman's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court. (*Hyman v. Cornell Univ*., 2018, p. 2)

While a Title IX issue exists, the lack of content would not lend itself to meaningful document analysis. With respect to the non-Title IX issue, the opinion of *Abbott v. Pastides* (2018) did involve the University of Southern California's Title IX deputy coordinator but focused solely on the issue of a First Amendment violation, not a Title IX violation.

The final analytic sample consisted of 33 appellate court decisions. Figure 2 graphically displays the inclusion and exclusion process for selecting legal opinions for analysis. I followed the Consolidated Standards of Reporting Trials (CONSORT) guidelines for constructing the figure, also known as a CONSORT Flow Diagram (CONSORT, n.d.). Generally speaking, the CONSORT diagram displays the process of selecting participants in a given study. The diagram can be revised and/or modified to suit the intended goals of the researcher (Schultz, et al., 2001).

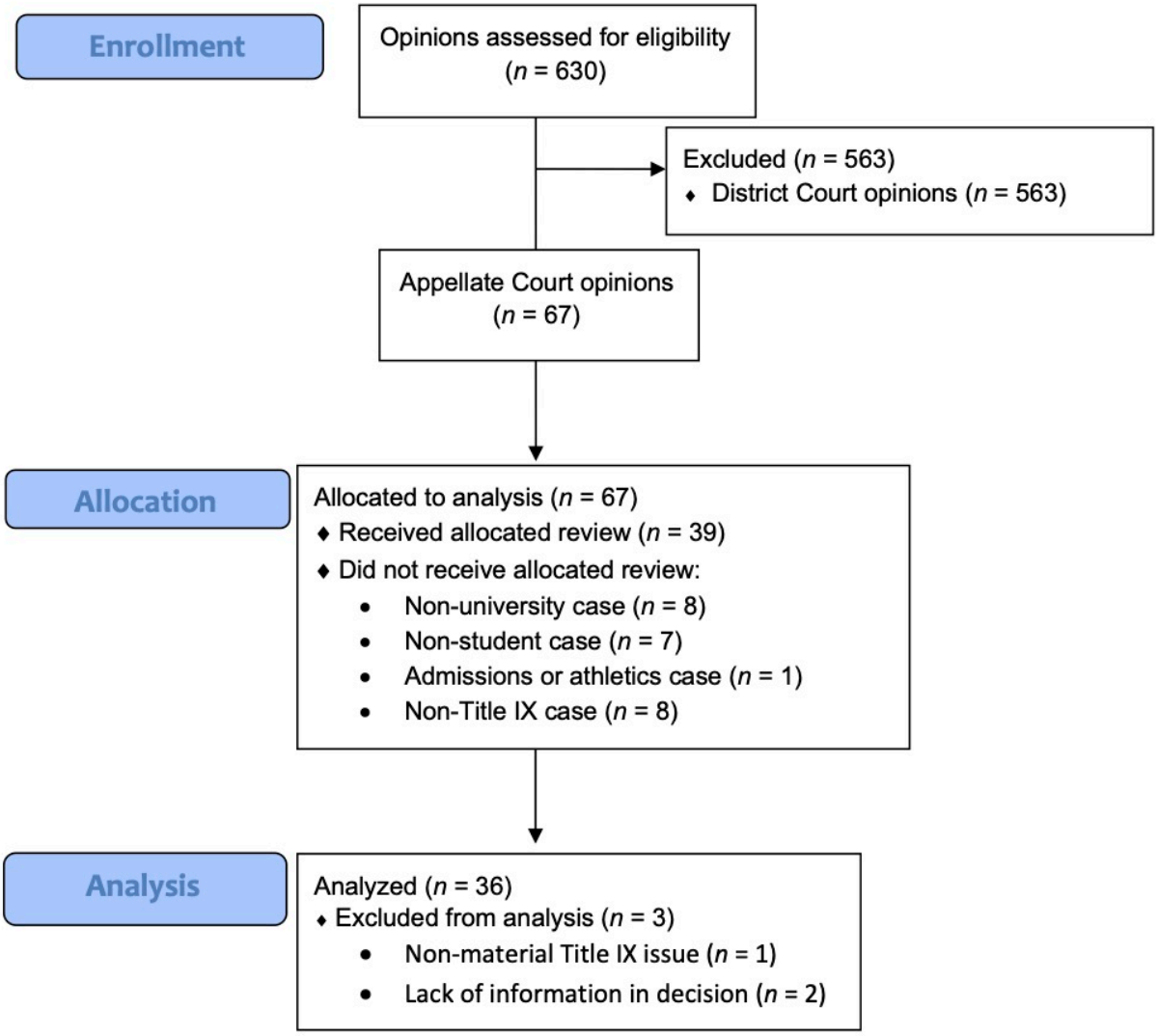


*Figure 2*. Choosing legal opinions.

## The Coding Processes

As Hall and Wright (2008) noted, legal opinions provide researchers an opportunity to analyze the judiciaries' methodologies and "judicial reasoning" (p. 94). As Auerbach and Silverstein (2003) explained, coding does not always progress from beginning to end but often involves moving back and forth among a data set. One of the primary purposes of coding is to develop a "cognitive style" (Auerbach & Silverstein, 2003, p. 48) by extracting the important

information, while filtering out irrelevant information. Fitzgerald (2012) stated that when conducting document analysis, coding schemes are useful in discovering themes and drawing inferences from those themes. After selecting the court opinions, I then established different but interconnected qualitative coding schemes and identified key parts of the opinions that pertained to research questions. As Schreier (2012) articulated, qualitative researchers must employ a concrete coding methodology with defined steps in order to preserve the integrity of the analysis.

In this study, I used several coding strategies: a) attribute coding in order to deliver matter-of-fact categorical information about the court opinions, b) line-by-line coding, c) descriptive coding, and d) holistic coding. In connection with the latter two coding processes, I also engaged in review and note-taking of each case.

**Step 1: Attribute Coding**

First, I incorporated the attribute coding process described by Saldaña (2015). Attribute coding is a useful first step for qualitative researchers to "document descriptive 'cover' information" (p. 71) about the sources, participants, demographics, geographical locations, and/or other standard information of a given study. I utilized the attribute coding strategy to gather and to sort the case information by case title, file/reporter number, Shepard symbol as of October 2019, incident date (if available), appellate circuit, decision/file date, judgment decision(s), and major issues. Appendix A contains all information from the attribute coding process.

While most of the attribute coding labels (case title, decision, etc.) are rather straight forward, one important category of information, which may not be familiar to non-legal researchers is the treatment of each legal opinion by the courts. In the process known as *shepardizing,* the case is given a "value" to determine whether the ruling or decision still holds

up (LexisNexis, n.d.). Generally speaking, cases are treated as either positive, neutral, potentially negative, or negative, depending on how other courts view the specific case's rationale. It is important to note that just because a case is treated as "negative," it does not mean the decision was wrong, but it does mean that the value is not as great as a case labeled "positive." The positive case also would be viewed as an important precedent for subsequent cases that involved similar fact patterns or issues of law. For example, an attorney involved in a 2019 technology case might cite a technology case decided in 1985 as on point with the 2019 issue. However, the court likely would see the 1985 case as obsolete because technology in 2019 is much different than it was in 1985. The same would hold true for Title IX cases. For example, a Title IX case heard in 2014 may have been seen as significant in 2014 but, due to a change in policy guidance, may no longer be seen as binding. On a macro level, such changes in case treatment could affect future Title IX policy, especially if a court disagrees with a prior decision. Figure 3, provided by LexisNexis (Appendix E contains the permission to reproduce the chart), gives a summary of the different symbols and their meanings.

**Listed below are *Shepard's* Signal indicators along with the most common analysis phrases tied to them.**

| *SHEPARD'S* SIGNAL INDICATORS | COMMON ANALYSIS PHRASES |
|---|---|
| **Positive treatment indicated**<br>The green signal indicates that citing references in the *Shepard's* Citations Service contain history or treatment that has a positive impact on your case (for example, affirmed or followed by). | **Followed by**—The citing opinion relies on the case you are *Shepardizing*™ as controlling or persuasive authority. |
| **Warning: Negative treatment is indicated for statute**<br>The red exclamation point signal indicates that citing references in the *Shepard's* Citations Service contain strong negative treatment of the *Shepardized*™ section (for example, the section may have been found to be unconstitutional or void). | **Unconstitutional by**—The citing case declares unconstitutional the statute, rule or regulation you are *Shepardizing*.<br><br>**Void or invalid by**—The citing case declares void or invalid the statute, rule, regulation or order you are *Shepardizing* because it conflicts with an authority that takes priority. |
| **Warning: Negative treatment is indicated**<br>The red signal indicates that citing references in the *Shepard's* Citations Service contain strong negative history or treatment of your case (for example, overruled by or reversed). | **Overruled by**—The citing case expressly overrules or disapproves all or part of the case you are *Shepardizing*.<br><br>**Abrogated by**—The citing case effectively, but not explicitly, overrules or departs from the case you are *Shepardizing*.<br><br>**Superseded by**—The citing reference—typically a session law, other record of legislative action or a record of administrative action—supersedes the statute, regulation or order you are *Shepardizing*. |
| **Questioned: Validity questioned by citing references**<br>The orange signal indicates that the citing references in the *Shepard's* Citations Service contain treatment that questions the continuing validity or precedential value of your case. | **Questioned by**—The citing opinion questions the continuing validity or precedential value of the case you are *Shepardizing* because of intervening circumstances, including judicial or legislative overruling. |
| **Caution: Possible negative treatment indicated**<br>The yellow signal indicates that citing references in the *Shepard's* Citations Service contain history or treatment that may have a significant negative impact on your case (for example, limited or criticized by). | **Criticized by**—The citing opinion disagrees with the reasoning/result of the case you are *Shepardizing*, although the citing court may not have the authority to materially affect its precedential value.<br><br>**Distinguished by**—The citing case differs from the case you are *Shepardizing*, either involving dissimilar facts or requiring a different application of the law. |
| **Neutral: Citing references with analysis available**<br>The blue "A" signal indicates that citing references in the *Shepard's* Citations Service contain treatment of your case that is neither positive nor negative (for example, explained by). | **Explained by**—The citing opinion interprets or clarifies the case you are *Shepardizing* in a significant way.<br><br>**Cited in Dissenting Opinion at**—A dissenting opinion cites the case you are *Shepardizing*.<br><br>**Interpreted or construed by**—The citing opinion interprets the statute, rule or regulation you are *Shepardizing* in some significant way, often including a discussion of the statute's legislative history. |
| **Cited by: Citation information available**<br>The blue "I" signal indicates that citing references are available in the *Shepard's* Citations Service for your case, but the references do not have history or treatment analysis (for example, the references are law review citations). | **Cited by**—The citing document references the *Shepardized* cite. |

Figure 3. Chart of Shepard's signal indicators and meanings adapted from Shepardizing: Only on the LexisNexis services. Copyright 2008 by LexisNexis. Reprinted with permission.

It should be noted that a decision's treatment can change over a period of time. For example, a decision deemed "positive" in 2016 can become "neutral" in 2017 and "potentially negative" in

2018 before going back to "neutral" in 2019. Such movement depends upon how the opinion is cited in subsequent decisions, indicating the dynamic nature of the law. Thus, the symbols included in Appendix A may very well be different by the time this study is published.

**Step 2: Line-by-Line Coding**

I employed a line-by-line coding process to discover the "rich dynamics of data" (Saldaña, 2015, p. 103) and foster a greater sense of analytical trust (Charmaz, 2008). Benaquisto (2008) noted that line-by-line coding enables the researcher to "identify as many ideas and concepts as possible without concern for how they relate" (p. 87). In essence, I read and notated each opinion individually (on the opinion and in my notes), analyzing the logic and reasoning behind the decision(s) in the opinion. As I read through each case, I also noted, using highlights and handwritten markings on the opinions, the key arguments of each opinion, noteworthy quotations or perspectives offered by the judges, and how the court decided for or against the appellant or appellee. The line-by-line coding process aided me greatly as I proceeded to the next two stages of my coding.

As I proceeded with my coding, I also began compiling the significant facts and issues that were the subject of the legal dispute. Auerbach and Silverstein (2003) discussed the concept of repeating ideas (several study participants expressing the same idea), and I used that strategy to establish links among the different opinions. It is important to keep in mind that in many cases, these decisions represent parts of a longer, more complex case with the possibility of more decisions both before and after these decisions were reached. Further, while the decisions themselves have been issued over a 2-year span, the actual cases and incidents may have originated years earlier, as noted in Appendix A. Auerbach and Silverstein (2003) emphasized the importance of focusing on the study-relevant information, and Schreier (2012) noted that

qualitative document analysis calls for the researcher to concentrate on "those aspects that relate to the overall research question" (p. 171).

While reviewing and note-taking during my line-by-line coding, I also focused on both organizational social action theory and conflict theory, looking for specific patterns and themes in the opinions from the courts' perspectives. I examined the opinions for instances of organizational inequality that existed among the institutions' handling of Title IX incidents involving their students. In addition, I examined the opinions for perceived conflict, felt conflict, and conflict aftermath. More specifically, I read through and notated each case to get a better understanding of the facts and issues present within it, especially from a thematic standpoint. Hall and Wright (2008) discussed how, when analyzing legal opinions in this manner, researchers can learn "about what courts do and how and why they do it" (p. 64). I paid close attention to the facts surrounding the case, the claims made by the appellant, and the court's commentary about each. I also looked at the rule(s) of law, which was applied to the specific situation and the reasoning, if any, behind applying that rule of law.

I also used a framework of the following questions provided by Novkov (n.d.):

1. What is the background of the case? Are there any legal terms I do not understand?
2. What are the facts of the case? Who are the parties on each side? What is/are the main issue(s) in the case? What side did the court find more convincing?
3. What is the legal question in the case and how does the court answer it?
4. What reasoning supports the court's decision?
5. Are there any separate opinions?
6. How does the decision fit with other cases?

The above questions, and especially Questions 4 and 6, really helped me break down each opinion and make connections from one opinion to the next; this is what Coffey (2014) referred to as auditing, involving the researcher looking for relationships between and among documents. I also utilized a well-established method IRAC (issue-rule-application-conclusion), which is

designed to help law students take a complex case and, through the writing process, put it into its simplest terms. As students read a case, they summarize it by determining the major issue or issues, the rule(s) of law that apply to the case, the application of the law(s) to the facts of the case, and the result of the case. IRAC was very helpful for me throughout my document analysis because it forced my attention to finding key issues and legal rules present in each opinion and then articulating those issues and rules to my audience (Columbia University Law School, n.d.). While I reviewed each decision several times to ensure I had what I needed, van den Hoonaard and van den Hoonaard (2008) explained that qualitative researchers who conduct numerous textual readings "gain confidence that [the data] contains enough material to warrant discovery and analysis, moving first from empirical observations and finally to conceptual insights" (p. 188). Once all cases were reviewed and notated, I used my notes and analysis to form the basis of answering my two research questions.

**Step 3: Descriptive Coding**

After conducting line-by-line coding, I used descriptive coding, as described by Saldaña (2015). Descriptive coding is designed to assist qualitative researchers in extracting topics or themes from those documents (Saldaña, 2015). The descriptive coding for this study was largely deductive in nature resulting from my attribute coding process. Shank (2008) commented that deductive approaches largely are associated with quantitative analysis due to using deduction to test researchers' hypotheses. That said, Creswell and Creswell (2017) stated that deductive analysis involves a researcher using themes to evaluate the data and find out whether more evidence might be needed for a particular theme.

In terms of procedures, I took the results of my line-by-line coding and, in my notes, created summaries of each of the opinions. Below is a sample summary taken from my written notes:

> Bernard v. E. Stroudsburg Univ., 700 Fed. Appx. 159
>
> Legal terms: deliberate indifference, due process
>
> 2007: Bernard (Student) accused VP of Advancement of Sexual Harassment. No evidence to support claim, so the insufficiency meant that the claim could not be proven. 2008: More students accused Sanders of sexual harassment - this time, a bigger investigation. Suspension and then termination of Sanders. Bernard sued in 2009 - different people added and subtracted from case. Sanders won on all counts. East Stroudsburg dismissed on summary judgment before Sanders verdict. Appellants claim that facts in the original case were not considered by district court: incomplete report (deliberate indifference), limited investigation, public rumors about Sanders, and lack of strong policies (and being told so by state official). Court stated that Dillman (ESU pres.) did not have to talk to Breese about report. Court DID say that the policy "required an explicit finding, and arguably, Breese did not provide one" (8). However, that wouldn't have changed anything if a clear finding was made. Also, Dillman did look at anonymous letters and was hindered because of a larger financial investigation.

While conducting descriptive coding, I also took a somewhat inductive approach, which Creswell and Creswell (2017) explained is used to find themes that were not previously identified. Likewise, Williams (2008) rationalized that inductive approaches to coding are important to find "emergent themes" (p. 249) that may have developed as the data analysis progressed.

I found the opinion summaries important to help me understand each of the opinions, especially the more complex ones, in order to better comprehend the rationale of the court and how one opinion might differ from another. In my case, the inductive analysis also allowed me to identify themes for which I did not account, such as negligence and breach of contract. In tandem with my attribute coding described earlier, the descriptive coding process ultimately revealed that deliberate indifference, gender bias, procedural due process, substantive due process, qualified immunity, and sovereign immunity were the dominant issues found in my set of court opinions. The descriptive coding also helped me to begin focusing on the issues that would become the focus for my second research question.

**Step 4: Holistic Coding**

Creswell and Creswell (2017) noted that one important aspect of coding is to ensure the themes contain "multiple perspectives from individuals and be supported by diverse quotations and specific evidence" (p. 194). Once the descriptive coding was completed, I conducted a deeper document analysis to examine the similarities and differences between IHE responses to Title IX incidents and the degree of alignment between the courts and IHEs regarding Title IX constitutional issues. As articulated by Saldaña (2015), holistic coding involves the examination of a long and complex document and the application of a descriptive code or an in vivo code (a code taken from the document) as a representation of that document (Saldaña, 2015).

To begin the holistic coding process, I turned to the results of my line-by-line and descriptive coding and began looking for different perspectives and viewpoints by both the courts and IHEs. For example, if an IHE was found not to have been deliberately indifferent because it responded appropriately, I noted that with a note such as NO DI PROPER RESPONSE. If a court agreed with an institution regarding proper procedural due process, I

noted that with the code COURT AGREES W/SCHOOL PDP. I used similar procedures for substantive due process (SDP), qualified immunity (QI) and sovereign immunity (SI). If I found I needed additional clarification while reviewing my descriptive coding summaries and holistically coding them, I returned to the court opinion to review it once more.

While the holistic coding process aided me in answering both research questions, the process especially helped me answer my second research question, since I could see clearly how IHEs and the courts lined up with regard to due process and immunity. The coding results identified the courts' and IHEs' organizational perspectives on the due process and immunity constitutional issues, showing the overall alignment with regard to Title IX responses involving constitutional issues. If I noted COURT AGREES WITH SCHOOL PDP more than I did COURT DISAGREES WITH SCHOOL PDP, the results suggested that IHEs and the courts were more or less in alignment. I did not examine a specific numerical degree of alignment. Instead, I looked at how an appellate court and an IHE interpreted a particular constitutional issue; a lack of alignment meant that the organizations interpreted the same law differently. For example, if an IHE viewed immunity as a right but an appellate court saw immunity as a privilege, then the court and the IHE were not aligned.

## Validation of Data

Patton (2015) noted that unlike quantitative analysis, qualitative analysis and findings is "judgment dependent" (p. 653) and "depends on the insights, conceptual abilities, and integrity of the analyst" (p. 653). To that extent, validation becomes a critical part of the qualitative research process, especially document analysis. Elo et al. (2014) referenced the problematic shift from ongoing validation during the collection process to a post-collection validation process, stating that a post-collection data validation would not be especially beneficial in addressing

issues that arose during the data analysis itself. In order to ensure appropriate data validity, I created a checklist modeled after the one by Elo et al. and divided my questions into three categories: preparation, organization, and reporting.

Table 2

*Data Validity Checklist*

| **Phase** | **Questions** | **Responses** |
|---|---|---|
| Preparation | How do I collect the most suitable data for my content analysis? | The best way to collect the most suitable data is to conduct the search outlined in my Chapter 3. |
| | Is this method the best available to answer the target research question? | Yes, this is the best available method because it allows me access to the data I seek. All data is public, too, so it cannot be questioned. |
| | Self-awareness: What are my skills as a researcher? | First and foremost, I can read and dissect complex documents, extracting the essential information from the documents. In addition, with respect to document analysis, I understand how to summarize and to convey the information in ways that anyone can understand. |
| | How do I pre-test my data collection method? | I am not sure how to answer this question, but I believe that my pre-test comes in ensuring that I have an accurate sample for my study. I will choose all appellate court decisions and will then examine each one to ensure connection to my study. |
| | Sampling strategy: What is the best sampling method for my study? | The best sampling method is by conducting a non-random sample of court opinions from a specific time period. |
| | Non-random sampling of the cases: Who are the best informants for my study? | The best informants for my study are the judges who communicated via their judicial opinions. |
| | What criteria should be used to select the participants? | My "participants" in this case are the opinions, but I must use search terms and a fixed date range to ensure I have a representative set of opinions. |
| | Is my sample appropriate? | Yes, it is appropriate. |
| Organization | Categorization and abstraction: How should the concepts or categories be created? | The concepts and categories should be created, first and foremost, using the court opinions themselves. An examination of each opinion will reveal the overarching concepts and terms that drove the court to rule the way it did. |
| | Are there still too many concepts? | There is an abundance of concepts, but I do not believe that there will be too many of them once the organization and sorting processes begin. |
| | Is there any overlap between categories? | I may experience some overlapping between categories. For example, while courts routinely rule on due process issues separate from Title IX issues, the two issues are interconnected and thus prone to overlap. That will not pose any sort of threat to my data validity as long as I note the overlap in my examination of the data. |
| | Interpretation: How do I ensure that the data accurately represent the information that the participants provided? | In this case, the participants are the court opinions themselves. The opinions, written by judges, are reviewed before publication to the public. I also need to check the treatment of the cases (positive, neutral, potentially negative) to ensure that I have the most up-to- |

| | | |
|---|---|---|
| | | date treatment. Going along with that, I need to ensure that I explain changes in treatment in my explanation of the cases to alert people that it may change following the publication of my dissertation. |
| | Representativeness: How do I check the trustworthiness of the analysis process? | In order to check the trustworthiness of the process, I need to ensure that the information I have in my raw summaries of the opinions reflects the facts and ideas put forth by the judges. I also must have the correct page numbers for any quotations I use. Frame of reference also might be required for some of the less obvious quotations or quotes that need explanation. |
| | How do I check the representativeness of the data as a whole? | All court opinions are from all of the appellate courts over a 2-year timespan. The number of opinions as well as the date range gives me confidence that I have a representative set of opinions that will serve me well. |
| Reporting | Reporting results:<br><br>Are the results reported systematically and logically? | Yes, I have categorized the data into easily viewed sections in Chapter 4. |
| | How are connections between the data and results reported? | I have tried to connect through explanation and analysis of the data. |
| | Is the content and structure of concepts presented in a clear and understandable way? | Yes, I do believe they are. |
| | Can the reader evaluate the transferability of the results (are the data, sampling method, and participants described in a detailed manner)? | Yes, I have included a diagram to show how I arrived at my final data. |
| | Are quotations used systematically? | Yes, I used an appropriate number of quotations from the opinions while also being sure not to overdo it. |
| | How well do the categories cover the data? | The categories cover the data quite well, especially because of the Title IX-related terminology present throughout the data. |
| | Are there similarities within and differences between categories? | Yes, there are both, as discussed in Chapter 4. |
| | Is scientific language used to convey the results? | To some degree, there is a fair amount of "legalese" in the results, but I tried to explain legal jargon in my discussion. |
| | Reporting analysis process:<br><br>Is there a full description of the analysis process? | Yes, there is. |
| | Is the trustworthiness of the content analysis discussed based on some criteria? | Yes, it is based on both the subject matter and the judicial authority present within the opinions. |

*Note*. Based on Elo et al., 2014.

During the preparation phase, I answered questions relating to researcher skills and criteria for data selection (Elo et al., 2014). I then focused on the organization phase, posing queries related to categorization and trustworthiness of the data (Elo et al., 2014). From a reporting standpoint, I inquired about the analysis and whether it appeared logical or not (Elo et al., 2014). A question might be what the data reveal about the participants (in this case, the courts) and their relationship to the opinions themselves: that is, whether the opinions tell us anything about the judges who ruled on the matters. I trust that any of the aforementioned did not lead to issues in the data analysis and interpretation. Since the data came from already-decided court cases and relied on rationalities in the judges' opinions, I did not have to worry about misquoting the record. However, I used the data validity checklist to self-check in order to make sure that the search process and data analysis were accurate and reasonable.

I also incorporated investigator responsiveness and data verification strategies described by Morse et al. (2002) to preserve my own data validation process. A responsive investigator must "remain open, use sensitivity, creativity and insight, and be willing to relinquish any ideas that are poorly supported regardless of the excitement and the potential that they first appear to provide" (Morse et al., 2002, p. 18). In my study, while examining the documents, I kept an open mind and avoided "overly adhering to instructions rather than listening to data" (Morse et al., 2002, p. 18) and other investigator pitfalls that could impact the data reliability and validity. The results of my investigator responsiveness were manifested in my summaries of the documents in Chapter 4, where I focused on the details of the opinions that correlated directly to my research questions.

In addition to investigator responsiveness, Morse et al. (2002) outlined several data verification strategies: methodological coherence, appropriate sampling, synchronized data

collection and analysis, theoretical thinking, and theory development. Of the strategies, I used methodological coherence, theoretical thinking, and theory development in this study. Methodological coherence is straightforward: The research questions, methods, data, and analysis all must agree (Morse et al., 2002). Such cohesiveness may not always progress in a linear fashion, as Auerbach and Silverstein (2003) noted in discussing the back-and-forth nature of analysis. Accordingly, during each step of my content analysis, I ensured cohesiveness between the research questions and the document analysis by constantly reviewing each of my descriptive coding summaries one-by-one and then collectively once I completed the holistic coding process.

When researchers think theoretically, Morse et al. (2002) stated that they steadily progress through their data while performing a series of checks and "building a strong foundation" (p. 18) upon which to base the analysis. This continues with the theory development, which means moving intentionally "between a micro perspective of the data and a macro conceptual/theoretical understanding" (Morse et al., 2002, p. 18) of the study as a whole. Upon completing my coding processes, I sorted the information into the sections that eventually would become the discussion of my results while making sure that each section's information reflected the coding I had conducted. For example, if I noticed that I had mentioned a dissenting opinion but had not provided sufficient information on the dissenting judge's rationale, I returned to the court opinion to conduct more content analysis that would fill in the gap.

Finally, I preserved validity by using what Patton (2015) described as triangulation of data sources: "comparing and cross-checking the consistency of information derived at different times and by different means" (p. 662). I checked for consistency from one opinion to the next, no matter the jurisdiction, the month or year of the opinion, and so forth. I also compared the

perspectives of the different organizations, most notably the courts and the IHEs, for purposes of consistency.

## Limitations of the Study

There are several limitations to this study that should be noted. The first has to do with the timing of the study. This study first was proposed in the Spring of 2017 before the September 2017 rescinding of the previous Title IX guidance. While the expectation was that the new guidance would change some of the previous guidance, by no means did I expect that the proposed guidance released in 2018 would resemble this study. The proposed guidance was discussed more in-depth in Chapter 2. The ED has included myriad references to case law in the over 100-page document outlining the proposed changes to Title IX policy. In fact, most of the cases referenced in the ED document appeared in the data-gathering phase of this study, and a few of them were used in my study. The policy changes may come either immediately after or sometime after this study is published.

A second limitation relates to the search term *university* in the selection of my court opinions. Because I did not use the term *college* in my search process, my results could have been limited to four-year institutions with the word *university* in their names, thereby excluding both 2-year community colleges and 4-year colleges that did not have university status. Two-year colleges were not the focus of this study, so the first limitation was not applicable. Further, as displayed in Appendix A, several schools contained the word *college* in their names: Boston College, Culver-Stockton College, and Valencia College. Thus, it can be reasonably inferred that the database algorithm included in the search results institutions with *college* as well as *university*.

Another limitation concerns the sheer number of appellate court decisions. As discussed previously, this study used appellate court decisions for several reasons. Appellate court opinions are more binding on IHEs than district court opinions are. Also, the Supreme Court does not hear every oral argument presented to it; consequently, for document analysis purposes, the number of opinions would be far fewer than the number of appellate court opinions. To use every appellate court Title IX legal opinion outside of the 2-year timeframe as a data source would have been almost infeasible. Every opinion has a different story, a different set of facts, and—in many cases—a different rationale for the court's decision. While that may not seem too significant, one of the main goals of this study was to examine the opinions so that schools can strengthen their Title IX institutional policies. That would have been difficult if every opinion had a different viewpoint and mode of thinking on the part of the court. At the very least, though, the decision to use recent case law reflects the courts' current perspectives on the issue.

Yet another limitation was the fact that while I sought to preserve reliability, I was the sole coder and researcher for this project. I did not conduct inter-rater reliability but rather relied on intra-rater reliability. Morse (1997) stated that inter-rater reliability is useful for "semistructured interviews, wherein all participants are asked the same questions, in the same order, and data are coded all at once at the end of the data collection period" (p. 446). Recognizing the lack of inter-rater reliability, I sought to establish intra-rater reliability and to guard against significant bias. I conducted my coding processes in line with a modified version of what Oluwatayo (2012) described as the parallel forms method of testing for reliability. With the parallel forms method, the researcher applies alternate (but closely related) testing procedures to the same subjects (in my case, the court opinions) at different periods of time. The goal of the parallel forms method is to ensure consistency with the results, thus preserving high reliability

(Oluwatayo, 2012). In connection with the document analysis portion of my study, I conducted line-by-line coding first, followed by descriptive coding, and finally holistic coding, all at different points throughout my study. After completing the descriptive coding, I compared the results of that coding process to the results of the line-by-line coding. I used the same procedures for the holistic coding, comparing those results to the results of the line-by-line coding and the descriptive coding. While there might have been a slight degree of bias in the coding process, I found significant stability and consistency from one coding process to the next.

Because of the changes occurring in Title IX policies, the introduction of the 2011 DCL probably led to an increase in the number of Title IX-related cases filed in the court system because, before the 2011 DCL, neither colleges nor their students may have been fully aware of the true nature of Title IX. Since September of 2017, the courts have seen a noticeable increase in the number of cases brought by accused students against their universities and perhaps even their accusers. The federal policy shift toward more rights for the accused has caused more penalized students to be aware of the rights they might have had violated during the investigation and hearing processes.

## Potential Researcher Bias

As will be demonstrated later, impartiality in Title IX policy is vital in order to preserve equality and fairness. While I am not a seasoned Title IX professional, I have had significant exposure to the field that should be addressed here. From September of 2017 until November of 2019, I worked with Rutgers Biomedical and Health Sciences (RBHS) on Title IX education, programming, and occasional review of investigation files. As of November of 2018, I served as the Title IX Education and Prevention Coordinator at RBHS. I conducted student Title IX training sessions with a focus on educating students on their Title IX responsibilities and

explaining what to do if ever faced with a Title IX situation (sexual harassment or sexual assault). I prepared a mandatory online training for new students and also attended and trained students on how to be prosocial bystanders. In addition, I attended both institutional and statewide Title IX meetings as well as two NASPA conferences. Further, I am an ATIXA-certified Title IX Investigator as a result of attending ATIXA training, though I have not conducted any Title IX investigations to date. Now working in the student affairs office at New Jersey City University (NJCU), one of my main tasks is to revise the NJCU Title IX and Student Conduct policies. I also have been tasked with co-writing a grant that would provide funding to NJCU to provide additional Title IX victims services.

Patton (2015) noted how "the trustworthiness of the data is tied directly to the trustworthiness of those who collect and analyze the data – and their demonstrated competence" (p. 706) and how addressing potential researcher bias comes in explaining why a researcher decided to undertake the study in the first place. My knowledge and work background clearly show my sincere interest in Title IX and student conduct policy work, especially if it means providing useful guidance and suggestions for improvement at both the student and the institutional levels. Also, while I am a trained Title IX investigator, I have not investigated any Title IX incidents of student sexual misconduct and therefore would not find any bias in how a particular investigator or other Title IX official mentioned in a court opinion handled an investigation. That said, I have worked closely with Title IX coordinators and understand the terminology and steps involved in conducting a Title IX investigation, from gathering information and evidence to interviewing parties, so that knowledge would help me when making sense of a court opinion that referred to similar content.

Patton (2015) also stressed the importance of a researcher's acknowledgement of perspective on the study's overarching issue. My perspective regarding the study is that organizational social action seems best served when the affected organizations can understand each other and look to collaborate on finding solutions to important issues while minimizing conflict. Specifically, if IHEs and courts gain insight into the sources of disagreement with respect to proper Title IX incident response, then they will have the ability to find agreement that will benefit all parties involved in Title IX incidents, most notably the students.

# CHAPTER 4: FINDINGS

Since the 2011 DCL, higher education institutions have faced a growing number of Title IX-related lawsuits filed against them for different reasons. As noted previously, the purpose of this study was to look at the contents of court opinions to examine the levels of consistency and conflict within higher education's responses to Title IX incidents of student sexual misconduct through the eyes of the judicial system. More specifically, this study was guided by two primary research questions:

1. What common themes and trends emerge from appellate court opinions that illustrate similarities and differences in institutional responses to Title IX incidents of student sexual misconduct?
2. Based on court opinions, in what ways are appellate courts and higher education institutions aligned with procedures for addressing Title IX incidents of student sexual misconduct?

Using document analysis as a methodological approach, I analyzed the court opinions to discover the themes and trends in how higher education institutions respond to Title IX incidents involving student sexual misconduct and to identify (mis)alignment, if any, between the courts and higher education in handling Title IX incidents procedurally. The first two sections of this chapter are devoted to answering each of the research questions. Within each section, I begin with a basic overview of the legal issues and then summarize and analyze the relevant court opinions. With respect to the first question, document analysis revealed that deliberate indifference and gender bias were the two most common themes illustrating institutional similarities and differences in response to Title IX incidents of student sexual misconduct. As for the second question, the analysis of court opinions showed

that due process (substantive and procedural) and immunity (qualified and sovereign) best illustrated the amount of alignment between the appellate courts and higher education institutions.

**Research Question 1**

**What common themes and trends emerge from appellate court opinions that illustrate similarities and differences in institutional responses to Title IX incidents of student sexual misconduct?**

The attribute coding and document analysis of the appellate court opinions revealed two dominant themes showing the variation in responses to Title IX student sexual misconduct incidents on the part of IHEs: deliberate indifference and gender bias. Those two themes also illustrated the organizational challenges facing the institutions described in the court opinions. After examining the topics and IHE's consideration of the specific issues in each case, I applied organizational social action theory to the analysis, with special attention on how the IHEs functioned both individually and as a single organization as well as any discrepancies that might have appeared.

**Deliberate Indifference**

The opinions in this study demonstrate that deliberate indifference, which is "the careful preservation of one's ignorance despite awareness of circumstances that would put a reasonable person on notice of a fact essential to a crime" (Garner & Black, 2019b, para. 1), is a pressing concern for higher education institutions. The theme of deliberate indifference appeared in 15 of the 33 opinions as part of this study. Unlike issues of due process and immunity, deliberate indifference is directly related to institutional Title IX policy.

In examining the appellate court opinions, it became clear that higher education institutions have responded in different ways with respect to issues of deliberate indifference. The opinions in this study revealed that while some institutions knew of and responded

appropriately to a student's claim of sexual misconduct, other institutions— in the eyes of the courts—did not take appropriate steps or demonstrate proactive behavior in responding to student reports of sexual misconduct and, thus, were deliberately indifferent. I have provided several case examples that highlight the aforementioned points.

***Maher v. Iowa State*: Student dissatisfaction does not equate to deliberate indifference.** Maher v. Iowa State Univ. provides an example of clear agreement between IHE and the court. It was a relatively straightforward decision involving deliberate indifference and did not require much discussion on the part of the court. In that case, the plaintiff student Maher filed a Title IX suit against Iowa State University (ISU) for showing deliberate indifference in handling her sexual assault investigation and hearing. Another student, Whetstone, assaulted Maher while as a student at ISU. Maher reported the incident to ISU, which began investigating the incident. According to the opinion, Maher later found out that Whetstone was living near her the following year; she discussed a possible housing change with ISU, but since the investigation was still ongoing, ISU could not move him until the investigation was complete (*Maher v. Iowa State Univ.*, 2019). ISU did give her two additional housing options, but she declined both options. The administrative judge found that Whetstone committed assault, and he eventually was expelled. Maher, however, filed a Title IX complaint against ISU, stating that she lost the right to participate as a student (the "educational program or activity" phrasing in the ED Title IX policy) due to ISU's perceived deliberate indifference toward her claim.

The district court dismissed Maher's complaint against ISU, in part, because there was no evidence ISU was deliberately indifferent to Maher, and Maher appealed that decision. The appellate court noted that deliberate indifference means that ISU did not take action, which was untrue in this case since ISU offered Maher two alternative housing options to help her gain

distance from the accused student. The court recognized that Maher may not have been pleased with ISU's options, but that "dissatisfaction with the school's response does not mean the school's response can be characterized as deliberate indifference" (*Maher v. Iowa State Univ.*, 2019, p. 2). Maher had asked that her attacker be moved, but the court added that to move him before the end of the hearing would have violated his due process rights because of the assumption of guilt. In a way, the appellate court indirectly warned ISU (and other schools) against punishing accused students preemptively. In this case, the court decided that ISU responded appropriately to Maher's Title IX incident report— and thus avoided deliberate indifference— by offering alternative housing options to Maher.

The Maher case reveals a straightforward approach to deliberate indifference. The appellate court stated that ISU's awareness of the issue and attempt to alleviate the situation meant that Maher could not claim deliberate indifference. The court also noted that ISU was aware of its procedural due process obligations, which is why the institution could not move Whetstone while the hearing was ongoing. The aforementioned suggests that in order to avoid the claim of deliberate indifference, higher education institutions should make a good faith attempt to address the needs of the accuser/victim while not overlooking the rights of the accused. For the *Maher* case, the court found that offering alternative housing solutions met the good-faith attempt.

***Feminist Majority Found. v. Hurley*: reasonable steps to avoid deliberate indifference.** Other opinions reveal how the appellate court applied advanced logic to more complex Title IX incidents and institutional responses involving deliberate indifference. In a key decision involving deliberate indifference, the Feminist Majority Foundation (FMF) filed an OCR complaint against the University of Mary Washington (UMW) for allowing a hostile environment to persist when students posted threatening anonymous messages about FMF on the then-popular app Yik Yak. FMF claimed that in a letter, President Richard Hurley downplayed their complaints and that UMW and the police never received Yik Yak complaints, equating to deliberate indifference (*Feminist Majority Found. v. Hurley*, 2018). The group withdrew their OCR complaint and instead filed suit in the Eastern District of Virginia, claiming deliberate indifference and retaliation (UMW not doing anything about their complaints and Hurley putting out the false letter). FMF also claimed Hurley violated their equal protection rights (*Feminist Majority Found. v. Hurley*, 2018).

The district court dismissed the complaint, stating that UMW had no way to control the use of Yik Yak. However, the appellate court overruled the district court, finding that UMW could have controlled Yik Yak since it was a location-based app and used on UMW's campus network (*Feminist Majority Found. v. Hurley*, 2018). The court stated that in addition to disabling the app's access, UMW could have had campus meetings to emphasize the importance of proper behavior and zero tolerance for posting comments and could have punished students for comments made against Feminist Majority Foundation. In essence, the appellate court rejected the premise that UMW could do nothing about Yik Yak because UMW did not try to do anything to control it. In the court's opinion, "…although the student culprits in these proceedings made their threats through an anonymous messaging application, the anonymity of

the threats does not excuse UMW's deficient response" (*Feminist Majority Found. v. Hurley*, 2018, p. 11) and that "the retaliatory harassment engaged by UMW students spanned a sufficient period for the University to have taken reasonable steps to address it" (*Feminist Majority Found. v. Hurley*, 2018, p. 14).

Like the *Maher* court, the Virginia court had to determine whether UMW knew about the issue and made a good faith effort to remedy it. Unlike the *Maher* court, however, this court had to consider more than just moving a potential offender to another building. The case not only involved different student organizations with multiple students but also involved the use of technology in the form of social media and wireless access (Wi-fi) networks. The appellate court believed that UMW could have conducted meetings and other awareness events to inform the students seemed to fit the good faith effort mentioned in *Maher*. However, whether UMW's failure to disable access to a third-party app (Yik Yak) and/or its Wi-fi network met the requirements for deliberate indifference could be debated. For example, if UMW took down its Wi-fi network for a short period of time in order to find the offending students using Yik Yak, how would that down time affect the remainder of the student population who likely relied on stable internet access to complete their studies, especially in the digital age? The Virginia appellate court's decision expands upon the good faith effort posited by the *Maher* court.

***Bernard v. E. Stroudsburg Univ.*: Proper procedures prevent deliberate indifference.** While the above case illustrated much complexity with respect to the number of details in a given incident response, courts have shown that most deliberate indifference issues arise in the steps taken (or not taken) by universities to investigate Title IX incidents in a fair and timely manner. In *Bernard v. E. Stroudsburg Univ.,* a case stemming from a 2007 incident, the student Bernard accused the East Stroudsburg University (ESU) Vice President of Advancement Isaac

Sanders of sexual harassment. Because there was no evidence to support Bernard's claim, ESU took no action. In 2008, however, more students accused Sanders of sexual harassment, which prompted ESU to investigate the incident. Ultimately, Sanders was first suspended and then terminated from his position. Bernard and several other students sued both ESU and Sanders in 2009, and while Sanders won on all counts, ESU was dismissed on summary judgment before Sanders's verdict came back. The appellants (including Bernard) claimed that certain facts in the original case were not considered by the district court: incomplete report, limited investigation, public rumors about Sanders, and lack of strong Title IX policies.

The court stated that ESU President Robert Dillman did not have to talk to Arthur Breese, the incident investigator, about the investigative report. While the court stated that the ESU policy "required an explicit finding, and arguably, Breese did not provide one" (*Bernard v. E. Stroudsburg Univ,* 2017, p. 8), the court stated that even a clear finding of fault would not have changed the result of the investigation. In addition, the court noted that Dillman did look at anonymous letters about Sanders in the file and that, while Breese did investigate Sanders's finances against the wishes of ESU, "Breese did investigate Sanders' finances insofar as they related to Bernard, the subject of his investigation" (*Bernard v. E. Stroudsburg Univ,* 2017, p. 4). In essence, from the perspective of the appellate court, ESU did everything that it could to investigate the misconduct and, it, in the court's opinion, was not deliberately indifferent. This case is interesting in that the court noted several alleged issues with ESU's response and, at one point in the opinion, even suggested that the appellants might have a viable claim against ESU:

> At the end of the day, Appellants may—or may not— have shown genuine disputes of material fact as to whether someone could have known about Sanders' behavior or

whether Breese's report could have been wider-ranging and more complete. (*Bernard v. E. Stroudsburg Univ,* 2017, p. 5)

Ultimately, the appellate court did not find ESU deliberately indifferent due to a lack of evidence. As noted before, Breese did not reach a conclusion in his investigative report, and he also disobeyed a direct order not to conduct a financial investigation. In addition, Dillman did not speak with Breese about Breese's investigative report, even to get some clarification regarding the lack of a conclusion. All of those practices (and non-practices) could lead a reasonable person to question whether ESU did in fact display some deliberate indifference.

**Actual Knowledge for Deliberate Indifference**

All of the court opinions reviewed in this study illustrate that in order for individuals to prove deliberate indifference, colleges need to have had prior actual knowledge of prohibited behaviors and fail to take corrective steps. In other words, courts likely will not rule against colleges that only learn of misconduct after a complaint is filed. For example, in *K.T. v. Culver-Stockton Coll.*, the plaintiff—a high school student—was an athlete visitor to Culver-Stockton College (Culver) who went to a fraternity party where she was sexually assaulted. The plaintiff sued under Title IX for student-on-student harassment and claimed deliberate indifference, arguing that Culver did not protect her nor give her treatment for her assault (*K.T. v. Culver-Stockton Coll.,* 2017). Culver successfully moved to dismiss because the plaintiff was not a student at Culver. In its opinion affirming the district court decision, the appellate court added that actual knowledge cannot come after the fact and that there were no allegations or evidence that Culver knew of the fraternity's prior bad behavior.

The actual knowledge requirement for deliberate indifference also was illustrated in *Doe v. Univ. of Dayton*, a case that also involves gender bias (discussed later) as part of the deliberate

indifference. Plaintiff Doe filed a Title IX lawsuit against the University of Dayton (Dayton), claiming gender bias and deliberate indifference after he was accused and found responsible for sexual assault. In September of 2016, Jane Roe reported that Doe had assaulted her. Dayton sent Doe a letter of investigation and informed him of his rights. In addition, Dayton hired an expert investigator, Daniel Swinton, who works for the National Center for Higher Education Risk Management (NCHERM) and is affiliated with the Association of Title IX Administrators (ATIXA), a leader in Title IX training and programming. Swinton initially found no coercion or incapacitation of Doe; however, upon doing a "consent analysis" (*Doe v. Univ. of Dayton,* 2019, p. 2), Swinton discovered probable cause for non-consensual sexual contact and sexual harassment. As a result, Dayton found Doe in violation by a preponderance of the evidence after the hearing board reviewed the report and heard testimony (*Doe v. Univ. of Dayton,* 2019).

Doe appealed the decision, and the Dayton Judicial Review committee realized that neither party turned in questions that could have been asked at the hearing, so they let both sides listen to the hearing's recording and then have one hour to come up with questions. Doe wrote more than two pages of questions, but the Committee decided that none of the questions would change the result and upheld Doe's 1.5-year suspension. Doe then sued for several reasons, one of which was deliberate indifference on the part of Dayton, claiming that Dayton had hosted campus events that had incidents of sexual harassment and gender discrimination at them. In affirming the district court finding for Dayton, the appellate court noted that Doe did not show that Dayton knew of any prior gender harassment at those events, thus defeating his claim of deliberate indifference (*Doe v. Univ. of Dayton,* 2019).

Actual knowledge seems an important part of determining whether higher education institutions exhibited deliberate indifference in their handling of Title IX incidents. The challenge

comes when other actors are involved in that determination. In the *Culver* case, the college stated that it had no indication of prior bad acts on the part of the fraternity and thus no actual knowledge of potential sexual misconduct involving the accused fraternity member. However, it seems reasonable to conclude that the fraternity could have had that knowledge yet failed to present it to Culver in fear that it (the fraternity) would have its campus privileges revoked. Culver, like many other institutions, likely relied on its fraternities and sororities to report all harmful or potentially harmful behavior. Had the fraternity done so in this case, then the plaintiff likely would have had a stronger case for deliberate indifference. The same holds true for the *Dayton* court, even though in this case, the accused was the one claiming deliberate indifference. He had to rely on other attendees at the campus events to provide the information that would amount to actual knowledge of gender harassment. Because no one else reported sexual harassment or gender bias at the events, Dayton could not claim that it had actual knowledge of harmful behaviors that would interfere with Doe's studies.

Based on the aforementioned cases, the appellate court opinions show some consistency with how IHEs prevent any possibility of deliberate indifference: by claiming they had no actual knowledge of prior harmful behavior such as sexual assault. However, not all incidents involving claims of deliberate indifference are equal with respect to actual knowledge. In *Farmer v. Kan. State Univ.*, two plaintiffs claimed deliberate indifference under Title IX by Kansas State University (KSU) after they reported students had raped them and that they lost their educational privileges. In 2015, plaintiff Farmer, after attending a fraternity party, was raped by a second student after she had sex with a first student, who may have set her up for the subsequent rape. The KSU CARE director told Farmer that the IFC (Interfraternity Council) would not investigate the rape (*Farmer v. Kan. State Univ.*, 2019). No reason was cited in the court opinion as to why

the IFC declined to investigate, though one could surmise that the IFC was looking to protect its member fraternities from future litigation should it investigate the incident at KSU. Farmer then tried to file a complaint via KSU's sexual misconduct policy but learned that the policy did not apply to fraternity houses.

Another rape took place at KSU involving additional plaintiff Weckhorst, who was assaulted in front of other students, some of who recorded and took pictures of it. She then was assaulted three more times, two of which were defined as rape, by different students. The KSU deans said that because the rapes occurred off campus, they could do nothing to help the situation and would not investigate the incidents. In each situation, and due to KSU's knowledge but lack of following through, the rapists stayed on campus, and both Farmer and Weckhorst experienced adversity at KSU as a result.

The appellate court had a central question to consider: "What harm must Plaintiffs allege that KSU's deliberate indifference caused them?" (*Farmer v. Kan. State Univ.*, 2019, p. 2). KSU stated that the deliberate indifference claim should have been for additional incidents after the initial incident, but the students countered that their vulnerable nature resulted from deliberate indifference. The appellate court pointed to Supreme Court precedent, stating that the plaintiffs had a justifiable claim for deliberate indifference and that the district court was right to deny KSU's motion to dismiss. The court cited part of the Title IX federal policy and stated that an institution can be liable for "its own deliberately indifferent response to known sexual harassment by students against other students" (*Farmer v. Kan. State Univ.*, 2019, p. 2). The appellate court ruled that KSU had actual knowledge of sexual harassment but by failing to act, the institution allowed for the plaintiffs to remain vulnerable. KSU claimed that no subsequent

harassment occurred, therefore they were not deliberately indifferent, but the courts disagreed with that interpretation:

> …a Title IX plaintiff must allege, at a minimum, that the funding recipient's deliberate indifference caused her to be vulnerable to further harassment. Plaintiffs have met that pleading requirement here by alleging, among other things, that KSU's deliberate indifference caused them objectively to fear encountering their unchecked assailants on campus, which in turn caused Plaintiffs to stop participating in the educational opportunities KSU offered its students. (*Farmer v. Kan. State Univ.*, 2019, p. 10)

Like the *Culver* decision, KSU's response was tantamount to actual knowledge; unlike the *Culver* decision, however, KSU had at least some prior knowledge of sexual assault but failed to act. In addition, the *KSU* court focused also on what happened as a result of having that actual knowledge and what future harms might come to the plaintiffs. For the court, it was enough that KSU had some knowledge of prior sexual assault but that it (KSU) did not mitigate either victim's situation. Interestingly, KSU actually abided by its own policies (such as the one that prohibited investigating off-campus incidents), but the appellate court clearly found that doing so subjected the plaintiffs to potentially future harms, such as seeing the accused students on campus, which was enough for the court to find that KSU violated Title IX by taking away their right to a harm-free education.

Sometimes, appellate courts will rule in favor of an institution but offer guidance that might prove important in future cases. In *Doe v. Miami Univ.*, John Doe and Jane Roe engaged in consensual sexual acts, but that arrangement ended at some point. They both had been intoxicated, and she went back to his room with him after they went to a party. He did not remember most of the night, but her statement recollected both the consensual and non-

consensual acts. One of Jane's friends told the RA, who reported the behavior to the college. The college notified Doe of the charges and went over the review and hearing process (*Doe v. Miami Univ.*, 2018). Doe was told that he had to submit a witness list and other supporting documents 2 days after learning of the charges and hearing. The victim evidently had more time to submit her statements. The hearing occurred a few days later, but Doe was not given any of the discipline report used in his case, and the hearing board ultimately found against him. After he appealed the decision and lost, he filed suit. He claimed Title IX violation of deliberate indifference for the college not to treat Jane's sexual assault of him (her kissing him) in the same light as his actions. The appellate court found that one incident as not being severe or pervasive, but the court also noted that it was not right for Miami to ignore his claim and thus was not in total agreement with how Miami responded (*Doe v. Miami Univ.*, 2018).

In the above case, the appellate court focused on the actions of both the accuser and the accused, ultimately determining that the accused's actions were tantamount to sexual assault. However, a reasonable person might conclude that Doe's inability to consent to the kissing (due to his intoxication) might equate to sexual assault, even if it does not rise to the "severe" or "pervasive" level of his own harmful behavior toward Roe. As such, incidents involving deliberate indifference often include unique characteristics in their fact patterns, so the courts exercise more caution when deciding whether an institution was deliberately indifferent. For example, in *Doe v. Brown Univ.*, plaintiff Doe, who was a student at Providence College, reported a sexual assault to Brown University (Brown) by their football players and claimed that Brown failed to investigate her claim. Because she was a student at Providence, Doe reported the assault to the Providence Police Department in the presence of the Brown Police Department. The Providence PD found evidence of the assault, and Brown told Doe that she could file report

based on their conduct policy but not a Title IX complaint (*Doe v. Brown Univ.,* 2018). As a result, Brown did not complete a Title IX investigation. Doe withdrew from Providence and sued Brown under Title IX, claiming that Brown's inaction interfered with her educational access. The appellate court, which affirmed the district court's decision, determined that because Doe was a student at Providence, she had no relief under Title IX because she would not have any discrimination under Brown's educational programs or activities.

The court stated that Doe had no relief under Brown's Title IX policy since she was not a student there. The Providence Police Department had knowledge of the incident, but it could not impose upon either Brown or Providence because it did not have the legal right to tell an institution to investigate a claim of sexual assault. This situation is unique in what is not contained in the opinion and whether such information would have changed the outcome. For example, the court opinion does not state whether Providence College had knowledge of the sexual assault at Brown, only that the plaintiff withdrew from Providence College due to the assault she suffered. It seems plausible that Doe may have withdrawn from Providence without disclosing to Providence the reason for the withdrawal. The appellate court also did not comment on whether Brown could have informed Providence of the sexual assault without violating student privacy laws such as FERPA. If Brown had notified Providence, then Providence still could claim that the assault occurred outside its purview and therefore could not be investigated. That said, Providence likely would have provided support services to Doe (counseling, amended class schedule, etc.) to help her recover and avoid having to leave the school. Still, Doe likely would not get the resolution she sought due to the fact that it occurred at another university. Both schools may have known of the harmful behavior, yet neither school could take action.

In *Ross v. Univ. of Tulsa*, plaintiff Ross was raped by a Tulsa student and sued Tulsa for Title IX damages. Ross claimed deliberate indifference on the part of Tulsa. There had been prior bad acts (rapes) by her rapist before she was raped, and that reports of prior bad acts were not used at the accused's hearing. The district court granted summary judgment to Tulsa, and Ross appealed. The appellate court found that Ross did not have a valid argument that met the legal requirements of deliberate indifference. In addition, Tulsa claimed they did not have actual notice and that they were not deliberately indifferent. With respect to notice, the district court noted that campus security officers were appropriate persons but that the prior report of the rape of another student (J.M.) was vague and J.M.'s refusal to go forward with a school or criminal complaint did not give notice (*Ross v. Univ. of Tulsa,* 2017). The appellate court stated that campus security officers were inappropriate persons and therefore could not take authoritative action. For the appellate court, the report contained enough details and that the officers acted "with deliberate indifference" (*Ross v. Univ. of Tulsa,* 2017, p. 5). The appellate court felt that the officers were appropriate because they received reports and they investigated matters. However, if the school was not aware of the reports, the court felt that it could not be held liable, which would be tantamount to vicarious liability while also punishing those officers who lacked authority. In this case, the court found partial fault with Tulsa's response, but the partial fault was not enough to rule against Tulsa. This case illustrates an important distinction between appropriate and inappropriate persons in terms of taking action. For the Tulsa court, in order for campus officers to be deemed appropriate persons, they would have had to have the ability to take action against the potential offenders.

As shown here, deliberate indifference is a substantial theme in Title IX court cases, and one that demonstrates variations in how institutions determine whether they acted appropriately

or not. Much of that determination involves multiple personnel and procedures, and sometimes even multiple policies. In addition, deliberate indifference also can bring in other Title IX issues such as gender bias (discussed in the next section).

**Gender Bias**

One clear issue challenging IHEs handling Title IX matters concerns how to address potential gender bias, a term that appeared in 10 of the 33 opinions. Courts have faced different forms of bias with Title IX matters, sometimes involving the court itself. In *Pinkston v. Univ. of S. Fla. Bd. of Trs.* (2018), Pinkston sued the University of South Florida (USF) under Title IX for gender discrimination. The district court dismissed the complaint, even after Pinkston said she had a claim for recusal of the judge, whom she felt was linked too closely to USF. Pinkston said that the district court judge should have recused herself because the judge received book royalties from USF and that he was close to the defendants' attorneys. However, she offered no proof of the alleged bias, so the appellate court applied the reasonability test (whether a reasonable person would determine bias) and found that a reasonable person would not find bias. The appellate court affirmed the district court regarding the recusal issue.

As has been discussed in previous opinions, reasonability is an important part of a court determining the appropriateness or inappropriateness of a person's or institution's actions, referred to as the reasonable person standard. Schmidt (2008) defined the reasonable person standard used by courts as follows:

> The reasonable person standard is a test used to define the legal duty to protect one's own interest and that of others. The standard requires one to act with the same degree of care, knowledge, experience, fair-mindedness, and awareness of the law that the community would expect of a hypothetical reasonable person. The standard is objective in that it

> compares one's behavior with that expected of a "reasonable person," without regard to one's intention or state of mind. (p. 1773)

That said, and as noted by Cornell University Law School's Legal Information Institute, reasonability is circumstantial and thus cannot be quantified universally, so each court must determine the difference between a person's reasonable and unreasonable actions and behaviors (Reasonability, n.d.). The court in the *USF* case applied the reasonable person standard as follows:

> That the judge was affiliated with other colleges, ruled against Plaintiff, made remarks stressing the importance of Plaintiff's compliance with her discovery obligations, and had once worked out of Jacksonville would not convince a reasonable person that bias actually exists or cause an informed lay observer to have significant doubt about the judge's impartiality. (*Pinkston v. Univ. of S. Fla. Bd. of Trs.*, 2018, p. 3)

The appellate court felt that the plaintiff's prior dealings with the judge were not enough to show recusal was necessary under the reasonable test. However, another court might very well rule the opposite given the lack of a true test for reasonability. That, in turn, would make it difficult for higher education institutions to maintain consistency with their responses to Title IX incidents, knowing that a court's decision might rest on reasonability.

In Title IX opinions examined in this study, the most common form of bias was gender bias, specifically involving the treatment of males (usually the accused) versus females (usually the accusers) and from where and why the perceived unequal treatment occurs. Some decisions, such as *Doe v. Colgate Univ. Board of Trustees*, comment on the student's perception of gender bias while finding that it does not exist. In that case, the accused student (Doe) felt that the investigator's background as a police officer combined with alleged inequity in the hearing

process equated to gender bias (*Doe v. Colgate Univ. Bd. of Trs.*, 2019). The court noted that, contrary to Doe's belief, bias did not exist simply because the hearing panel accepted the multiple accusers' versions of events and not his own. In its decision, the appellate court also affirmed the district court's decision to bar the plaintiff's expert, Professor Aya Gruber, from offering a report criticizing the investigation of Doe that, in part, stated the following as summarized by the court:

> Gruber's report discusses two "modes of thinking" that she claims are prevalent in university Title IX policy and impacted Colgate's adjudication of the claims against John Doe: the "trauma trope" and the "serial rapist trope." The trauma trope, according to Gruber, is "the presumption that anyone who makes a complaint of sexual assault, or even minor sexual contact, suffers from debilitating, or at least serious, trauma." Gruber contends that this prevented the University from questioning why all three complainants came forward at almost exactly the same time. The serial rapist trope, according to Gruber, is the mistaken idea that most college sexual assaults are perpetrated by a few serial rapists. She contends that the three complainants may not have come forward had they not talked to each other and concluded that John Doe "was a 'serial' rapist, and therefore what happened to them was rape." Gruber further concludes that the serial rapist trope may have influenced the University's determination that John Doe was responsible for sexual misconduct because there were multiple accusations against him. (*Doe v. Colgate Univ. Bd. of Trs.*, 2019, p. 3)

In support of its decision to affirm the summary judgment motion, the court pointed out that Gruber lacked expertise with Title IX investigations and that her report would not help a jury decide a case on the facts (*Doe v. Colgate Univ. Bd. of Trs.*, 2019). The court cited statistics that

showed in recent Colgate cases, more male respondents had been found not responsible than females had been found responsible. The plaintiff claimed bias on the part of the investigator, but the court noted that the plaintiff had the chance to, but did not, cross-examine the investigator. The court did make two related points: 1) that the coordinator's use of male pronouns in connection with respondents and female pronouns in connection with complainants did not amount to bias; and 2) "the statistical reality [is] that most respondents are men and most complainants are women" (*Doe v. Colgate Univ. Bd. of Trs*, 2019, p. 5).

For some institutions, the institutional conduct policies sometimes illustrate whether or not gender bias occurred. In *Doe v. Trs. of Bos. Coll.* (2018), the appellant sued Boston College for gender bias under Title IX. According to the decision, John Doe was accused in 2012 of sexual assault and, after several hearings, was sanctioned, ultimately graduating from Boston College in May of 2014. Doe's parents sought expungement of his record and requested an independent review of his case, but the review upheld the original decision. The court in that case pointed to the language in the policy and the handbook and stated that nowhere did it show bias against males:

> Actually, throughout the Student Guide, both victims and the accused are referred to as "he or she," indicating that B.C. believes that men and women can both be victims and perpetrators. The Does have pointed to no circumstantial evidence, other than the statistics of male accused students and the language in the Student Guide, that would suggest that gender bias played a role in the outcome of the proceedings in this case. (*Doe v. Trs. of Bos. Coll.,* 2018, p. 14.)

Further, the court noted that Doe showed no evidence that the 2011 DCL was biased against him.

Both the *Colgate* and the *Boston College* decisions point to policy language as an important part of deciding whether gender bias occurred. The *Colgate* court found nothing wrong with Colgate using male pronouns for the accused and female pronouns for the accuser, citing statistics to support its finding. However, the court may have missed an opportunity to encourage schools to use gender-neutral language (for example, referring to both accused and accusing students as they) to prevent against any future claims of bias, even unintentional ones. The *Boston College* court noted the presence of male and female pronouns to describe both the accused and the accusers, so as to illustrate more impartiality than the *Colgate* court did. The court did not rule on whether the 2011 DCL exhibited bias with respect to Doe; the court simply stated that Doe did not prove the DCL showed gender bias. That is an important point considering that the current ED administration stated in a press release that "the withdrawn documents [including the 2011 DCL] ignored notice and comment requirements, created a system that lacked basic elements of due process and failed to ensure fundamental fairness" (U.S. Department of Education, 2017b, para. 6). The last part, "fundamental fairness," speaks to the issue of bias, so it is interesting that in 2018, the Boston College court, knowing that the ED soon would strive for more fairness in the federal Title IX policy, simply declined to consider bias in the DCL rather than state that it was bias-free.

In addition to decisions examining institutional policies, court decisions involve issues with student conduct programming. In *Doe v. Univ. of Dayton* (discussed earlier with respect to deliberate indifference), the plaintiff also alleged that Dayton demonstrated gender bias, in part, due to a hearing board member's Facebook post about a film called *The Hunting Ground*. However, as questionable as that might seem to Doe and to others, the appellate court felt that the comment did not give rise to gender bias on the part of Dayton:

> Doe argues that one member of the Hearing Board revealed gender bias by supporting the film *The Hunting Ground*, which Doe alleges portrays campus sexual assault inaccurately. Just over a year before Doe's hearing, the Board member posted on Facebook that the film was a "[m]ust see," indicated it was unacceptable for a fraternity to be known as the "roofie frat," and agreed with a response implying that men should masturbate instead of "hav[ing] sex with unconscious women." A single comment made at a substantial temporal remove from Doe's hearing is of limited value in discerning discrimination—especially when, as here, the discriminatory aspect of the statement is difficult or impossible to discern. It is not problematic for a Board member to express distaste for sex with unconscious partners or for using drugs to obtain consent—both clear violations of Dayton's "effective consent" policy. And while Doe has alleged that the film is based on inaccurate statistics and discredited accounts, those flaws do not plausibly suggest gender bias in a supporter of the film who was not necessarily aware of the criticisms. (*Doe v. Univ. of Dayton*, 2019, p. 4)

The above passage from the Dayton decision raises a couple of important points regarding bias. In full disclosure, I viewed *The Hunting Ground*, researched the film's history, and found several discussions concerning the validity of information presented in it. Folkenflik (2015) noted how employees at institutions such as Florida State University (which itself was the subject of a high-profile sexual assault case involving star quarterback Jameis Winston) and Harvard University faulted the film for its perceived inaccuracies. Thus, I went into it knowing that the information as presented might not be totally accurate but that the film was meant to raise awareness about campus sexual assault. The appellate court noted that failure to be unaware of those criticisms does not constitute gender bias, and there is some truth to that. However, when applying the

reasonability test, a reasonable person showing the film at a university might have been expected to research the film and any potential issues with showing it, especially since the subject matter likely would lead to serious discussion. Failure to do so might not alone constitute gender bias, but the addition of questionable comments and other film-related perspectives might be enough to constitute a hostile environment at the very least.

IHEs must also consider the introduction of information from outside organizations when considering potential gender bias, whether perceived or actual. In *Doe. v. Miami Univ.*, in arguing that Miami exhibited gender bias toward him, John Doe alleged that Miami faced external pressure by the ED to resolve its Title IX cases, leading to a high percentage of male students being found responsible for violating Miami's code of conduct. The district court did not agree with Doe, but the appellate court reversed the district court's ruling. In the decision, the appellate court cited Doe's offering of statistics showing how Miami investigated male accused students but not female accused students and how Miami served as the gatekeeper of that information:

> Discovery may reveal that the alleged patterns of gender-based decision-making do not, in fact, exist. That information, however, is currently controlled by the defendants, and John has sufficiently pleaded circumstantial evidence of gender discrimination. (*Doe v. Miami Univ.*, 2018)

Doe also brought forth evidence of how Miami was subject to both the ED's external pressure to clean up its investigation process and former students' litigation for failure to investigate their claims of sexual assault (*Doe v. Miami Univ.*, 2018).

In *Doe v. Baum*, John Doe claimed that the University of Cincinnati demonstrated gender bias in accepting the victims' statements but not his statement and that the district court erred in finding against him. The appellate court majority agreed with Doe:

> When viewing this evidence in the light most favorable to Doe, as we must, one plausible explanation is that the Board discredited all males, including Doe, and credited all females, including Roe, because of gender bias. And so this specific allegation of adjudicator bias, combined with the external pressure facing the university, makes Doe's claim plausible. Indeed, other courts facing similar allegations have reached the same result. (*Doe v. Baum*, 2018, p. 7)

The court also referred to the ED investigating Cincinnati's sexual misconduct investigation process and noted how the media brought attention to female victims receiving insufficient investigations, which might have led to pressure on Cincinnati to resolve the Title IX claims more expeditiously. The *Doe v. Baum* court was not united in its stance on gender bias. In his separate opinion, Judge Ronald Lee Gilman did not agree that Doe showed sufficient evidence that Cincinnati demonstrated overt gender bias toward him:

> I therefore find no basis to reasonably infer that the Appeals Board declined to rely on the statements made by Doe and his witnesses *simply because they were men*. This leaves us with only one fact from which to infer that gender bias caused the procedural defects in Doe's disciplinary proceedings – the general pressure on the University to adequately address sexual assault claims. But as discussed above, this is not sufficient to show the "particularized . . . casual connection" required to plausibly allege a claim of gender bias under Title IX. (*Doe v. Baum*, 2018, p. 12)

Both the *Miami* and *Baum* courts highlight an important point about gender bias: how the ED's involvement in Title IX proceedings and how, in investigating institutions and issuing multiple DCLs and Q/As, the ED might have made it more difficult for higher education institutions to guard against gender bias on a consistent basis. The ED is tasked with investigating all institutions accused of Title IX violations, but as shown in several decisions, litigants have used (or attempted to use) those investigations as evidence that institutions are responding to Title IX incidents due to pressure from the federal government, which in the litigants' minds could lead to gender bias, since most of the accused are male. The gender bias issues presented in several of the opinions in this study may speak to one of the core reasons the ED decided in 2017 to overhaul Title IX regulations in the first place. However, even those proposed changes conceivably could lead to more gender bias issues, especially in light of Betsy DeVos's 2017 meeting with several men's rights advocacy groups (Kreighbaum, 2017). For example, as a result of the forthcoming revised Title IX regulations, higher education institutions soon might feel pressured to question the credibility of female complainants/victims who cannot recall all details of their sexual misconduct incidents, just so the institutions can show that they are treating male respondents with greater care.

**Organizational Inequality and Dependence Among IHEs**

In connection with Research Question 1, the court opinions reveal that higher education institutions displayed a certain degree of organizational inequality and organizational dependence on long-held response standards with regard to both gender bias and deliberate indifference, as well as a degree of subjectivity when deciding appropriate response protocol. In terms of deliberate indifference, Vaughan's (1998) amoral calculator model (the likelihood of the institution being punished for taking action versus the possible benefit for taking that same

action) involving risk assessments seems appropriate, as institutions had to consider whether or not failing to act, as discussed in the *Doe v. Brown* and *K.T. v. Culver-Stockton Coll.* decisions, would affect a student. Both of those schools calculated correctly that their responses did not amount to deliberate indifference, and both relied on objectivity in the form of their institutional policies and federal policy as well.

From an intra-organizational standpoint, higher education institutions can be viewed in two ways: as individual institutions and as a single organization made up of multiple institutions. If an individual institution exhibits organizational dysfunction, that might translate to organizational dysfunction within higher education as a whole.

On the other hand, institutions such as KSU in *Farmer v. Kan. State Univ.* calculated incorrectly, at least in the eyes of the courts. KSU did not consider its failure to act as constituting deliberate indifference, but the fact that it had knowledge of an accused sexual assaulter but did not protect its student body clearly resonated with the appellate court. Likewise, in *Feminist Majority Found. v. Hurley*, the court opined that UMW might have had difficulty preventing student access to a third-party app but that its failure to provide sufficient campus resources and information in connection with the harassment constituted deliberate indifference. If UMW had done the latter, the court might have taken a more conciliatory position with respect to the former, since, at the very least, UMW would have made a more fruitful attempt to address the on-campus misconduct.

For gender bias, the opinions in this study pointed to issues with policy wording, statistics, and the language used by Title IX personnel, not to mention the conflicting roles that may have led some personnel to exhibit a degree of bias, which is directly linked to subjectivity. As highlighted in the *Colgate* and *Boston College* courts, policies that rely solely on masculine

pronouns to describe the accused do not automatically demonstrate subjectivity and/or bias. Likewise, sexual assault prevention programming, such as was the case in *Doe v. Univ. of Dayton* with the showing of *The Hunting Ground*, does not equate to gender bias with respect to creating a hostile environment. However, when higher education institutions are under investigation by the ED, those institutions may be more prone to exhibit gender bias (even unintentionally) to close their cases and show that they are responding appropriately, as illustrated in *Doe v. Baum*. In addition, the long-established fact that most accused students are male clearly contributed to the organizational inequality in terms of the treatment of male students versus female students.

In sum, not all higher education institutions responded to Title IX incidents of student sexual misconduct in the same way. Part of that stems from the fact that administrators exercised their own judgments in handling Title IX matters, which sometimes adversely affected students. In some cases, students had unrealistic expectations as to how their matters would be handled by their respective institutions, causing those institutions to have to defend themselves in court. While the variation in Title IX incident responses might be small, if higher education is to serve as an agent of change, then greater inter-organizational equality seems necessary (Powell & Brandtner, 2016), especially as the federal Title IX guidelines are closer to implementation and will apply to all institutions. Because individual IHEs (as social actors) function as a mechanism of producing inequality and subjectivity, higher education systematically might also manifest such a complicated set of dynamics.

**Research Question 2**

**Based on court opinions, to what extent are appellate courts and higher education institutions aligned with procedures for addressing Title IX incidents of student sexual misconduct?**

Melnick (2018) noted that courts rely on constitutional interpretation of Title IX while higher education institutions (like the ED) use a more statutory interpretation, often resulting in conflicting opinions on the correct way to interpret the policy. In light of Melnick's observation and my incorporation of conflict theory, I decided to answer my second research question focusing on two constitutional issues present in the court opinions: due process and immunity. In examining the appellate court decisions, the amount of alignment between appellate courts and higher education institutions was most demonstrated in the analysis of opinions related to due process and immunity, In this section, I first will discuss due process in general, followed by a discussion of the two major types of due process: substantive and procedural. Finally, by drawing from conflict theory I will illustrate the degree and nature of conflict between the appellate courts and higher education

**Due Process: An Introduction**

The phrase *due process* appears in 17 out of 33 of the legal opinions used in this study, which demonstrates that due process is a significant theme facing IHEs and the courts. As discussed in Chapter 2, due process, a constitutional protection, has been a dominant issue in Title IX policy, and the court opinions clearly reflect that trend. Due process also is perhaps the most complicated issue since it involves both federal and state laws, which do not always agree. As shown in the opinions in this study, courts deciding due process issues primarily have to determine whether students had their substantive due process (protected by the Fourteenth Amendment) violated by being suspended or expelled, and whether students lost their right to procedural due process (protected by the Fifth Amendment) when universities conducted their

investigations and hearings using allegedly questionable practices. Also important is how the courts made those determinations and whether they were consistent from one court to the next. To add to the complexity of the issue, many courts separate due process issues from Title IX issues, even though the two issues go hand-in-hand.

It is important to note that while due process violations can occur outside of the context of a Title IX complaint, such violations are interconnected with Title IX. For example, appellants could accuse a university of conducting an improper hearing by failing to provide sufficient time for a party to review evidence. Such a charge would violate procedural due process as well as federal Title IX policy. While substantive due process does not connect directly to Title IX, the decisions on substantive due process violations speak to an institution's response to Title IX incidents and ultimately can affect Title IX proceedings.

**Substantive Due Process: Access Denied**

In remarks delivered in 1998, distinguished Constitutional Law Professor Erwin Chemerinsky commented on substantive due process as follows: "Substantive due process has been used in this century to protect some of our most precious liberties. Still, there are now and have always been Justices of the Supreme Court who believe there is no such thing as substantive due process" (Chemerinsky, 1998, p. 1501). Chemerinsky added that while legal scholars often have looked to the Supreme Court to define substantive due process, such a definition does not exist (Chemerinsky, 1998), which clearly would pose a problem for any court deciding a substantive due process argument. According to the court documents, appellate courts often are faced with substantive due process questions as to students' rights to continue their educational studies. However, before students pursue substantive due process claims in federal court, they first must seek relief in their state jurisdictions, arguing that the state is taking away a

particular constitutional right. Otherwise, the federal court will deny their claims. As Professor Chemerinsky alluded to, the question of whether substantive due process applies is not always an easy one to answer, nor is the answer consistent. Still, as shown below, the court opinions demonstrate that colleges respond to substantive due process on a consistent basis and that their responses mirror the legal opinions provided by the appellate courts.

In addition to requiring that parties file first in state court, substantive due process only can apply to state actors: individuals and organizations that are under the purview of the state. In *Faparusi v. Case W. Reserve Univ.*, an opinion that followed a previous opinion (*Faparusi v. Case Western Reserve U.*) involving the same parties, the plaintiff student Faparusi was found responsible for violating CWRU's sexual misconduct policy when he took photos in the women's restroom. He ultimately was suspended by CWRU. The appellate court found that because CWRU is a private institution, it could not be considered a state actor; thus, substantive due process was not applicable (*Faparusi v. Case W. Reserve Univ.*, 2017). As will be discussed in Chapter 5, the court's logic here was grounded strictly within the Constitution, but such logic has proven challenging in the context of Title IX. The court added that that Faparusi did not show how or why CWRU would be considered a state actor and therefore subject to an exception to the substantive due process requirement as a state actor (*Faparusi v. Case W. Reserve Univ.*, 2017). To confound matters, Faparusi claimed that CWRU violated his claim under non-Title IX due process and yet that they were a state actor under Title IX because CWRU received federal funding. Ultimately, the appellate court noted that CWRU as a private school might receive federal funding, but that does not mean CWRU automatically becomes a state actor, nor does it mean that the federal government has any active role in CWRU's operations (*Faparusi v. Case W. Reserve Univ.*, 2017). Again, the court leaned on the Constitution to support its ruling against

Faparusi, but it also inadvertently raised the question as to why schools like CWRU should have to follow any form of federal policy (including Title IX) if they are exempted due to their private status.

In this case, both CWRU and the appellate court were in agreement with respect to substantive due process. The court seemed to suggest that if Faparusi had shown sufficient evidence that CWRU should be considered to be a state actor or exempt from that particular requirement, he could have had a viable claim for his due process being violated. As noted in the opinion, the following excerpt highlights the problem with Faparusi's understanding of due process

> This fatal flaw in Faparusi's due process argument is made clear by the very cases he relies on: they either considered private law contract challenges, not constitutional ones, based on the schools' deviation from its own disciplinary procedures…or disciplinary actions by state universities. […] Faparusi may have his reasons to be indignant about CWRU's treatment of him. But a perception of mistreatment, even a well-founded one, does not automatically mean Faparusi has suffered a deprivation of his rights under the Constitution. (*Faparusi v. Case W. Reserve Univ.*, 2017, p. 5)

In fact, the court pointed out that private institutions are to be treated as state institutions when the evidence shows that both public and private entities operate virtually the same. The phrase "perception of mistreatment" (*Faparusi v. Case W. Reserve Univ.*, 2017, p. 5) indicates that concrete evidence might have led to a different outcome. In this case, the court felt that the evidence was lacking on the part of Faparusi and that CWRU followed the letter of the law with respect to substantive due process.

The aforementioned case also raises an important question about the right to receive education. Is it a right at all? Or is it more of a privilege? Many students may view the idea of education as a somewhat automated process that continues until they (students) have decided it is time to stop. In their minds, they—and not the university or even the judicial system— control how and when their education proceeds. Not even a violation of a school policy is enough for many students to believe that their education will be interrupted or come to an end. *Faparusi* provides an example of a public institution, which technically is not bound to the same rules as state institutions.

Similar to *Faparusi*, *Doe v. Valencia Coll.* (2018) presented an issue with a student's right to continue his education, but this time at a state institution. Plaintiff Jeffrey Koeppel continually harassed and stalked his lab partner via text message and then admitted to the behavior, but he claimed that his misbehaviors did not violate Valencia's code of conduct policy (*Doe v. Valencia Coll.*, 2018). Valencia felt differently and suspended Koeppel for one year for having been found in violation of its conduct policy. In his lawsuit, Koeppel argued that Valencia violated his constitutional (and substantive) due process right to pursue his education. However, in its opinion, the appellate court directly stated that the right to education is a right created by the state, not the Constitution:

> Koeppel contends that he was deprived of substantive due process because he had a constitutionally protected right to continued enrollment at Valencia, and that right was violated when the school acted in an arbitrary and capricious manner during his disciplinary proceedings. But students at a public university do not have a fundamental right to continued enrollment. (*Doe v. Valencia Coll.*, 2018, p. 9)

In other words, Koeppel's claim first should have been against the State of Florida in state court, not the United States, since Florida ultimately decided to enroll him. If he had been unsuccessful in state court, he could have pursued a substantive due process violation in federal court. Regardless, as the appellate court noted (and similar to *Faparusi*), students cannot violate institutional policies with clearly articulated sanctions and then claim violations of substantive due process. It is standard protocol for institutional Title IX and student conduct policies to contain sanctions that may include suspension or expulsion for failure to abide by those policies. Students may not have come to realization unless they violate a conduct policy, but that lack of knowledge likely would not be enough to exempt them from possible suspension or expulsion.

**Procedural Due Process: Conflicting Procedures**

The court opinions reveal that the appellate courts have not always agreed with how IHEs handle procedural due process protections for their students in Title IX cases of sexual misconduct. When examining the possibility of procedural due process, the opinions in this study show that the courts often examine the university's personnel and procedures to determine whether any sort of bias occurred during the investigation and/or hearing processes. The decisions can go either way, but the court opinions show different responses both by IHEs and the courts.

In *Doe v. Miami Univ.*, the appellant sued Miami University of Ohio and several of its employees for Title IX and due process claims. While the district court sided with all defendants, the appellate court found that Doe's procedural due process claims were violated by Susan Vaughn, Miami's ethics and student conduct resolution director. Vaughn served multiple roles at the university, and the appellate court took issue with the fact that Vaughn served as Doe's "investigator, prosecutor, and judge" (*Doe v. Miami Univ.*, 2018, p. 13) and that she controlled

his hearing, at one point even opining that he was a multiple offender, which demonstrated clear bias to the court:

> Vaughn's alleged dominance on the three-person panel raises legitimate concerns, as she was the only one of the three with conflicting roles. Furthermore, John alleges that Vaughn announced during the hearing that "I'll bet you do this [i.e., sexually assault women] all the time." Id. ¶ 66 (Page ID #1988). This statement implies that Vaughn had determined prior to the hearing that John was responsible for the misconduct alleged in this incident and had a propensity for engaging in sexual misconduct. (*Doe v. Miami Univ.*, 2018, p. 13)

As a result of the bias, the appellate court found that the district court erred in dismissing Doe's claim for procedural due process violation by Vaughn (*Doe v. Miami Univ.*, 2018). Doe's procedural due process also was violated because he did not get the evidence or report used in his hearing, which was a violation of Miami policy. Clearly, the appellate court found a significant gap in Miami's response: the administrator's (Vaughn) conflict of interest with respect to her differing roles in the investigation and hearing processes.

Based on the above, one might argue that, unlike IHEs, courts see conflicting roles as a potential due process issue, and that definitely seems the case. A similar potential conflict occurred in *Plummer v. Univ. of Houston*, but with a much different result. In that case, which involved students taking video and photos of a sexual assault, Richard Baker, Houston's Vice-President of the Office of Equal Opportunity Services, served as both the victim advocate and the investigator for the duration of the investigation and hearing. Such a mix in roles seems highly unusual and, for many experts, could seemingly cause trouble with the investigating and hearing processes. Unlike the court in *Doe v. Miami Univ.*, however, the majority of the appellate court

judges found no issue with that apparent conflict. That is not to say that all judges agreed with the overall decision. Judge Edith Jones, the dissenting judge, pointed out how "…the problem of Baker's conflict of interest cannot be overstated" (*Plummer v. Univ. of Houston,* 2017, p. 11) and that he "assumed the roles of prosecutor, jury and judge" (*Plummer v. Univ. of Houston,* 2017, p. 9), using language very similar to *Doe v. Miami Univ*.

While the aforementioned opinions may differ in their perspectives on conflict of interest, they indicate that appellate courts have noticed a concerning trend with administrators holding multiple roles in Title IX and student conduct offices. As has been discussed previously, the practice is not uncommon, but as the two opinions illustrate, conflicting roles can lead to serious procedural due process violations. In the *Miami Univ.* decision, Vaughn's expansive role meant that her decision-making power could go unchecked from the beginning of the investigation until the hearing's decision was rendered. Further, her comment at the hearing suggesting that Doe had a propensity for sexual assault only magnified the already questionable investigation and hearing procedures. Contrasting with the *Miami Univ.* decision, it is noteworthy that the *Univ. of Houston* court saw no issue with Richard Baker serving as both a victim's advocate and an investigator. The job of a victim's advocate is to advocate for those who have experienced sexual misconduct. That role comes with an obvious focus on the victim, which also could lead to viewing the accused in a negative light. The latter part goes against the role of an investigator, who is tasked with taking statements and gathering facts to be presented to the Title IX Coordinator and the hearing board. Therefore, impartiality is key in that role.

In addition to conflicting roles, another procedural due process issue comes in whether IHEs should allow live cross-examination during a hearing. One of the most controversial cases involving cross-examination was *Doe v. Baum*. In its opinion, the appellate court majority set the

tone at the outset with the following statement, hinting to a very complex discussion of procedural due process:

> If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder. (*Doe v. Baum*, 2018, p. 2)

According to the opinion, Doe and Roe went to a frat party and later engaged in sexual intercourse. Sometime later, Roe filed a sexual misconduct complaint against Doe, claiming that their encounter was not consensual. The Title IX investigator gathered evidence and took 23 witness statements, including statements from people at the party but found no convincing evidence of sexual assault and closed the case. Roe appealed the decision, and the hearing board reversed the prior decision after reading the unchanged report that contained no new evidence. The board concluded that her statement was more accurate than his was.

Doe sued for a procedural due process violation because he claimed he had no chance to be heard and stated that he was forced to leave or else be thrown out of school. The district court said the lack of a new hearing would not have made a difference in his decision, but the appellate court did not concur. Rather, the appellate court opined that cross-examination was vital to reconciling the conflicting information and that the school relied solely on Roe's credibility in reversing the decision: "Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives" (*Doe v. Baum*, 2018, p. 5). The appellate court added that demeanor also cannot be observed and that cross-examination could occur with representatives and also referred to the *Cincinnati* (872 F 3d) decision: "If credibility is in dispute and material to the outcome, due process requires

cross-examination" (*Doe v. Baum*, 2018, p. 5). The University felt that Doe's admission of guilt rendered cross-examination moot, but the court stated that Roe had provided different information to the detective earlier in the day, so there was a question as to whether he admitted to anything in the statement.

In the dissenting opinion, Judge Gilman agreed that Doe's procedural due process had been violated but disagreed with the significance of cross-examination. One particular point Judge Gilman inquired about was who would question the witnesses. Some might suggest an attorney, but that would go against the law established in *Flaim v. Med College of Ohio*, forbidding attorneys from actively participating in disciplinary hearings. According to the judge, any options such as having administrator, instructors, or someone close to the accused as a witness might add an unnecessary burden to process.

Live cross-examination might appear more appropriate in a court proceeding and not in a university hearing. However, in the majority opinion, Judge Thapar emphasized his support for live cross-examination in college hearings, referencing two famous films in a footnote:

> Even popular culture recognizes the importance of cross-examination. See *A Few Good Men* (Castle Rock Entertainment 1992) (depicting one of the most notable examples of cross-examination in American cinema); *My Cousin Vinny* (Palo Vista Productions et al. 1992) (demonstrating that cross-examination can both undermine and establish the credibility of witnesses). (*Doe v. Baum*, 2018, p. 5)

While it may not be a standard practice for courts to use popular cinema in support of their arguments, such examples likely resonate more with a wider audience, which is exactly the point of using them.

Not all courts have followed the *Doe v. Baum* decision in calling for live cross-examination. In *Doe v. Colgate Univ. Bd. of Trs.* (2019), a decision that came after *Doe v. Baum*, the court supported a different standard for cross-examination in Title IX hearings. In that case, John Doe was able to both ask questions in person to the investigator and submit questions in advance (through the dean) that would be asked to the students accusing him of misconduct (*Doe v. Colgate Univ. Bd. of Trs.*, 2019). While there was no mention of procedural due process violations in that decision, the very fact that the court had no issue with Colgate's hearing procedures— especially the submission of questions— was surprising when contrasted with the *Doe v. Baum* court's insistence on live cross-examination. Regardless, the courts definitively view cross-examination as an important part of the hearing process, even if not all courts are consistent with how they believe IHEs should conduct cross-examination during their hearings.

The *Doe v. Baum* court also highlights the conflict that may exist within a single court, a fact that is magnified in *Quade v. Ariz. Bd. of Regents* (2017). In that case, the student Quade sued Arizona State University (ASU) and its Board for substantive due process violations. Because Quade did not seek redress in the state court, the federal court of appeals stated that he could not pursue relief in federal court. However, the dissenting judge, Judge Leavy, felt differently, opining that Quade had given up because of not being able to present evidence or testimony from the detective who investigated the case. According to the judge, the case was closed because ASU Police Detective Matthew Parker felt Quade would not be found guilty/responsible. However, ASU still penalized him. The district court applied res judicata ("matter judged" and thus not eligible for retrial) unfairly because it did not determine whether fairness applied to Arizona's hearing process. Ultimately, the judge felt that Quade's substantive due process was indeed violated: "Any student suspended from a state university following a

potentially specious charge of sexual misconduct should be afforded sufficient due process protections in this important subject matter of campus sexual assault" (*Quade v. Ariz. Bd. of Regents*, 2017, p. 5). Judge Levy found ASU's hearing process problematic and felt that Quade was denied a fair hearing simply because of a procedural formality.

Cross-examination, whether delivered live or via the submitting of questions, is closely associated with a courtroom trial. As mentioned in Chapter 2, scholars have questioned the incorporation of courtroom procedures in higher education Title IX and conduct hearings and whether cross-examination belongs in a university hearing at all (Koss et al., 2014; Rubenfeld, 2016). The aforementioned opinions demonstrate that even the appellate courts are conflicted with how cross-examination should be treated outside of a courtroom. The differing opinions regarding cross-examination also illuminate the complex nature of procedural due process. Unlike substantive due process, procedural due process seems a much more prominent theme in the appellate court opinions, and one that shows how courts and higher education institutions are not fully aligned on appropriate responses to Title IX student sexual misconduct incidents. The fact that the appellate court judges themselves have different perspectives on the same topic only heightens procedural process as a significant issue in Title IX policy.

In sum, the opinions in this study revealed that appellate courts found that IHEs did not always exercise proper procedures and response protocol in ensuring procedural due process protections for their students. The courts noted the danger of conflict of interest, manifested in an individual administrator holding conflicting roles. In the eyes of the courts, a Title IX coordinator could not also be an investigator due to the requirement of investigator impartiality. The courts also did not feel that some institutions ensured equal protections for both the complainant and respondent, such as was the case with cross-examination. While some

alignment did exist between the courts and IHEs, the lack of alignment in several opinions suggests some conflict between the two entities still exists.

**An Introduction to Immunity**

In addition to due process and deliberate indifference, the opinions in this study show that courts have to consider whether IHEs and their administrators are immune from lawsuit but that courts do not always align with IHEs on that topic. The presence of the term *immunity* in 15 out of 33 court opinions in this study shows that courts and IHEs, at the very least, have had meaningful conversation about the topic. In all Title IX cases involving colleges and universities, plaintiffs pursue claims against two groups: IHEs and the people who work for them, both of whom are represented by the same counsel. As was discussed in Chapter 2, organizational social action theory treats organizations as singular entities while also recognizing that the employees within the organization play a key role in driving the organizational goals. Generally speaking, universities almost always are defendants in Title IX cases for the simple reason that they are tasked, as a single entity, with ensuring that students comply with institutional Title IX policy. However, in many Title IX lawsuits, the schools are not the only parties being sued. Oftentimes, plaintiffs also file claims against individual administrators: presidents, vice-presidents, Title IX coordinators and investigators, and so forth. Part of the reason for that is strategic; a plaintiff may be unsuccessful in pursuing a Title IX claim against an institution but may have better success in suing an individual who was a part of the investigation and/or hearing processes and who made an incorrect decision that adversely affected the plaintiff.

**Qualified Immunity**

It should be noted that not every university or administrator is liable when a student experiences an alleged Title IX violation. According to the opinions in this study, courts have

granted what is known as qualified immunity to schools and to administrators, essentially dismissing them from the larger lawsuit. Garner and Black (2019c) defines qualified immunity as "immunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights" (para. 1). In other words, in order to be immune from lawsuits, an administrator, when carrying out an action, must not have realized that said action would have harmed the plaintiff. The opinions below illustrate varying degrees of alignment between appellate courts and IHEs: While courts are inclined to grant qualified immunity under the right circumstances, schools and administrators will not always receive it.

Sometimes, the qualified immunity determination is rather cut-and-dry, even though the facts themselves are intricate. Such was the case in *Kollaritsch v. Michigan State Univ. Bd. of Trs.*, a case first heard and decided by the Western Michigan district court in 2017. In that case, plaintiff Kollaritsch and two other students were sexually assaulted by several MSU students and filed a Title IX lawsuit against MSU, alleging deliberate indifference. MSU Vice President of Student Affairs Denise Maybank appealed the district court's denial of her petition to seek qualified immunity, and the appellate court reversed the district court, opining that she was at least permitted to ask for review and to file her petition (*Kollaritsch v. Michigan State Univ. Bd. of Trs.,* 2018). While not a part of this study, the Western Michigan appellate court ultimately decided in 2019 that Maybank did meet the requirements for qualified immunity and ordered the remainder of Kollaritsch's case dismissed (Banta, 2019).

The Western Michigan appellate court had to answer the question whether Maybank should be allowed to seek qualified immunity, to which the appellate court replied in the affirmative. Once the appellate court determined the applicability of qualified immunity, it was

up to the district court to determine whether Maybank met the standard for qualified immunity. Maybank filed her petition with the district court, and the district court simply examined Maybank's actions as vice president of student affairs and whether a reasonable person would foresee her actions as harmful to Kollaritsch. While the appellate court demonstrated alignment with MSU and Maybank, it clearly conflicted with the opinion of the district court, which previously had denied Maybank's petition. Even more interesting, the district court—which previously had ruled against Maybank seeking to petition for qualified immunity—now found that she did meet the requirements, which indicates that the district court may have felt pressured by the appellate court to rule in Maybank's favor.

In *Collick v. William Paterson Univ.*, Jane Doe accused Collick and Williams of sexual assault. Though the grand jury declined to indict the two students, the university nonetheless expelled the students. Consequently, Collick and Williams sued William Paterson University (WPU) for Title IX violations. Relying on the Fourth Amendment, WPU claimed qualified immunity for itself as well as for Sergeant Ellen DeSimone, a member of the WPU Police Department who had applied for arrest warrants. The district court failed to grant qualified immunity to DeSimone, and the appellate court affirmed the district court, noting that "DeSimone's entitlement to qualified immunity depends on the objective reasonableness of her actions at the time she applied for the arrest warrants" (*Collick v. William Paterson Univ.,* 2017, p. 3). The appellate court determined that qualified immunity hinged on DeSimone's knowledge when she applied for the warrants, which went to the "reasonableness of her actions," and that more information was needed to determine whether DeSimone should be immune from litigation. In addition, the court stated that WPU could not claim qualified immunity by simply

pointing out the absence of facts in the plaintiff's complaint and that it had to put forth a legitimate argument as to why it was entitled to qualified immunity.

A court applied the reasonability test; in this case, and unlike prior cases, both DeSimone and WPU failed the test in terms of determining whether qualified immunity applied. In ruling against WPU, the appellate court made an important point: Just because qualified immunity exists to protect state institutions, it does not mean that an institution automatically receives qualified immunity. WPU likely relied on qualified immunity as an automatic protection rather than something which needed to be argued, as evident by its reliance on the lack of facts in the plaintiff's complaint. Like other constitutional protections, qualified immunity must be sought before being granted. As for DeSimone, the appellate court focused on DeSimone's prior knowledge of the incident's facts and whether that knowledge tainted her ability to be objective when applying for arrest warrants. In this case, the court felt that DeSimone may have had too much prior knowledge (creating subjectivity on her part) that led her to seek the arrest warrants. If DeSimone had sought the warrants at an earlier point in time before she knew the facts of the case, the court likely would have ruled in her favor. The information provided to the court did not indicate at what point DeSimone gained her knowledge about the case, which illustrates the significance of maintaining objectivity when responding to Title IX incidents.

The same issue with a different result arose in *Jones v. Pi Kappa Alpha Int'l Fraternity, Inc.*, where defendant Ramapo College sought dismissal in the district court on the grounds of both qualified immunity and sovereign immunity. Ramapo opined that as a state institution, both the college and its administrators should be treated as an "arm of the state" (*Jones v. Pi Kappa Alpha Int'l Fraternity, Inc.*, 2019, p. 7) and that the individual administrators therefore were exempt under qualified immunity. The district court felt otherwise and refused dismissal, but the

appellate court reversed, finding that Ramapo and its officers enjoyed the same protections that Montclair State University successfully argued in a similar case within the same circuit (*Maliandi v. Montclair State Univ.*, 2016). In addition, the appellate court found that because the plaintiff did not argue Ramapo's administrators put forth a "state-created danger" (meaning the actor caused the plaintiff significant harm that could have been foreseen/prevented), the administrators were entitled to qualified immunity.

As the opinions in this study illustrate, appellate courts do not always agree with IHEs in determining qualified immunity. Such a determination can be difficult, especially since the applicability can depend on the actions of the district court. In *Doe v. Univ. of Ky*., the district court took the unusual (but legally allowable) step of abstaining from the case since UK's hearing process resembled a state court proceeding: "A state actor, the public University, is a party to the proceeding and initiated the action. Additionally, the case against Doe involved a filed complaint, an investigation, notice of the charge, and the opportunity to introduce witnesses and evidence" (*Doe v. Univ. of Ky*., 2017, p. 3). In other words, the district court, using a test from a prior case, decided that UK's third conduct hearing rendered a potential court proceeding moot.

In connection with that, UK sought to apply qualified immunity to Denise Simpson, Director of the Office of Student Conduct, essentially arguing that it would be a waste of the court's time to determine her immunity status since UK would handle the hearing internally. However, the appellate court disagreed, stating that the district court could focus on the qualified immunity claim immediately and with very little time wasted:

> The disciplinary proceedings will continue at the University level, and as Simpson is no longer involved, she will not be harmed by waiting for the proceedings to be concluded at

> the state level. Once the hearings are complete, Doe may continue with his federal claims, if he chooses, and the district court can evaluate qualified immunity early in that point of the litigation. As a qualified immunity determination involves analyzing important and difficult issues in the case, finding that it applies after choosing to abstain defeats the purpose of allowing the state proceedings to go forward without interference from the federal courts. (*Doe v. Univ. of Ky*., 2017, p. 5)

Similar to the *Collick v. William Paterson Univ.* (2017) court, this appellate court signified that qualified immunity must be determined after a review of the facts and arguments presented by the institution. Qualified immunity, as noted previously, is a constitutional protection, but not an automatic one.

In *Feminist Majority Found. v. Hurley*, President Richard Hurley—who also was sued as an individual— sought qualified immunity. While the appellate court found against UMW, it felt differently about Hurley's involvement individually:

> We are thus constrained to conclude that, at the time of President Hurley's challenged conduct, the equal protection right to be free from a university administrator's deliberate indifference to student-on-student sexual harassment was not clearly established by either controlling authority or by a robust consensus of persuasive authority. Consequently, Hurley is entitled to qualified immunity, and the dismissal of the equal protection claim by the district court must be affirmed. (*Feminist Majority Found. v. Hurley*, 2018, p. 21)

In other words, because Hurley did not have notice that his conduct was questionable, the equal protection claim against him could not go forward. In ruling in favor of Hurley, the appellate court found sufficient evidence presented that as an individual, Hurley did not have sufficient knowledge that his behavior was in violation of anyone's rights.

Similar to due process, qualified immunity is a constitutional protection afforded to all public higher education institutions and their employees. However, also like due process, those institutions and employees must show why they should be exempt from litigation. The above opinions illustrate that higher education institutions have not always been successful in doing so, mainly because they assume that qualified immunity is a right and not a privilege.

**Sovereign Immunity**

In addition to qualified immunity, there also is the concept of sovereign immunity, which "prevents the government or its political subdivisions, departments, and agencies from being sued without its consent" (Garner & Black, 2019d). In general, the opinions in this study revealed that, similar to qualified immunity, the courts do not always align with how IHEs apply sovereign immunity in their Title IX cases. Sovereign immunity, while a somewhat straightforward legal doctrine and a constitutional protection, often is determined on a case-by-case basis, which requires the court to apply specific rationale and principles to the issue(s) at hand. As will be shown in the discussion, the circumstances of a particular case usually determined whether the court and the institution shared the same perspective.

As shown in the decisions, appellate courts sometimes have straightforward rationale for determining the application of sovereign immunity, even if that rationale conflicts with the district court. In *Doe v. Regents of the Univ. of Cal.* (2018), the district court had ruled against the motion for summary judgment filed by the University of California (Cal). The plaintiff John Doe had been accused and found responsible for sexual assault and was suspended. Doe filed suit against Cal, alleging that his procedural due process rights were violated via a perceived unfair hearing process. He further argued that Cal waived its sovereign immunity claim by not making a formal declaration, something with which the district court agreed. The appellate court,

however, noted that Doe's claim was more suitable for state court and that the Eleventh Amendment disallowed him from pursuing his claim in federal court without going through the proper procedures (*Doe v. Regents of the Univ. of Cal.,* 2018).

While that seems like a logical decision, the question arose: If the state court requirement is so straightforward, then why did the district court not share the same viewpoint of the appellate court? The appellate court pointed to specific wording in the district court's decision with which it (the appellate court) did not agree:

> Under the Ex parte *Young* exception to that Eleventh Amendment bar, a party may seek prospective injunctive relief against an individual state officer in her official capacity. […] However, the *Young* exception does not apply when a suit seeks relief under state law, even if the plaintiff names an individual state official rather than a state instrumentality as the defendant. […]Those Eleventh Amendment principles require dismissal of Doe's § 1094.5 writ petition, which is a state law claim. The district court erred when it determined that Doe's § 1094.5 petition was not a state law claim, but rather a "state-law procedural mechanism" and "vehicle" for Doe's federal claims. (*Doe v. Regents of the Univ. of Cal.,* 2018, p. 4)

In other words, the appellate court was in agreement with Cal that Doe did not follow proper procedures and that because of that, his claim could not proceed. As discussed with qualified immunity, if Doe was successful with his claim, Cal would have had to argue that sovereign immunity should apply and that the institution should not be subject to litigation in this case. If Doe had followed proper procedures, it would have been interesting to see whether Cal argued successfully that sovereign immunity applied or whether it relied on the constitutional protection without formally asking for it.

A unique situation occurred in *Fryberger v. Univ. of Arkansas*, a case stemming from the sexual assault of Elizabeth Fryberger while she was student at Arkansas. Fryberger took the university to court, suing for compensatory damages under Title IX for gender discrimination and a hostile environment connected to her report of being sexually assaulted. Being a state actor, Arkansas sought relief through sovereign immunity, arguing that it never consented to being sued and thus should be dismissed as the defendant. Normally, the aforementioned would be an open-and-shut case, since it stands to reason that a university would not knowingly consent to litigation. The district court disagreed, citing the relevance of the Remedies Equalization Amendment of 1986 (REA), which bars state immunity for Title IX violations and allows for the recovery of damages, and denied the University's motion to dismiss the damages claim (*Fryberger v. Univ. of Arkansas*, 2018). Arkansas sought relief in appellate court, but the appellate court affirmed the lower court's decision, citing prior case law that laid out the waiving of sovereign immunity.

The court's reasoning for ruling against Arkansas was that Fryberger claimed that because Arkansas received federal funds, it waived sovereign immunity as a state actor and thus could be sued for damages. While the University countered that claims for damages were not intended under the REA, the appellate court found that "remedies at law include damages" (*Fryberger v. Univ. of Arkansas*, 2018, p. 3) and that under the REA, Title IX violations allowed for such remedies. In the court's opinion, and contrary to what Arkansas claimed, neither Congress nor the REA showed any ambiguity when it came to a plaintiff seeking compensatory damages under Title IX, regardless of sovereign immunity: "Congress 'specifically considered state sovereign immunity,' including immunity to Title IX suits for damages, and 'intentionally legislated on the matter,' conditioning funds on a waiver of that immunity" (*Fryberger v. Univ. of*

*Arkansas*, 2018, p. 4). In short, the appellate court rationalized that under the REA, Arkansas's receipt of federal funds automatically negated its claim for sovereign immunity concerning Title IX damages litigation. Unlike the Cal court, this court conflicted with Arkansas's interpretation of sovereign immunity.

In contrast, a very different sovereign immunity outcome occurred in *Rymer v. LeMaster,* which was a case involving a student who accused multiple defendants, including the University of Tennessee (UT), of retaliating against his concerns about the UT curriculum and attempting to make him a Christian convert, an experience that he said led to multiple mental health issues. UT opined that it functioned as part of Tennessee and thus should be excused under the doctrine of sovereign immunity. Rymer, however, claimed that UT had private fundraising dealings that led to its finances that became independent of the Tennessee state treasury and eliminated UT's state connection and also its reliance on sovereign immunity. The appellate court came to a different interpretation and noted prior case law "affirming the district court's conclusion that UT is an arm of the State of Tennessee and entitled to sovereign immunity" (*Rymer v. LeMaster*, 2019, p. 3). The student plaintiff continued to argue against sovereign immunity by claiming the project assigned to him was retaliatory in nature and beyond the authority roles of the two defendants LeMaster and Stennett, thus qualifying as an exception to sovereign immunity. The appellate court was not persuaded by this argument due to the lack of evidence and supporting documentation. Rymer also claimed a racketeering violation by LeMaster and Stennett, and here is what the court had to say about that:

> Rymer organized his alleged concrete instances of racketeering activity into a table attached to his complaint, but the table exclusively contains LeMaster's instructions to Rymer on how to research the milling-machine project, Rymer's collection of

> information from outside parties regarding the project, LeMaster's awarding Rymer a grade of "D+," and Rymer's mailing his own grade transcript to a prospective employer. These allegations are not sufficient to demonstrate "a pattern of racketeering activity" and do not even mention any actions taken by anyone other than LeMaster and Rymer himself. (*Rymer v. LeMaster*, 2019, p. 4)

Needless to say, this was not a very difficult case for the appellate court upon which to rule due to the facts and the lack of sufficient legal recourse. In addition, the student plaintiff also served as his own attorney, which the court alluded to as a reason why he might have lost.

Like qualified immunity, sovereign immunity must be argued by the higher education institution; the court does not automatically apply it just because it exists. In addition, akin to qualified immunity, exceptions exist that may render sovereign immunity null and void. For example, the *Fryberger* appellate court noted that while Arkansas normally could seek sovereign immunity, in a damages lawsuit, its receipt of federal funds expressed a waiver of the immunity. As mentioned in the *UT* decision, retaliation could have been a viable exception as well, but the plaintiff in that case did not present enough evidence to the court that such retaliation existed.

The court opinions here demonstrate a lack of total alignment between the appellate courts and IHEs with respect to sovereign immunity. Appellate courts, perhaps even more so than district courts, rely on effective argument, sufficient evidence, and proper procedures by all parties in determining whether a university should or should not be entitled to immunity. As noted previously, while appellate courts recognize that IHEs should be entitled to sovereign immunity to protect themselves from unnecessary litigation, IHEs must argue why the immunity should apply. Further, and like other constitutional protections, exceptions to immunity may apply that might nullify the application of sovereign immunity.

**Perceived Conflict, Felt Conflict, and Conflict Aftermath between IHEs and Courts**

As discussed in the previous sections, the appellate courts are not completely aligned with higher education institutions with regard to due process or qualified or sovereign immunity, or even with deliberate indifference or gender bias for that matter. Conflicts exist between the two organizations (higher education and the courts) that provide insight as to why Title IX policy has experienced some of its most recent challenges.

One of the main reasons for the courts' conflict with IHEs is because both due process and immunity are constitutional protections guaranteed by specific constitutional amendments. A reasonable person might conclude that appellate court judges, by nature of their profession, have a greater understanding of the Constitution than do Title IX administrators working in higher education, and that likely would be the case. Further, the judges may not be cognizant of the lack of constitutional knowledge when ruling for or against an institution or an administrator. For example, both the *Fryberger v. Univ. of Arkansas* and the *Collick v. William Paterson Univ.* opinions demonstrate that higher education institutions have a basic understanding of qualified and sovereign immunity. However, Pondy's (1967) discussion of perceived conflict seems applicable here; IHEs may perceive no conflict with the courts, but the legal opinions themselves show that conflict indeed exists, as evidenced by that fact that higher education institutions have lost immunity arguments that they expected to win by default.

When it comes to felt conflict (Pondy, 1967), the court opinions show how judges are adept at conveying pathos, or emotional appeal, to point to conflict with higher education institutions. As discussed previously in *Doe v. Baum*, Judge Thapar cited two popular movies in his support for live cross-examination. While he mentioned those movies seemingly to make cross-examination more relatable to a non-legal audience, he also used them as an emotional

appeal to illustrate the conflict that exists between higher education institutions and the courts regarding cross-examination. The court in *Doe v. Miami Univ.* stated how Susan Vaughn's role was akin to "investigator, prosecutor, and judge" (p. 13); a similar comment came in the dissenting opinion in *Plummer v. Univ. of Houston*, labeling Richard Baker as the accused's "prosecutor, jury and judge" (p. 9). Both of those statements are similar to the "judge, jury, and executioner" phrase used in popular culture, and it seems reasonable that the judges were aware of the fact and purposely chose their words, which illustrates the nature of the conflict with higher education institutions. While higher education institutions may utilize one or two administrators to respond to a Title IX incident, the courts rely on attorneys, witnesses, juries, and judges to ensure equity and fairness.

Conflict aftermath (Pondy, 1967) is perhaps the most prominent of the conflict stages displayed in the opinions in this study, though the aftermath itself may not necessarily appear in these opinions. In appellate court decisions, and as shown in Appendix A, appellate judges either affirm the district court's opinion or reverse part or all of the opinion and remand (return) the case to the district court for either additional proceedings or for dismissal. While both the appellant and appellee sometimes both prevail (such as if a judge affirms dismissal of certain charges but reversing others), often it is one or the other who comes out victorious; that outcome likely brings with it some sort of conflict aftermath. For example, in *Collick v. William Paterson Univ.,* WPU's failure to attain qualified immunity meant that it had to return to court and face further litigation. In *Kollaritsch v. Michigan State Univ. Bd.*, the appellate court reversed the district court's denial of Denise Maybank's petition for qualified immunity. As a result, Maybank successfully petitioned for qualified immunity, which ultimately led to the rest of the case being dismissed. The most concerning part of conflict aftermath is that in the conflict between higher

education institutions and the courts, some student complainants and student respondents involved in Title IX student sexual assault incidents may be the ultimate "victims" of those conflicts.

## Summary

In sum, and as will be discussed more in Chapter 5, the appellate court opinions reveal several prominent themes and trends regarding variations in how IHEs respond to Title IX incidents. In addition, the opinions in this study show that the judicial system does agree with IHEs regarding certain Title IX response criteria but that incongruity exists with other criteria. Additionally, not all judges within a single court share the same opinion about whether an IHE has followed proper Title IX response procedures or whether the IHE should be immune from Title IX litigation in light of the IHE's response to a Title IX incident. Chapter 5 not only will discuss the above issues in more detail but also will examine the importance of higher education institutions ensuring for better constitutional protections and sounder response protocols, all to safeguard their students while also protecting themselves.

# CHAPTER 5: CONCLUSION

By conducting document analysis, the purpose of this study was to identify what themes emerge from appellate court decisions regarding higher education institutions' handling of Title IX incidents of sexual misconduct and whether IHEs' handling of those incidents aligns with the appellate courts. This chapter looks at the broader implications of how the schools have handled Title IX matters and, more important, how institutions can use this information to improve their policies. I will discuss the major themes and their implications more broadly and also will reflect on a few themes that may prove important to institutions moving forward while not dominant in the court opinions. This discussion is followed by recommendations for practice and research and concluding thoughts on this study. The following table displays my research questions, themes/topics, and the example court opinions referenced in this chapter.

Table 3

*Research Questions, Themes/Topics, and Example Court Opinions*

| **Research question** | **Themes/Topics** | **Example court opinions** |
|---|---|---|
| What common themes and trends emerge from appellate court opinions that illustrate similarities and differences among institutes of higher education in institutional responses to Title IX incidents of student sexual misconduct? | Deliberate indifference | *Ross v. Univ. of Tulsa*<br>*Plummer v. Univ. of Houston* |
| | Gender bias | *Doe v. Baum*<br>*Doe v. Miami Univ* |
| | Substantive due process<br>Procedural due process | *Faparusi v. Case W. Reserve Univ.*<br>*Doe v. Valencia College*<br>*Doe v. Miami Univ.*<br>*Plummer v. Univ. of Houston*<br>*Quade v. Ariz. Bd. of Regents* |
| | Qualified immunity<br>Sovereign immunity | *Collick v. William Paterson Univ*<br>*Doe v. Univ. of Ky*<br>*Fryberger v. Univ. of Arkansas* |

Overall, and as will be discussed more in detail in the coming sections, the research demonstrated a fair amount of consistency with how institutions respond to Title IX incidents. Moreover, the legal opinions indicate that rather than applying a universal approach to decisions, the appellate courts consider the facts of each situation when deciding how to rule, often using reasonability (e.g., what a reasonable person might expect) as a measure. The opinions in this study also show a degree of misalignment between how the appellate courts and higher education institutions respond to Title IX student sexual misconduct incidents. The courts emphasize the importance of following established laws, especially constitutional laws; crafting strong institutional policies and procedures; and employing sufficient personnel who have clearly defined roles. Institutions are held to high standards of administering to their students by the appellate courts, so the institutions that fail to do that likely will find themselves defending their Title IX response procedures.

## The Importance of Constitutional Protections

As discussed in Chapter 4, higher education institutions have had to deal with constitutional issues involving different types of due process and immunity. While the Constitution affords all institutions those fundamental constitutional protections, the institutions must ensure full compliance with the criteria for each protection. The court opinions show that, for reasons associated with their respective cases, not every IHE is aligned with the courts with respect to due process or immunity and that as a whole, higher education likely will need to commit more attention toward firming up its compliance with both areas.

### Ensuring Appropriate Due Process

Due process issues continue, and likely will continue, to be an area of significance and concern for Title IX administrators. Despite the presence of federal policy, institutional

administrators at individual schools clearly have different interpretations of due process, resulting in conflicting approaches as to how institutions handle their Title IX investigations and render decisions. The courts ultimately decide whether a due process issue exists and whether a university violated a plaintiff student's substantive and/or procedural due process. However, as demonstrated in this study, the courts' opinions are not uniform and, in some cases, also conflict with an institution's interpretation of due process.

Regarding substantive due process, the overarching questions are twofold. First, do the courts consider attending college a substantive right under the Fifth Amendment? If so, to what degree are colleges prepared to defend their decisions to suspend and expel accused students? Court opinions such as *Faparusi v. Case W. Reserve Univ* and *Doe v. Valencia College* clearly show that courts do not view education as a fundamental right and that, as per Title IX federal policy, institutions have every right to suspend or expel students for failure to abide by institutional codes of conduct. If, however, an accused student demonstrates that the investigation and hearing processes led to an erroneous outcome and that the student should not have been sanctioned, then courts likely will order institutions to reverse the sanctions and reinstate the students to their programs. Dayton (2015) noted that in most cases, student or faculty dismissal of any kind must come with sufficient notice, documentation, and overall support for the dismissal. It also is important to note that the question of whether it applies or not cannot be easily answered because substantive due process itself is a murky area (Chemerinsky, 1998).

Further, students first must seek remediation in state court before proceeding to the federal level. Also, if an institution is private and/or religious, then the institution likely is not subject to substantive due process since it is not viewed as part of the state. This directly

connects to the religious exemption issue discussed in Chapter 2. However, this raises an important question: Are private (and especially religious) institutions still able to avoid the same scrutiny put on public universities? In addition to Constitutional protections, all institutions are required to protect their students' quality of life; part of that comes with having strong institutional conduct policies. However, if a university violates substantive due process and then claims exemption due to its status, that suggests a different standard by which it should be judged, which could be interpreted as conflict with equity and fairness for all students as part of the federal Title IX policy. For example, School A (a religious institution) and School B (a public university) both expel students who were found to have committed offenses, and both schools later are sued by the students for Title IX violations. However, School A can claim constitutional religious exemption (including exemption from substantive due process) under Title IX and thus experience less pressure in complying with federal policy. That, in turn, could cause greater misalignment between IHEs and the courts regarding substantive due process violations.

As substantive due process seems complex, procedural due process is even more complicated for higher education institutions. For universities, the root issue with procedural due process comes in the process itself: namely, the procedures an institution uses to handle a Title IX complaint or incident from the moment the school learns about it until the final decision is rendered by the appropriate decisionmaker (hearing official or hearing board). The court opinions show that, for the most part, colleges and universities have procedures in place, which should guide them throughout the investigation and hearing processes. That said, the courts have found demonstrable conflicts of interests (and thus organizational conflict) in those processes, as evinced by *Doe v. Miami Univ*. and *Plummer v. Univ. of Houston*. The opinions in this study

indicate that higher education institutions would be best served employing several administrators to respond to Title IX incidents. Both complainant and respondent should have simultaneous notice of hearings, consistent deadlines, and equal access to the investigative reports and materials; that seems a logical part of procedural due process. However, as *Quade v. Ariz. Bd. of Regents* illustrates, not all institutions have preserved that equity. In short, though higher education institutions may have the knowledge and resources to handle procedural due process, they do not always utilize that knowledge and those resources. Nevertheless, as Ellman-Golan (2017) stated, proper procedural due process is vital because investigations "must become fair: they must not give off the appearance of bias or suggest that the school has violated the accused student's rights to a fair proceeding" (p. 179).

**Maintaining Proper Immunity**

Both qualified and sovereign immunity are constitutional protections that allow higher education institutions and their officers to avoid unnecessary or unfair litigation. While the protections operate slightly differently, they both afford federal protections to institutions as part of their roles as "arms of the state" and providers of key government-sponsored services (in this case, education) to students. Still, as Hunter (2018) stated, while arguing against immunity may prove difficult, "courts should recognize that there is imminent harm involved in the particular instance of rape culture on campus because of its unique position in society today. Immunity should not shield…administrators when students are endangered by their actions" (p. 305).

The appellate court opinions indicate a number of students' challenges to institutional immunity, both qualified and sovereign. More notable is that in more than one instance, said immunity was denied, even though the Constitution technically allows for the immunity to apply to the institution. As articulated in *Collick v. William Paterson Univ* and *Doe v. Univ. of Ky*, one

of the most basic mistakes made by institutions, and as articulated in the opinions in this study, is the lack of argument for why qualified or sovereign immunity should indeed apply. The courts have noted that while the immunity may exist as a constitutional proviso, it is up to the institution to assert that immunity should be granted. Additionally, an institution may waive immunity voluntarily or involuntarily, such as was the case in *Fryberger v. Univ. of Arkansas,* a suit for damages under Title IX. Exceptions exist that may lead courts to deny immunity when institutional officers should have foreseen that their actions in Title IX response would have violated some other law or guaranteed protection. The opinions in this study suggest that higher education institutions view immunity as a right while the courts view it as a privilege. Considering that the courts have the ultimate say in constitutional arguments, higher education institutions would be best served to have arguments prepared on why immunity should apply in any case involving Title IX.

**Avoiding Deliberate Indifference and Gender Bias**

In addition to due process, deliberate indifference also has revealed procedural conflicts both within and among higher education institutions, especially with regard to their response procedures. As organizational agents of change, higher education institutions want to ensure they are protecting their students while also protecting institutional interests. However, while the ED may have intended to put forth a clear set of response procedures for all institutions to follow, the court opinions demonstrate a high degree of organizational conflict. For example, in order for an institution to take action on an incident, it needs actual knowledge that an incident has occurred. While one would expect actual knowledge to be a given, the court opinions illustrate an inconsistency with gaining the knowledge that an incident has occurred as well as who gains that knowledge.

An institution needs to have the appropriate persons to intake the initial incident report and begin the formal investigation process. For example, one might believe that campus security officers, usually those who receive the first notification of student misconduct, would be appropriate persons when it came to reporting and investigating Title IX violations. However, it was seen in *Ross v. Univ. of Tulsa* that the courts did not view such officers as appropriate persons. That same court stated that even if the officers had been appropriate persons, vicarious liability was not appropriate, as their failure to act would not have meant the university failed to act. That same court noted that because the security officers were not designated as appropriate persons in the university policy, they could not have known they were appropriate persons.

In addition, institutions need to have clearly articulated policies and procedures that assign specific, non-conflicting roles to all involved in the investigation and hearing processes. As discussed in Chapter 2, university officials with conflicting roles in Title IX administration may affect how the courts interpret an institution's response to the incident. Those officials also must have the proper training on how to do their role; for example, hearing officers should know what to expect in a hearing. Further, everyone involved in the investigation and hearing must follow the timelines set forth in the Title IX policy, ensuring equity and fairness for both the complainant and the respondent, so as not to be accused of bias or inaction. As illustrated in *Doe v. Baum* and *Doe v. Miami Univ.*, colleges and universities have struggled with avoiding gender bias. In addition, Curcio (2017) noted that while deliberate indifference may be difficult to prove, some parties have sought to use a closely related negligence claim to show that an institution knew of a risk but failed to act upon it, a practice that should "motivate[e] schools to engage in meaningful awareness and risk reduction education" (p. 54) to guard against both deliberate indifference and negligence.

The above discussion points to a high degree of intra-organizational perceived conflict, where institutional actors within a university are unaware that their actions conflict with what actually should be occurring. As described in *Plummer v. Univ. of Houston*, a victim advocate should not be involved in any part of the Title IX investigation itself. Likewise, hearing board officers should recuse themselves if they have had any prior interactions— no matter how innocuous— with the complainant or the respondent. Such situations clearly could lead to conflicts of interest and a flawed investigation or hearing. However, as witnessed in opinions such as *Doe v. Miami Univ*, institutional dysfunction and lack of cohesion have led to inconsistent policies and procedures and significant issues with personnel.

## Practical Improvements for Institutions

In order to increase Title IX response consistency and to improve the alignment between IHEs and the courts, what follows are several suggestions for strengthening institutional practices regarding Title IX policy. Clearly, many institutions had issues enforcing Title IX mandates even before the ED rescinded the Obama-era Title IX guidance. For example, in 2013, University of Connecticut (UConn) students sued the school for what they said were unlawful responses to their individual Title IX complaints (New, 2014). While UConn eventually settled with each student in 2014 and denied all guilt, the situation there became representative of the struggles that higher education has faced over the last few years.

### Make Enhancements in Personnel and Operations

Title IX cases often involve stakeholders including students and their peers, faculty members, Title IX investigators and coordinators, student affairs professionals, school administrators, advisors, coaches, mentors, fraternities, third-party individuals, and so forth. In short, institutions have so many potential parties who may not understand the true nature of Title

IX, which leads to the intra-organizational conundrums that many schools have faced. As Dudley (2016) noted, Title IX personnel need to understand the proper procedures for responding to incidents of student sexual misconduct, especially when students experience sexual trauma: "Without understanding the trauma issues inherent in a campus sexual assault, Title IX investigations can produce inaccurate or inconsistent victim statements" (p. 118). The challenge for institutions becomes clear: how to ensure that all institutional members not only learn about Title IX but also understand their individual and collective responsibilities. For example, Title IX investigators must collect all information about an incident while remaining impartial as to the accused's innocence or guilt. However, as seen in the Miami University in Ohio case, a biased investigation certainly will lead to legal troubles for a university (*Doe v. Miami Univ.*, 2018).

While a single solution may prove impossible, higher education can take the lead in initiating a multi-tiered approach to effective Title IX management, reducing intra- and inter-organizational conflict. Some of these proposed solutions may seem too traditional, especially since today's higher education is focused on innovation, but these ideas also will help build a much-needed Title IX knowledge base for the higher education community.

First, higher education institutions should work much more closely with local law enforcement, government agencies, and judges to ensure consistency with Title IX knowledge and practices, especially when new legislation, policy, or even court opinion may require a new approach. Melnick (2018) noted that while "schools are eager to demonstrate that they are serious about addressing sexual misconduct, OCR's investigatory strategy has often created an adversarial relationship between its staff and school officials" (Chapter 11, Section 6, para. 7), which in his view has contributed to the fragmentation and overall lack of coordination among the groups with interests in Title IX policies and procedures.

More opportunities for collaboration likely would reduce the amount of conflict. For example, in September of 2019, more than 300 higher education professionals attended a conference in New York City entitled, "Better People, Better Leaders, Better Nation: A Regional Discussion on Sexual Assault & Sexual Harassment at America's Colleges, Universities and Service Academies." The conference was co-presented by the State University of New York (SUNY) and the United States Department of the Navy and consisted of several keynote speakers along with small group breakout sessions on different Title IX topics: strategies for proper data collection and distribution, approaches to prevention education, development of common practices and language, and so forth (SUNY Events). While it might be up to the institutions to seek such partnerships, doing so may foster across-the-board organizational harmony and mitigate organizational conflict.

In addition, institutions may wish to employ more experienced personnel dedicated to Title IX matters. As discussed in this study, colleges and universities often have employed administrators with different responsibilities, one of those responsibilities being to administrate over Title IX incidents. In many cases, it stems from different levels of budgetary issues. Keppler (2010) stated that for most student affairs departments, under which Title IX offices usually fall, budget cuts have become a regular occurrence, forcing administrators to take on different and potentially conflicting roles.

In the wake of high-profile Title IX court cases such as Michigan State, universities have begun to look for more Title IX professionals. According to data (contained in Appendix C) provided by ATIXA, approximately 735 Title IX-related jobs have been posted since July of 2017, which indicates a continued focus by colleges in hiring Title IX personnel (Association of Title IX Administrators, n.d.). A closer examination of Appendix C also reveals the range of

positions sought by IHEs: Title IX coordinators, Title IX incident investigators, clinical counselors, student advocates, and more. The variety of positions shows that IHEs may be recognizing the importance of having a more comprehensive staff able to address multiple aspects of proper Title IX response procedures. By spending more resources and hiring personnel, colleges also will avoid the conflicts that arise when, as shown in the data, one person is handling all phases of an investigation and/or has conflicting roles.

**Enable Meaningful Trainings and Policy Review**

Improving the hiring process to allow for more personnel, however, is only part of the solution. All Title IX personnel should increase their level of consistent professional development by attending conferences, participating in webinars, and taking advantage of any and all opportunities to stay abreast of current Title IX topics, matters, and policy or content changes. The busy schedules faced by most Title IX professionals likely has contributed to lack of participation in certain trainings, but even re-learning material can be beneficial, as can learning about new or emerging topics. More professionals, no matter how long they have been in the field, should take advantage of those opportunities, especially those with little or no cost.

Institutions also should look at the major issues present in the majority of court opinions, for example, due process, gender bias, and deliberate indifference as well as the facts and rationale behind the decisions no matter which way those decisions might go. While Title IX personnel may lack the legal background required to understand court decisions, there is nothing preventing an institution from collaborating with legal scholars (perhaps even retired judges) to better comprehend case law. While such an endeavor may be expensive, institutions need to commit more resources to put toward this. In addition, schools need to craft stronger, more comprehensive policies that address all of the issues raised by the judicial system. Dayton (2015)

stated three principles from Supreme Court decisions for all schools to have: effective policies, expedient yet fair investigations, and appropriate responses. While those three factors are a solid foundation, higher education institutions have much more to consider with prohibited behaviors, more diverse student demographics, and— as mentioned before— personnel and other issues.

Wiersma-Mosley and DiLoreto (2018) stressed the importance of Title IX training for all stakeholders affiliated with an IHE: students, faculty, staff, and administrators. To that extent, every member of a university must participate in Title IX training, whether in-person or online, on different topics. Coker (2018) stated that it is important for all IHE administrators to participate in bias training. Likewise, students should participate in trainings that present hypothetical situations to help them understand school and federal policy. Investigators should learn and/or reaffirm the procedures of a proper Title IX investigation. All trained participants should have a Title IX certification as part of their records. Failure to obtain certification may result in a notation on an employee's record (and regular reminders to complete the training) or, in the case of a student, a hold on registration or, for seniors, graduation.

Rutgers University, as an example, requires all new students to complete the *Not Anymore* online training, which educates students on sexual misconduct and healthy relationships and which has been shown to increase their knowledge on those topics, as part of their orientation process (Rutgers University, n.d.). After the initial training (and with the exception of graduating seniors), each person would complete an online, on-demand refresher course at the commencement of each academic year. The course could be completed on-demand but must be done within the first month of classes. The same penalties as above would apply for failure to complete the course. While some may see those penalties as unduly harsh, Title IX affects everyone at a university, so everyone needs to have the knowledge base.

The court decisions also point to the flaws in universities' policies, which calls for substantial policy review. Title IX violations are student conduct issues, and as the judicial opinions suggest, it is up to higher education institutions to review and revise their existing conduct policies to strengthen them. Policy review, especially of a policy that affects multiple institutional constituencies, should not be a one-person job but rather should be tasked to a committee. Rutgers University, for example, has a Title IX policy committee that includes Title IX personnel from all four Rutgers campuses: New Brunswick, Newark, Camden, and RBHS. The committee meets several times a year to discuss Title IX at the institutional level as well as federal legislation or case law that may impact the Rutgers' Title IX policy. Because Rutgers has an expansive Title IX policy (more than 40 pages long), and in light of the expected changes from the ED, the policy committee broke into subcommittees to handle revisions to the university policy.

**Improve the Campus Climate and Culture**

Besides looking at procedures and best practices, the policy committee also should consider new ways to handle student conduct violations, including responses that may not require suspension or expulsion and that might be more meaningful to those who have been affected by the misconduct. Effective Title IX conflict resolution is key for all higher education institutions so as to prevent future prohibited behaviors from occurring. It is easy to react impulsively to conflict and to punish the accused with suspension or expulsion, but higher education professionals should take the time to think about the conflict before deciding how to resolve it.

Schuh et al. (2017) made the point that all conflict resolution consists of four steps: naming, framing, blaming, and taming (p. 489). When revising the policy, Title IX committees

should pay close attention to how they outline conflict resolution, following the four-step sequence when proposing Title IX conflict resolution. First, a Title IX professional categorizes the conflict so that all parties, most notably the accuser and the accused, understand its basic elements. Next, the professional establishes the parameters of the conflict. Following that comes the deconstruction of the situation and figuring out who should be responsible for the part of the conflict. Finally, the professional looks for equitable ways to resolve the issue. There may be what is called "dynamic tension" (Schuh et al., 2017, p. 493) in the resolution phase, but such tension is healthy and a part of the overall resolution thought process, especially with regard to the resolution itself.

The pattern of court opinions suggests that until this point, higher education institutions have employed two resolutions to punish students found responsible of Title IX violations: suspension and expulsion. However, Title IX administrators should incorporate a restorative justice response to, as Schuh et al. (2017) explained, "restore[s] the dignity of those who have been victims or survivors of wrongdoing, as well as restoring the humanity of those who carried out harmful acts" (p. 488). If Title IX professionals identify the root causes of a conflict and then promote just resolution without doling out additional punishment to the conflict's perpetrator, institutions may experience less conflict in the future.

It might appear that the burden of Title IX reform at higher education institutions falls mostly on the Title IX personnel. However, institutions can take a lesson from the #metoo movement and, in the process, strengthen their approaches to Title IX. For colleges and universities, meaningful intra-organizational social action relies not only on the employees, but also on the students themselves. Thus, by creating climates that promote student engagement and

active involvement, higher education institutions will strengthen their internal organizational components and, in turn, reduce the risk of organizational conflict.

As organizational agents of change, higher education institutions also are responsible for "advocating for social change by working to address structural diversity" (Schuh et al., 2017, p. 93) and showing students how to make "reasoned choices" (Schuh et al., 2017, p. 93) to avoid serious situations, such as sexual harassment and sexual assault. Institutions not only should conduct yearly institutional Title IX policy review and revision but also should engage a diverse selection of student groups to help with the policy process. Policy forming often is thought of as an administrative task, but multicultural and gender equity student groups might be able to provide policy insights that administrators do not possess. Such a practice will help students understand that college is not simply about becoming a passive receptor of knowledge but is more about their overall transformation into active, engaged, socially responsible individuals who can contribute to their society.

While ethics clearly matter, without a strong campus culture, very few students will be able to develop their sense of ethics. Campus culture always has been an important part of student affairs professional philosophy, and Schuh et al, (2017) stressed three aspects of culture–– "artifacts, values, and basic assumptions and beliefs" (p. 67)— that all institutions should incorporate into their culture. Students must see the evidence of culture, must feel the presence of culture, and must believe in the idea of culture. As Schuh et al., noted, "Culture is a driving force on college and university campuses" (p. 67), and higher education professionals are responsible for ensuring that students have a culture that fosters and encourages them within and outside of the classroom, leading them to become more active agents of social change.

Higher education institutions should gauge the campus culture— or climate—by conducting an institutional campus climate survey. Wiermsa-Mosley and DiLoreto (2018) commented that even though IHEs may have to use incentives to get students to complete campus climate surveys, the survey is "considered one of the most accurate ways to capture the rates of campus sexual assaults" (p. 8). Campus climate surveys have become significant in determining the degree to which students have experienced sexual harassment, sexual assault, gender discrimination, and other prohibited behaviors, all of which contribute to students' perceptions of their campus's culture (Schuh et al., 2017). Once the survey results come back, institutions can use the data to improve campus safety, to revise their policies and procedures, and to make overall campus climate stronger and more positive. The survey would promote organizational function and reduce the chances for conflict. To avoid conflict from one IHE to another, Krause et al. (2018) called for a climate survey national database with a standard survey (rather than an institutional-specific one) used by all IHEs. Such a practice would eliminate most of the variations in questions from one IHE to the next (which they found in their study) and "would ensure comparable data and allow colleges and universities to focus questions on key components to avoid survey fatigue of participants" (Krause et al., 2018, p. 618).

Moreover, colleges and universities should take advantage of the new breed of college students. Rather than, or in addition to, relying on administrators and staff to cultivate positive campus climate, IHEs can take advantage of this new student activism and involve students in changing the campus climate. Rutgers University's Office for Violence Protection and Victim Assistance (VPVA) offers various opportunities for students to promote healthy campus culture. SCREAM (Students Challenging Realities and Educating Against Myths) Theater, for example, allows Rutgers students, using audience-engaged theater, to "provide information about

interpersonal violence including sexual assault, dating violence, same-sex violence, stalking, bullying, and peer harassment" ("SCREAM Theater and SCREAM Athletes," n.d.). Involving students in promoting a more positive campus climate may lead to a decrease in student sexual misconduct and also take some of the pressure off administrators.

## Suggestions for Future Research

It is important to consider future research that would benefit higher education institutions. The most significant challenge is the fact that, due to its real time status, there may be changes to Title IX policy, processes, or court decisions on a regular basis. As of Spring 2020, speculation exists within higher education that the ED is aiming to release the new Title IX regulations in 2020, though that still is far from certain. This study has provided higher education institutions an explanation as to how an outside organization— the justice system— interprets institutional Title IX policies. This study attempted to reveal the intra- and inter-organizational dysfunction and conflict that exists among the ED, higher education, and the courts, and it intended to provide those organizations a foundation upon which to collaborate for the benefit of all three organizations. This section offers suggestions for future research.

### Revisit the Schools That Lost—and Won— Their Cases

As one of the chief goals of this study was to determine whether schools had adequate preparation to address Title IX concerns, future research should be conducted to follow up with the schools mentioned in this study to determine how they have implemented changes to their Title IX policies and procedures. Future research could begin with the institutions that were found responsible for Title IX violations and conduct interviews with the administrators regarding institutional changes to Title IX procedures, compare the institutional policies before and after the court rendered its decision, and look to see whether additional students filed suit for

Title IX violations. Also, it can look at institutions for which the court ruled in favor, using the same procedures that they used with the first group of schools. Given the instability of the Title IX landscape, it might be interesting to discover whether any schools have kept their policies intact since the court ruled in their favor.

**Expand the Opinion Scope and Sources**

This study examined 2 years' worth of appellate court decisions. In order to gain a more complete picture of court rationale, future research can be expanded to include the timeframe and go back to 2011, when the first DCL was released under President Obama, as well as move forward to a point in time after the ED releases the new Title IX regulations sometime in 2020. Different time periods also could be compared to determine whether changes in leadership had any effect on the cases. Researchers also might want to look at differences in each appellate circuit and whether changes to judges (particularly in terms of political affiliations) led to differences in opinions. Alternatively, researchers could examine district court opinions over the same 2-year span in this study, seeking to better reconcile differences in decisions between the two levels of courts.

**Analyze the Real-Time Tracking**

In addition to looking at already decided cases, researchers should use the Public Access to Court Electronic Records (PACER) system to track the number of complaints filed in the district courts and appeals appellate courts. There clearly are more cases waiting to be legislated, and as witnessed in the evidence here, many cases may not be decided for quite some time. PACER is not an open resource and comes with a cost, but a researcher may find a way to mitigate the expense and provide more substantive research on how many cases are currently in the judicial pipeline.

### Talk With the Experts

Given the intra- and inter-organizational conflicts that currently exist in the judicial system, it would be helpful to conduct a comprehensive, multifaceted qualitative study of different groups of Title IX experts as the data source. In his 2018 dissertation, Nathan Miller, the Senior Associate Dean of Student Life at Swarthmore College, interviewed 19 Title IX and student conduct professionals "to examine the effects of addressing college sexual violence and sexual harassment on student conduct administrators and Title IX coordinators in relation to organizational structure" (p. 46).

Using Miller's methodology as a foundation and applying it not only to higher education Title IX officials, but also to retired judges and to federal government officials, future research needs to analyze the interviews for commonalities and differences with both language and rationale or mindset. A qualitative study of this nature would help all three organizations—higher education, the federal government, and the justice system— understand how and why the organizational conflicts have come about and perhaps suggest ways to bridge the gulfs existing among the organizations.

## Concluding Thoughts: From Dysfunction and Conflict to Order and Coherence

While it is clear that higher education institutions have experienced—and will experience more—uncertainty with regard to Title IX policy, institutions need to find more positive inter-organizational balance, and a reduction in conflict, with both the ED and the court system. This becomes extremely important partly because the inevitable release of the revised federal Title IX regulations and the anticipated policy changes that most, if not all, institutions will have to make in order to maintain federal compliance.

Since November of 2018 when the ED released the proposed regulations, higher education has waited with bated breath for the ED to comb through the thousands of policy comments and feedback provided by institutions and submit the final regulations. Interestingly, the ED's proposed regulations, attached here as Appendix B, rely on some of the same court opinions used in this study to bolster the ED's argument for revised procedures to cross examination and other areas. Of course, as discussed in Chapter 3, there are political undertones, since some of the courts are more in line politically with the current administration than they were the previous administration. Nevertheless, institutions must comply (otherwise risk losing their federal funding). Mere compliance, however, is not enough, and the practical suggestions I proposed earlier in this chapter would safeguard universities to a much higher degree.

In addition, universities need to realize that their institutional actions and inactions are now in full view due to the 24/7/365 transmission of information in society. As discussed in Chapter 2, Title IX has become much more of a public issue in light of the #metoo movement. As the #metoo movement continues to spread and to bring about new issues, so has the movement to publicize the significance of what victims experienced, with the publicity sometimes coming from unexpected sources. In *Kollaritsch v. Mich. State Univ. Bd. of Trs.* (2018), the appellate court declined to take judicial notice of two news articles submitted by the appellants, articles that detailed the facts of their case against MSU. According to Rule 201 of the Federal Rule of Evidence, judicial notice is taken when a fact "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Judicial Notice of Adjudicative Facts, 2019, para. 4). While the court did not give much insight into its denial, one can assume

that it did not view news articles as definitive sources of facts, which is somewhat unsurprising in this day and age given the constant scrutinization of the news media.

Still, the case serves as a reminder of the media's significance in Title IX cases and how, in the case of MSU, too many perceived missteps may lead to significant negative press. In May 2019, after several years of Title IX-related issues, MSU appointed its third president in 3 years. Longtime president Lou Anna Simon was fired and later criminally charged for committing perjury regarding her knowledge of Larry Nassar's behavior; that followed with interim president John Engler quitting for making disparaging remarks about sexual assault survivors (Bauer-Wolf, 2018b). All of the controversy and leadership changes at MSU have not gone unnoticed by the general public. In a roundtable discussion entitled "Area Universities Grapple With Increased Attention to Title IX in Light of Michigan State, #MeToo," St. Louis attorney Nicole Gorovsky understood how colleges and universities may struggle to deal with the unwanted attention but that, in her opinion, they have had more than enough time to craft strong conduct policies: "Their Title IX investigators and coordinators should know exactly how to do a complete investigation at this point in time and weigh that evidence" (as cited in Hemphill, 2018, para. 11).

Given Title IX incidents are not diminishing anytime soon, it will mean more litigation for universities. As evidenced in this study, both district and appellate courts have heard cases on a regular basis; due to the organizational conflict within the court system, the Supreme Court soon could get involved as well (Bauer-Wolf, 2019). Consequently, higher education institutions must continue to ensure they are doing all that they can to protect their populations. Much of that means crafting sound, encompassing, equitable policies that have the students' best interests at heart, but it also means examining the way the organization operates and whether it functions as

a positive agent of change or a source of conflict. If the latter, then institutions must be proactive in their approaches to resolving intra-organizational conflict so as to avoid inter-organizational conflict with both the ED and the judicial system.

Melnick (2018) put forth a powerful commentary on the present-day struggles with Title IX:

> In the end, adequately understanding these issues requires us to descend from airy abstractions about rights, stereotypes, and equal opportunity into the sometimes confusing, often dreary weeds of statutory provisions, Federal Register notices, Dear Colleague Letters, judicial opinions, and settlement agreements. This is a world in which one finds many of the pathologies identified by serious students of regulation, including mission creep, goal displacement, bean counting, and unanticipated consequences. Regulating thousands of schools with millions of students and teachers is an enormously difficult task. It takes much more than good intentions. A first step for improving this regulatory regime is to learn from past mistakes. (Chapter 1, Section 5, para. 8)

As he pointed out, crafting effective and protective Title IX policy will take more than a series of policies, procedures, and court opinions. No one organization solely is accountable for the current state of Title IX policy; the ED, the judicial system, and higher education all are responsible both individually and collectively for what currently exists. As of this study, the ED still has not released the new Title IX guidelines, but with the guidelines being in the Final Rule Stage ("Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," n.d.), higher education institutions expect the release to come shortly. Regardless of what the new rules might state, institutions are responsible for providing for and protecting their students, and they can do so by reducing conflict while

becoming agents of change that ensure Title IX provisions and protections continue for all who take part in the educational process.

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# APPENDICES

## Appendix A: Legal Opinion Chart

| Case | File Number | Shepard Symbol as of Feb. 2020 | Incident Date (if avail.) | Appellate Circuit | Decision/File Date | Judgment Decision* | Major Themes/Issues |
|---|---|---|---|---|---|---|---|
| Bernard v. E. Stroudsburg Univ. | 700 Fed. Appx. 159 | Positive | 2007 | Third | 8/16/17 | Affirmed (E. Stroudsburg Univ.) | Deliberate Indifference, Due Process |
| Collick v. William Paterson Univ. | 699 Fed. Appx. 129 | Neutral | | Third | 10/26/17 | Affirmed (Collick) | Qualified Immunity |
| Doe v. Baum | 903 F.3d 575 | Potentially Negative | | Sixth | 9/7/18 | Reversed & remanded (Doe) | Due Process |
| Doe v. Brown Univ. | 896 F.3d 127 | Potentially Negative | 2013 | First | 7/18/18 | Affirmed (Brown Univ.) | Deliberate Indifference |
| Doe v. Colgate Univ. Bd. of Trs. | 760 Fed. Appx. 22 | Neutral | 2014 | Second | 1/15/19 | Affirmed (Colgate Univ.) | Gender Bias |
| Doe v. Hagenbeck | 870 F.3d 36 | Neutral | 2013 | Second | 8/30/17 | Reversed & remanded (Hagenbeck) | Equal Protection (Military Issue) |
| Doe v. Loh | 767 Fed. Appx. 489 | Neutral | 2014 | Fourth | 4/24/19 | Affirmed (Loh) | Due Process |
| Doe v. Mercy Catholic Med. Ctr. | 850 F.3d 545 | Potentially Negative | 2012-13 | Third | 3/7/17 | Affirmed in part (Mercy Catholic re: hostile env.), Reversed in part & remanded (Doe re: retaliation & quid pro quo) | Deliberate Indifference |
| Doe v. Miami Univ. | 882 F.3d 579 | Potentially Negative | 2014 | Sixth | 2/9/18 | Affirmed (Miami re: deliberate indiff.), Reversed in part & remanded (Doe re: gender bias) | Deliberate Indifference, Due Process, Gender Bias |
| Doe v. Regents of the Univ. of Cal. | 891 F.3d 1147 | Neutral | 2014 | Ninth | 6/6/18 | Reversed & Remanded (U. Cal.) | Due Process |
| Doe v. Trs. of Bos. Coll. | 892 F.3d 67 | Positive | 2012 | First | 6/8/18 | Affirmed in part (Bos. Coll. re: gender bias & 2014 breach of contract), vacated in part (Bos. Coll. re: 2012 breach of contract & basic fairness) | Gender Bias |
| Doe v. Univ. of Cincinnati | 872 F.3d 393 | Potentially Negative | 2016 | Sixth | 9/25/17 | Affirmed (U. of Cincinnati) | Due Process |

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|---|---|---|---|---|---|---|---|
| Doe v. Univ. of Dayton | 2019 U.S. App. LEXIS 7680 | Positive | 2016 | Sixth | 3/15/19 | Affirmed (U. of Dayton) | Gender Bias, Deliberate Indifference |
| Doe v. Univ. of Ky. | 860 F.3d 365 | Potentially Negative | | Sixth | 6/15/17 | Affirmed in part (Univ. of Ky: re: harassment of Doe), Reversed in part & remanded (Doe re: qualified immunity) | Qualified Immunity |
| Doe v. Valencia Coll. | 903 F.3d 1220 | Neutral | 2014 | Eleventh | 9/13/18 | Affirmed (Valencia Coll.) | Due Process |
| Faparusi v. Case Western Reserve Univ. | 690 Fed. Appx. 396 | Neutral | 2016 | Sixth | 6/21/17 | Affirmed (Case W.) | Due Process |
| Faparusi v. Case W. Reserve Univ. | 711 Fed. Appx. 269 | Positive | 2016 | Sixth | 10/4/17 | Affirmed (Case W.) | Due Process |
| Farmer v. Kan. State Univ. | 918 F.3d 1094 | Positive | 2014 | Tenth | 3/18/19 | Affirmed (Farmer) | Deliberate Indifference |
| Feminist Majority Found. v. Hurley | 911 F.3d 674 | Potentially Negative | 2014 | Fourth | 12/19/18 | Affirmed in part (Hurley re: qualified immunity), Reversed and remanded (FMF re: deliberate indifference) | Deliberate Indifference, Qualified Immunity |
| Fryberger v. Univ. of Arkansas | 889 F.3d 471 | Neutral | | Eighth | 5/2/18 | Affirmed (Fryberger) | Sovereign Immunity |
| Hyman v. Cornell Univ. | 721 Fed. Appx. 5 | Neutral | | Second | 5/9/18 | Affirmed (Cornell Univ.) | Res judicata (already tried and cannot be retried) |
| Jones v. PI Kappa Alpha Int'l Fraternity, Inc. | 765 Fed. Appx. 802 | Potentially Negative | | Third | 4/1/19 | Affirmed in part (Ramapo U. re: qualified immunity), Reversed in part (Jones re: deliberate indifference) | Qualified Immunuty, Sovereign Immunity, Deliberate Indifference |
| Kollaritsch v. Mich. State Univ. Bd. of Trs. | 2018 U.S. App. LEXIS 17379 | Neutral | | Sixth | 6/25/18 | Affirmed (Mich. St.) | Qualified Immunity |
| K.T. v. Culver-Stockton Coll. | 865 F.3d 1054 | Potentially Negative | | Eighth | 8/1/17 | Affirmed (Culver-Stockton) | Deliberate Indifference |

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|---|---|---|---|---|---|---|---|
| Maher v. Iowa State Univ. | 915 F.3d 1210 | Positive | 2014 | Eighth | 2/15/19 | Affirmed (Iowa State) | Deliberate Indifference, Due Process |
| Pinkston v. Univ. of S. Fla. Bd. of Trs. | 752 Fed. Appx. 756 | Positive | 2017 | Eleventh | 9/28/18 | Affirmed (Univ. of S. Fla.) | Gender Bias |
| Plummer v. Univ. of Houston | 860 F.3d 767 | Potentially Negative | 2011 | Fifth | 6/23/17 | Affirmed (Univ. of Houston) | Deliberate Indifference, Gender Bias, Due Process |
| Prewitt v. Hamline Univ. | 764 Fed. Appx. 524 | Neutral | 2014 | Sixth Circuit | 3/22/19 | Affirmed (Hamline Univ.) | Gender Bias |
| Quade v. Ariz. Bd. of Regents | 700 Fed. Appx. 623 | Neutral | 2014 | Ninth Circuit | 6/28/17 | Affirmed (Ariz. Bd.) | Due Process |
| Ross v. Univ. of Tulsa | 859 F.3d 1280 | Potentially Negative | 2012 | Tenth Circuit | 6/20/17 | Affirmed (Univ. of Tulsa) | Deliberate Indifference |
| Rymer v. LeMaster | 2019 U.S. App. LEXIS 1295 | Potentially Negative | 2016 | Sixth Circuit | 1/14/19 | Affirmed (LeMaster) | Sovereign Immunity |
| Samuelson v. Or. State Univ. | 725 Fed. Appx. 598 | Neutral | | Ninth Circuit | 6/6/18 | Affirmed (Or. State Univ.) | Deliberate Indifference |
| Zara v. Devry Educ. Grp., Inc. | 706 Fed. Appx. 328 | Neutral | | Seventh Circuit | 12/15/17 | Affirmed (Devry) | Gender Bias |

*Notes for "Decision" column:

- "Reversed and remanded" means the appellate court reversed district court and remanded for further proceedings.
- "Affirmed" means that appellate court upheld district court decision. The appeal winner is in parentheses.
- In some cases, the appellate court affirmed certain claims and reversed certain claims, all of which are noted.

Appendix B: ED Proposed Title IX Regulations Summary (U.S. Department of Education, 2018)

**U.S. Department of Education Proposed Title IX Regulation Fact Sheet**

**Guiding Principles**

- **Rulemaking Process:** It is important to address this issue through notice-and-comment rulemaking rather than non- binding guidance. The Department looks forward to the public's comments, and has benefitted from listening sessions and discussions with students, schools, advocates, and experts with a variety of positions.
- **Greater Clarity:** The proposed regulation seeks to ensure that schools understand their legal obligations and that complainants and respondents understand their options and rights.
- **Increased Control for Complainants:** The Department recognizes that every situation is unique and that individuals react to sexual harassment differently. The proposed regulation seeks to ensure that schools honor complainants' wishes about how to respond to the situation, including increased access to supportive measures.
- **Fair Process:** The proposed regulation is grounded in core American principles of due process and the rule of law. It seeks to produce more reliable outcomes, thereby encouraging more students to turn to their schools for support in the wake of sexual harassment and reducing the risk of improperly punishing students.

**Nature of a School's Response to Sexual Harassment & Assault**

- The proposed regulation would adopt a clear definition of sexual harassment actionable under Title IX:
    - A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called **quid pro quo** harassment);
    - Consistent with U.S. Supreme Court precedent, unwelcome conduct on the basis of sex that is so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school's education program or activity; or
    - **Sexual assault**, as the Clery Act defines that crime in 34 CFR 668.46(a).
- Consistent with Supreme Court precedent and the text of Title IX, a school would be obligated to respond when: (1) the school has **actual knowledge** of sexual harassment; (2) that occurred within the school's own "**education program or activity**"; (3) against a "**person in the United States.**"
- Consistent with U.S. Supreme Court precedent, the proposed regulation would hold a school liable under Title IX only when it is "**deliberately indifferent**" to known sexual harassment, meaning its response is "**clearly unreasonable in light of known circumstances.**"
- The proposed regulation would require schools to investigate **every formal complaint** and to **respond meaningfully to every known report of sexual harassment.**
- The proposed regulation highlights the importance of **supportive measures** designed to preserve or restore access to the school's education program or activity, with or without a formal complaint.
- Where there has been a finding of responsibility, the proposed regulation would require **remedies designed to restore or preserve access** to the school's education program or activity.

## Due Process Protections & Reliable Outcomes

- To achieve fairness and reliable outcomes, the proposed regulation would require **due process protections,** including:
    - A **presumption of innocence** throughout the grievance process, with the **burden of proof on the school;**
    - **Live hearings** in the higher education context;
    - **A prohibition of the single-investigator model,** instead requiring a decision-maker separate from the Title IX Coordinator or investigator;
    - The clear and convincing evidence or preponderance of the evidence standard, subject to limitations;
    - The opportunity to **test the credibility** of parties and witnesses through **cross-examination,** subject to "rape shield" protections;
    - Written **notice of allegations** and an equal opportunity to **review the evidence;**
    - Title IX Coordinators, investigators, and decision-makers **free from bias or conflicts of interest;** and
    - **Equal opportunity for parties to appeal**, where schools offer appeals.

Appendix C: New Title IX Positions Submitted to ATIXA through October 7, 2019

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Assistant Director for Education, Outreach, and Conflict Resolution | | 7/25/2017 |
| Student advocate | | 7/25/2017 |
| Investigator | | 7/25/2017 |
| Deputy Title IX, Social Equity, and HR Coordinator | | 7/25/2017 |
| Title IX Coordinator | | 7/25/2017 |
| Director of Diversity, Equity, & Inclusion | | 7/25/2017 |
| Title IX Coordinator | | 7/25/2017 |
| Voice Center Volunteer Coordinator and Direct Service Specialist | | 7/25/2017 |
| Assistant Director, Safe Office | | 7/25/2017 |
| HR Compliance Specialist | | 7/25/2017 |
| Special Assistant | | 7/25/2017 |
| Director of Education | | 7/25/2017 |
| Title IX Coordinator | | 7/25/2017 |
| University Investigator | | 7/25/2017 |
| Assistant Director Wellness Center Health Promotion | 6/26/2017 | 8/2/2017 |
| Interim Title IX Coordinator | 6/26/2017 | 8/2/2017 |
| College Title iX Coordinator and Clery Officer and Associate Dean | 6/26/2017 | 8/2/2017 |
| Title iX Coordinator | 6/27/2017 | 8/2/2017 |
| Equal Opportunity and Title IX Investigator | 6/27/2017 | 8/2/2017 |
| Prevention Specialist and Clinical Counselor | 6/27/2017 | 8/2/2017 |
| Title IX Investigator/Assistant Coordinator | 6/27/2017 | 8/2/2017 |
| Executive Director for the Office of Student Concerns | 6/27/2017 | 8/2/2017 |
| Safety & Security Compliance Analyst/Clery Compliance | 6/28/2017 | 8/2/2017 |
| Campus Violence Advocate | 6/29/2017 | 8/2/2017 |
| Navigator | 6/29/2017 | 8/2/2017 |
| EEO Director/Title IX Coordinator | 6/29/2017 | 8/2/2017 |
| Affirmative Action/Title IX Coordinator | 6/29/2017 | 8/2/2017 |
| Senior Program Developer | 7/7/2017 | 8/8/2017 |
| Director, Program Development for Underrepresented Communities | 7/7/2017 | 8/8/2017 |
| Senior Trainer | 7/7/2017 | 8/8/2017 |
| Program Manager | 7/7/2017 | 8/8/2017 |
| Title IX Coordinator | 7/7/2017 | 8/8/2017 |
| Assistant Director of Advocacy & Wellness | 7/7/2017 | 8/2/2017 |

| Job Title | Date Posted | Date Removed |
|---|---|---|
| Title IX Coordinator | 7/7/2017 | 8/8/2017 |
| Title IX Compliance Officer | 7/7/2017 | 8/8/2017 |
| Director, Alice! Health Promotion | 7/13/2017 | 8/15/2017 |
| Clery Act/ADA Compliance Coordinator | 7/13/2017 | 8/15/2017 |
| Assistant Director, Women's Resource Center | 7/13/2017 | 8/15/2017 |
| Director of Equity, Access & Inclusion | 7/14/2017 | 8/15/2017 |
| Associate Director, Center for Gender Equity | 7/17/2017 | 8/23/2017 |
| Case Manager | 7/17/2017 | 8/23/2017 |
| Title IX Coordinator | 7/17/2017 | 8/23/2017 |
| Educational Equity Coordinator | 7/17/2017 | 8/23/2017 |
| Lead Investigator, Title IX | 7/18/2017 | 8/23/2017 |
| Victim Survivor Advocate | 7/25/2017 | 8/15/2017 |
| Title iX Investigator | 7/25/2017 | 8/23/2017 |
| Title IX & Bias Harassment Coordinator | 7/25/2017 | 8/30/2017 |
| Violence Prevention and Response Coordinator | 7/25/2017 | 8/30/2017 |
| Compliance and Prevention Coordinator | 7/25/2017 | 8/8/2017 |
| Assistant Director of Health & Wellness Programs | 8/2/2017 | 9/6/2017 |
| Director of Compliance and Title IX Coordinator | 8/2/2017 | 9/6/2017 |
| Title IX Investigator | 8/2/2017 | 9/6/2017 |
| Assistant Director of Women's Center | 8/2/2017 | 8/30/2017 |
| Director of Women's Center | 8/2/2017 | 9/6/2017 |
| Assistant Director, Student Health Center | 8/2/2017 | 9/6/2017 |
| Executive Director for Gender Equity & Inclusion | 8/2/2017 | 9/6/2017 |
| Vice President for Inclusive Excellence | 8/2/2017 | 9/6/2017 |
| Director of Title IX Investigations | 8/8/2017 | 9/13/2017 |
| Director of Equal Opportunity - Center of Excellence | 8/8/2017 | 9/13/2017 |
| Investigator | 8/8/2017 | 9/13/2017 |
| EEO/Title IX Specialist | 8/8/2017 | 9/13/2017 |
| Title IX Investigator | 8/8/2017 | 8/30/2017 |
| Title IX Case Coordinator | 8/8/2017 | 9/13/2017 |
| Director, Women's Center | 8/15/2017 | 9/20/2017 |
| Title IX Coordinator | 8/23/2017 | 9/27/2017 |
| Deputy Title IX Coordinator | 8/23/2017 | 9/27/2017 |
| Sexual Misconduct Investigator | 8/23/2017 | 9/27/2017 |
| Title IX and Compliance Investigator | 8/23/2017 | 9/27/2017 |
| Title IX Coordinator/HR Compliance Specialist | 8/30/2017 | 10/6/2017 |
| Affirmative Action/Title IX Coordinator | 8/30/2017 | 10/6/2017 |
| Director of Equal Opportunity Investigations | 8/30/2017 | 10/6/2017 |

| Job Title | Date Posted | Date Removed |
|---|---|---|
| Vice President for Inclusion, Diversity and Equity | 8/30/2017 | 10/6/2017 |
| Assistant Director - Women's Resources Center | 8/30/2017 | 10/6/2017 |
| Associate Director for IPV Services | 8/30/2017 | 10/6/2017 |
| Director, Office of Equal Opportunity and Title IX | 9/6/2017 | 10/11/2007 |
| Staff Clinician/Sexual Assault Services Specialist | 9/6/2017 | 10/11/2017 |
| Affirmative Action and Equal Opportunity Manager | 9/6/2017 | 10/11/2017 |
| Equal Opportunity and Title IX Officer | 9/6/2017 | 10/11/2017 |
| Assistant Director of Prevention and Men's Engagement | 9/6/2017 | 10/11/2017 |
| Case Prevention Education Coordinator | 9/13/2017 | 10/18/2017 |
| Civil Rights Investigator | 9/13/2017 | 10/18/2017 |
| Title iX Investigator | 9/13/2017 | 10/18/2017 |
| Director of Training | 9/13/2017 | 9/20/2017 |
| Title IX Coordinator | 9/13/2017 | 10/18/2017 |
| Title IX Investigator | 9/13/2017 | 10/18/2017 |
| Director of Human Resources and Title IX Coordinator | 9/20/2017 | 10/25/2017 |
| Sexual Misconduct Investigator | 9/20/2017 | 10/25/2017 |
| Title IX/Civil Rights Officer | 9/20/2017 | 10/25/2017 |
| EEO Complaint Investigator | 9/20/2017 | 10/18/2017 |
| Education and Prevention Specialist | 9/20/2017 | 10/25/2017 |
| Deputy Title IX Coordinator | 9/27/2017 | 11/1/2017 |
| Case Investigator - Special Projects Coordinator | 9/27/2017 | 11/1/2017 |
| Title IX Coordinator | 9/27/2017 | 11/1/2017 |
| Chief Intercultural Advancement Officer | 9/27/2017 | 10/25/2017 |
| ECU EEO Complain Investigator | 9/27/2017 | 11/1/2017 |
| Title IX Investigator | 9/27/2017 | 11/1/2017 |
| Violence Prevention Specialist | 10/6/2017 | 11/1/2017 |
| Vice President of Diversity, Equity and Inclusision | 10/6/2017 | 11/8/2017 |
| Associate Director of Interpersonal Violence Services | 10/6/2017 | 11/8/2017 |
| Dean of Students and Deputy Title IX Coordinator | 10/6/2017 | 11/8/2017 |
| Assistant Director | 10/6/2017 | 10/18/2017 |
| Director, Compliance, Training and Employee Relations | 10/6/2017 | 10/18/2017 |
| Cleary Act Compliance Coordinator | 10/6/2017 | 11/8/2017 |
| Deputy Title IX Officer | 10/6/2017 | 11/8/2017 |
| Title IX Coordinator | 10/6/2017 | 11/8/2017 |
| Interim Director of the Center for Gender Equity | 10/11/2017 | 11/15/2017 |
| Student Relations and Title IX Officer | 10/11/2017 | 11/1/2017 |
| Title IX System Coordinator/Compliance Officer | 10/11/2017 | 11/15/2017 |
| Title IX Officer | 10/18/2017 | 11/21/2017 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Assistant Director of Title IX Programs | 10/18/2017 | 11/21/2017 |
| Title IX Coordinator | 10/18/2017 | 11/21/2017 |
| Director of Student Conduct and Community Standards | 10/18/2017 | 11/21/2017 |
| Title IX & Compliance Trainer/Investigator | 10/18/2017 | 11/8/2017 |
| Institutional Equity Coordinator | 10/25/2017 | 11/1/2017 |
| OVW Program Coordinator | 10/25/2017 | 11/29/2017 |
| Assistant Vice President for Student Success | 10/25/2017 | 11/29/2017 |
| Title IX/EEO Investigator | 10/25/2017 | 11/1/2017 |
| Director of Title IX Investigations | 10/25/2017 | 11/29/2017 |
| EEO Investigator | 10/25/2017 | 11/29/2017 |
| Chief Intercultural Engagement Officer | 10/25/2017 | 11/29/2017 |
| Director of Investigations | 10/25/2017 | 11/29/2017 |
| Administrator for Violence Prevention and Response | 11/1/2017 | 12/6/2017 |
| Title IX Investigation Specialist | 11/1/2017 | 12/6/2017 |
| Senior Health Educator and Advocacy Coordinator | 11/1/2017 | 12/6/2017 |
| Title IX Director | 11/8/2017 | 12/6/2017 |
| Title IX Investigator | 11/8/2017 | 12/12/2017 |
| HRC Conduct Coordinator | 11/8/2017 | 12/6/2017 |
| Associatr Director, Title IX | 11/8/2017 | 12/12/2017 |
| Director of Community Standards | 11/8/2017 | 12/12/2017 |
| Assistant Vice President for Student Services | 11/8/2017 | 12/12/2017 |
| Chief Diversity Officer & Director Equal Access | 11/15/2017 | 12/19/2017 |
| Director of Investigations/Deputy Title IX Coordinator | 11/15/2017 | 12/19/2017 |
| Director of the Office of Institutional Equity | 11/15/2017 | 12/19/2017 |
| Director of Student Conduct and University Title IX Coordinator | 11/21/2017 | 1/3/2018 |
| Director and Coordinator of Title IX | 11/21/2017 | 1/3/2018 |
| Equity Specialist | 11/21/2017 | 1/3/2018 |
| Associate Dean of Student Rights and Responsibilities and Title IX Student Support Services | 11/21/2017 | 1/3/2018 |
| Assistant Director of the University Health Center for Sexual Assault Prevention Programming | 11/29/2017 | 1/3/2018 |
| Sexual Violence Prevention and Response Office at West Point | 12/6/2017 | 12/12/2017 |
| Title IX Investigator | 12/6/2017 | 1/10/2018 |
| Title IX Coordinator | 12/6/2017 | 12/19/2017 |
| Director, Office of Sexual Assault Prevention & Response | 12/6/2017 | 1/10/2018 |
| Director of Title IX | 12/6/2017 | 1/10/2018 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Title IX Program Manager | 12/12/2017 | 1/17/2018 |
| Hearing Coordinator | 12/12/2017 | 1/10/2018 |
| Institutional Equity and Compliance - Title IX Investigator | 12/12/2017 | 1/17/2018 |
| University Title IX Coordinator | 12/12/2017 | 1/17/2018 |
| Title IX Investigator | 12/12/2017 | 1/10/2018 |
| Director of Employee Relations, Compliance & Title IX Coordinator | 12/12/2017 | 1/17/2018 |
| Assistant Director of Prevention and Men's Engagement | 12/12/2017 | 1/17/2018 |
| Title IX Coordinator/Director of Equity and Compliance | 12/12/2017 | 1/17/2018 |
| Executive Director for Gender Equity & Inclusion | 12/12/2017 | 1/17/2018 |
| Equity Compliance Case Manager | 12/12/2017 | 1/10/2018 |
| Assistant Vice Chancellor for Civil Rights, Title IX and ADA | 12/19/2017 | 1/23/2018 |
| Title IX Coordinator | 12/19/2017 | 1/23/2018 |
| Director of Training | 12/19/2017 | 1/23/2018 |
| Associate Vice Chancellor and Chief Compliance Officer | 12/19/2017 | 1/23/2018 |
| Title IX Coordinator and Access Officer | 12/19/2017 | 1/23/2018 |
| Director of Community Standards & Deputy Title IX Coordinator for Students | 12/19/2017 | 1/23/2018 |
| Title IX Investigator | 12/20/2017 | 1/23/2018 |
| Coordinator for Violence Prevention & Healthy Masculinity | 12/20/2017 | 1/23/2018 |
| Title IX Coordinator | 12/20/2017 | 1/23/2018 |
| Title IX Officer | 1/3/2018 | 2/7/2018 |
| Director for the Office of Equity and Compliance/Title IX Coordinator | 1/3/2018 | 1/23/2018 |
| Director of OPHD and Title IX Officer | 1/3/2018 | 2/7/2018 |
| Assistant Director-The Gender & Sexuality Center: Serving Women & LGBTQA Communities | 1/3/2018 | 2/7/2018 |
| Investigator and Equity Consultant in the Office for Civil Rights & Title IX | 1/3/2018 | 2/7/2018 |
| EO Officer & Deputy Title IX Coordinator | 1/3/2018 | 2/7/2018 |
| Title IX Investigator/Trainer | 1/10/2018 | 2/14/2018 |
| Investigator, Office of Staff and Student Diversity | 1/10/2018 | 2/14/2018 |
| Interpersonal Violence Prevention Specialist | 1/10/2018 | 2/7/2018 |
| Title IX Investigator | 1/10/2018 | 2/14/2018 |
| Senior Health Educator and Advocacy Coordinator | 1/17/2018 | 2/7/2018 |
| Office of the President, Compliant Resolution & Systemwide AA/EEO Compliance Specialist | 1/17/2018 | 1/23/2018 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Human Resources Specialist in EEO & HR Regulations | 1/17/2018 | 2/7/2018 |
| Victim Service Coordinator (Advocate) | 1/17/2018 | 2/21/2018 |
| Title IX Investigator/Compliance Coordinator | 1/17/2018 | 1/23/2018 |
| Coordinator for Wellness Programing-2 postitions | 1/18/2018 | 1/31/18<br>2/21/18 |
| Sexual Assault Prevention and Advocacy Coordiantor | 1/18/2018 | 1/31/2018 |
| Deputy Title IX Coordinator | 1/23/2018 | 2/27/2018 |
| Program Coordinator | 1/23/2018 | 2/27/2018 |
| Title IX Investigator | 1/23/2018 | 2/21/2018 |
| Chief Diversity Officer | 1/23/2018 | 2/27/2018 |
| Title IX Coordinator | 1/23/2018 | 2/27/2018 |
| Title IX Coordinator & Discrimination, Harassmet & Retaliation Prevention Administrator | 1/23/2018 | 2/27/2018 |
| Equal Opportunity Discrimination Investigator (Title IX Investigator) | 1/31/2018 | 2/14/2018 |
| Assistant Professor for Human Services | 1/31/2018 | 2/28/2018 |
| Equity, Inclusion & Title IX Associate | 1/31/2018 | 3/6/2018 |
| Project Coordinator, School of Nursing-Comprehensive Community Response Team | 1/31/2018 | 3/6/2018 |
| Title IX Coordinator | 1/31/2018 | 3/6/2018 |
| Associate Vice President for Equity | 1/31/2018 | 3/6/2018 |
| Chief Operating Officer | 2/6/2018 | 2/21/2018 |
| Equity and Access Services, Accessibility Administrator | 2/6/2018 | 3/6/2018 |
| Administrative Investigator | 2/6/2018 | 3/6/2018 |
| Director of Institutional Equity and Compliance/Title IX Coordinator, 504 Compliance Officer | 2/14/2018 | 3/16/2018 |
| Title IX Deputy Director | 2/14/2018 | 3/12/2018 |
| Title IX Investigator | 2/14/2018 | 3/16/2018 |
| Office of Title IX and Clery University Program Specialist and Campus Investigator | 2/14/2018 | 2/27/2018 |
| Title IX Investigator / Training Specialist | 2/14/2018 | 3/12/2018 |
| Title IX Coordinator & Diversity Officer | 2/14/2018 | 3/12/2018 |
| Executive Director | 2/14/2018 | 3/16/2018 |
| Title IX Coordinator | 2/21/2018 | 3/23/2018 |
| Title IX and Civil Rights Investigator | 2/21/2018 | 3/23/2018 |
| Executive Director | 2/21/2018 | 3/23/2018 |
| Director of Campus Safety | 2/21/2018 | 3/23/2018 |
| Program Coordinator, Sexual Violence Prevention | 2/21/2018 | 3/23/2018 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Director, Office of Affirmative Action and Deputy Title IX Coordinator | 2/21/2018 | 3/23/2018 |
| Associate Director of Student Life for Student Conflict and Conflict Resolution, Relationship Violence and Sexual Misconduct Policy | 2/27/2018 | 3/16/2018 |
| Program Specialist | 2/27/2018 | 3/27/2018 |
| Discrimination, Harassment, Retaliation Administrator and Title IX Coordinator-Salary Change | 2/28/2018 | 3/6/2018 |
| Title IX/Civil Rights Investigator | 2/28/2018 | 4/3/2018 |
| Investigator | 3/6/2018 | 4/5/2018 |
| Institutional Equity & Title IX Coordinator | 3/6/2018 | 4/5/2018 |
| Title IX Coordinator | 3/6/2018 | 4/5/2018 |
| Executive Director | 3/6/2018 | 4/5/2018 |
| Title IX Coordinator & Diversity Officer | 3/12/2018 | 4/13/2018 |
| Director for Institutional Equity | 3/12/2018 | 4/13/2018 |
| Assistant Director | 3/12/2018 | 3/27/2018 |
| Sexual Misconduct Investigator | 3/12/2018 | 4/3/2018 |
| Director of Equity, Diversity, & Compliance | 3/12/2018 | 4/13/2018 |
| Title IX Investigator | 3/16/2018 | 4/17/2018 |
| Director of Equity and Compliance | 3/16/2018 | 4/17/2018 |
| Director, Office of Equal Opportunity, Access & Title IX Coordination | 3/20/2018 | 4/23/2018 |
| Title IX Coordinator | 3/20/2018 | 4/23/2018 |
| Prevention Programs Manager | 3/20/2018 | 4/3/2018 |
| Title IX Officer | 3/23/2018 | 4/23/2018 |
| Title IX Investigator | 3/23/2018 | 4/23/2018 |
| Title IX Investigator | 3/23/2018 | 4/23/2018 |
| Division Counsel, Employment and Title IX | 3/23/2018 | 4/23/2018 |
| Title IX Coordinator and Director of Equity Investigations | 3/23/2018 | 4/5/2018 |
| Chief Compliance Officer | 3/27/2018 | 5/1/2018 |
| Director of Affirmative Action | 3/27/2018 | 5/1/2018 |
| EEO Compliance Specialist - Depty Title IX Coordinator | 3/27/2018 | 4/5/2018 |
| Assistant Director, University Equal Opportunity Programs | 3/27/2018 | 5/1/2018 |
| Project Assistant | 4/3/2018 | 5/8/2018 |
| Title IX Investigation and Training Specialist | 4/3/2018 | 5/8/2018 |
| Assistant Vice President for Human Resources, Equity, and Inclusion | 4/3/2018 | 5/8/2018 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Student Advocate for Gender Based Violence Prevention, Education and Advocacy | 4/3/2018 | 5/8/2018 |
| Senior Research Associate I | 4/3/2018 | 5/8/2018 |
| Title IX Compliance Specialist | 4/5/2018 | 4/23/2018 |
| Lead Deputy Title IX Coordinator | 4/5/2018 | 4/23/2018 |
| Compliance Manager | 4/5/2018 | 5/8/2018 |
| Assistant or Associate General Counsel | 4/10/2018 | 5/15/2018 |
| Title IX and Civil Rights Investigator | 4/10/2018 | 5/15/2018 |
| Assistant Vice President for Diversity, Community and Inclusion | 4/10/2018 | 5/15/2018 |
| Prevention Educator and Victim Resource Specialist | 4/13/2018 | 4/23/2018 |
| Equity Manager/Deputy Title IX Coordinator | 4/13/2018 | 5/15/2018 |
| Civil Rights Investigator | 4/13/2018 | 5/15/2018 |
| Health Promotion Specialist, Interpersonal Violence Prevention | 4/17/2018 | 5/21/2018 |
| Title IX Program Assistant | 4/17/2018 | 5/21/2018 |
| Equal Opportunity Complaint Investigator | 4/17/2018 | 5/21/2018 |
| EEO/Title IX Specialist | 4/23/2018 | 5/29/2018 |
| Deputy Title IX and Civil Rights Coordinator | 4/23/2018 | 5/15/2018 |
| Sexual Assault Response Coordinator | 4/23/2018 | 5/29/2018 |
| Title IX Director | 4/23/2018 | 5/29/2018 |
| Associate Vice President for Fair Practices | 4/23/2018 | 5/29/2018 |
| Director, Title IX Compliance | 4/25/2018 | 5/29/2018 |
| Associate General Counsel | 4/25/2018 | 5/29/2018 |
| Administrative Assistant to the Vice President for Human Resources | 4/25/2018 | 5/15/2018 |
| Associate Director, Office for Sexual Misconduct Support and Resources | 4/25/2018 | 5/29/2018 |
| Program Officer for Title IX and Professional Conduct | 5/1/2018 | 6/5/2018 |
| Deputy Coordinator | 5/1/2018 | 6/5/2018 |
| Director of Title IX and Bias Response | 5/1/2018 | 6/5/2018 |
| Victim Advocate | 5/1/2018 | 5/15/2018 |
| Compliance Manager (Revised) | 5/8/2018 | 6/12/2018 |
| Civil Rights Investigator | 5/8/2018 | 6/12/2018 |
| Compliance Supervisor | 5/8/2018 | 6/12/2018 |
| Title IX and Compliance Investigator | 5/8/2018 | 6/12/2018 |
| Investigator | 5/15/2018 | 6/19/2018 |
| Title IX Coordinator | 5/15/2018 | 6/19/2018 |
| Coordinator - Office of Institutional Equity | 5/15/2018 | 6/19/2018 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Associate Dean for Equity and Compliance Programs | 5/15/2018 | 6/19/2018 |
| Title IX Coordinator | 5/21/2018 | 6/26/2018 |
| Assistant Dean of Students/Investigator | 5/21/2018 | 6/19/2018 |
| Deputy Title IX Manager & Social Equity Director | 5/21/2018 | 6/26/2018 |
| Compliance Investigator | 5/21/2018 | 6/26/2018 |
| Rape Prevention Education Coordinator | 5/21/2018 | 5/29/2018 |
| Director and Coordinator of Title IX | 5/21/2018 | 6/26/2018 |
| Director of Equity | 5/21/2018 | 6/26/2018 |
| Director of Equity, Diversity, & Compliance | 5/21/2018 | 6/19/2018 |
| Associate Director, Diversity & Inclusion Student Commons | 5/21/2018 | 6/26/2018 |
| Title IX Investigator and Education Specialist | 5/29/2018 | 7/3/2018 |
| Compliance & Title IX Investigator and Student Conduct Manager | 5/29/2018 | 7/3/2018 |
| Violence Prevention Coordinator | 5/29/2018 | 6/19/2018 |
| Assistant Director of Student Conduct/Deputy Title IX Coordinator | 5/29/2018 | 7/3/2018 |
| Student Affairs Director | 5/29/2018 | 6/26/2018 |
| Title IX/Equity and Diversity Officer | 5/29/2018 | 6/19/2018 |
| Associate Director for Student Conduct, Deputy Title IX Coordinator | 5/29/2018 | 6/19/2018 |
| Investigator | 5/29/2018 | 7/3/2018 |
| Title IX Coordinator | 6/5/2018 | 7/10/2018 |
| Health Educator | 6/5/2018 | 6/19/2018 |
| Assistant Dean of Students for Prevention and Response | 6/5/2018 | 7/10/2018 |
| Diversity & Inclusion Director/Title IX Coordinator | 6/5/2018 | 7/10/2018 |
| Associate Vice President and Chief Diversity Officer | 6/5/2018 | 7/10/2018 |
| Director for Institutional Equity and Title IX Coordinator | 6/5/2018 | 7/3/2018 |
| Violence Prevention Manager | 6/5/2018 | 7/3/2018 |
| Title IX Coordinator & Director of Equity Investigations | 6/5/2018 | 7/10/2018 |
| Director of the Office of Sexual Misconduct Prevention and Response | 6/5/2018 | 7/10/2018 |
| WISE Campus Advocate | 6/5/2018 | 7/10/2018 |
| Director, Office of Sexual Assault and Violence Prevention | 6/5/2018 | 6/19/2018 |
| Prevention and Education Specialist | 6/5/2018 | 7/10/2018 |
| Title IX Coordinator/Director of Employee Relations | 6/5/2018 | 7/10/2018 |
| Director of Equity and Compliance, Title IX & 504 Coordinator | 6/5/2018 | 7/10/2018 |

| Job Title | Date Posted | Date Removed |
|---|---|---|
| Assistant Director for the Office of Institutional Equity and Compliance | 6/12/2018 | 7/17/2018 |
| Associate Director of Human Resources | 6/12/2018 | 7/17/2018 |
| Women's Center Director | 6/12/2018 | 7/17/2018 |
| Complaint Resolution Officer | 6/12/2018 | 7/17/2018 |
| Title IX Coordinator | 6/19/2018 | 7/24/2018 |
| Title IX Coordinator | 6/19/2018 | 7/24/2018 |
| Institutional Compliance Officer/Title IX Coordinator | 6/19/2018 | 7/24/2018 |
| Manager of Violence Prevention | 6/19/2018 | 7/24/2018 |
| Interpersonal Violence Prevention Coordinator | 6/19/2018 | 6/26/2018 |
| Investigator for Employee Concerns | 6/19/2018 | 7/24/2018 |
| Health Promotion Specialist | 6/26/2018 | 7/30/2018 |
| Equity Compliance Specialist Senior | 6/26/2018 | 7/30/2018 |
| Assistant Director of the Center for Diversity and Inclusion | 6/26/2018 | 7/10/2018 |
| Title IX Coordinator | 6/26/2018 | 7/30/2018 |
| Violence Prevention Coordinator | 6/26/2018 | 7/10/2018 |
| Student Engagement Coordinator | 6/26/2018 | 7/10/2018 |
| Title IX Coordinator | 6/26/2018 | 7/10/2018 |
| Director of Affirmative Action & Equal Opportunity | 6/26/2018 | 7/10/2018 |
| Associate Director, Equal Opportunity Office & Deputy Title IX Coordinator | 6/26/2018 | 7/30/2018 |
| Title IX & Equal Employment Opportunity Investigator | 7/3/2018 | 7/30/2018 |
| Associate Director of Student Conduct | 7/3/2018 | 7/30/2018 |
| Title IX Investigator | 7/3/2018 | 7/30/2018 |
| Investigation & Resolution Specialist/ UCIRO Investigator | 7/3/2018 | 7/30/2018 |
| Prevention Specialist | 7/10/2018 | 8/7/2018 |
| Associate Director, Office for Access and Equity | 7/10/2018 | 8/7/2018 |
| Associate Director of Offie of Sexual Misconduct Prevention and Response | 7/10/2018 | 8/7/2018 |
| Executive Director, Office of Equity & Diversity | 7/10/2018 | 8/7/2018 |
| Division Director, Risk Solutions | 7/10/2018 | 7/30/2018 |
| Deputy Title IX Coordinator & Director of Student Wellness | 7/17/2018 | 8/14/2018 |
| Assistant Director, Women's Community Center | 7/17/2018 | 8/14/2018 |
| Title IX Investigator | 7/17/2018 | 8/14/2018 |
| Title IX/Civil Rights Investigator | 7/17/2018 | 8/14/2018 |
| Executive Director of Campus Wellness & Mental Health | 7/24/2018 | 8/28/2018 |
| Lead Investigator & Deputy Title IX Coordinator | 7/24/2018 | 8/28/2018 |

| Job Title | Date Posted | Date Removed |
|---|---|---|
| Investigator, Department of Diversity & Equal Opportunity | 7/24/2018 | 8/28/2018 |
| Title IX Investigator | 7/24/2018 | 8/14/2018 |
| Director, Office of Equal Opportunity Services & Title IX Coordinator | 7/24/2018 | 8/21/2018 |
| Assistant Dean and Director, Women's Resource Center | 7/24/2018 | 8/28/2018 |
| Prevention Manager, Faculty & Staff Programs | 7/24/2018 | 8/28/2018 |
| Assistant Director, Student Conduct Legal Services | 7/24/2018 | 8/28/2018 |
| Research and Program Development Lead | 7/24/2018 | 8/28/2018 |
| Postdoctoral Research and Program Development Fellow | 7/24/2018 | 8/28/2018 |
| Title IX Investigator | 7/24/2018 | 8/28/2018 |
| Associate Attorney | 7/24/2018 | 10/2/2018 |
| Associate Consultant | 7/24/2018 | |
| Assistant Vice President-Student Success Services | 7/30/2018 | 9/4/2018 |
| Assistant Vice President for Academic Affairs | 7/30/2018 | 9/4/2018 |
| Assistant Vice President for Workforce and Economic Development | 7/30/2018 | 9/4/2018 |
| Assistant Director of the Women's Center | 7/30/2018 | 9/4/2018 |
| Women's Center Program Coordinator | 7/30/2018 | 9/4/2018 |
| Human Resources Specialist, Investigations | 7/30/2018 | 9/4/2018 |
| Director, Title IX | 7/30/2018 | 8/28/2018 |
| Title IX Coordinator, The Office of Equal Opportunity | 7/30/2018 | 9/4/2018 |
| Title IX Coordinator | 7/30/2018 | 9/4/2018 |
| Compliance Investigator II | 7/30/2018 | 9/4/2018 |
| Hearing Officer | 7/30/2018 | 9/4/2018 |
| Survivor Resource Specialist-Respect | 7/30/2018 | 9/4/2018 |
| Deputy Title IX Coordinator | 8/2/2018 | 9/4/2018 |
| Title IX Deputy Coordinator | 8/7/2018 | 8/14/2018 |
| The Director of Gender & Equality Center | 8/7/2018 | 8/21/2018 |
| Associate Vice Chancellor & Dean of Students | 8/7/2018 | 9/11/2018 |
| Prevention Manager, Faculty & Staff Programs | 8/7/2018 | 9/11/2018 |
| Director of Title IX and Human Resources Compliance Services | 8/7/2018 | 9/11/2018 |
| Chief Investigator | 8/7/2018 | 9/11/2018 |
| Director of Student Protections | 8/7/2018 | 9/11/2018 |
| Director of Title IX Compliance & Training | 8/7/2018 | 9/11/2018 |
| Director of Title IX Investigations | 8/7/2018 | 9/11/2018 |
| Title IX Officer | 8/7/2018 | 9/11/2018 |

| Job Title | Date Posted | Date Removed |
|---|---|---|
| Title IX Trainer | 8/7/2018 | 9/11/2018 |
| Title IX Coordinator | 8/7/2018 | 9/11/2018 |
| Assistant Inspector General - Sexual Abuse & Harassment Investigations Unit | 8/7/2018 | 9/11/2018 |
| Invesetigator - Sexual Abuse & Harassment Investigations Unit | 8/7/2018 | 9/11/2018 |
| Title IX Director | 8/14/2018 | 9/18/2018 |
| Title IX / Equal Opportunity Investigator | 8/14/2018 | 9/18/2018 |
| Senior EEO Consultant | 8/14/2018 | 9/18/2018 |
| Institutional Equity Officer | 8/14/2018 | 8/28/2018 |
| Associate Director of Student Conduct | 8/14/2018 | 8/28/2018 |
| Lead Investigator for Equity and Title IX | 8/14/2018 | 9/18/2018 |
| Institutional Equity Investigator | 8/14/2018 | 9/18/2018 |
| Director of Title IX and Training | 8/14/2018 | 9/18/2018 |
| Program Assistant | 8/14/2018 | 8/28/2018 |
| Assistant Vice Preident, Inclusion and Institutional Equity | 8/21/2018 | 10/2/2018 |
| Director of Student Accountability & Title IX Investigator | 8/21/2018 | 9/11/2018 |
| Title IX Coordinator | 8/21/2018 | 9/4/2018 |
| Deputy Title IX Coordinator | 8/21/2018 | 10/2/2018 |
| Deputy Title IX Coordinator for Educational Outreach and Training & Title IX Investigator | 8/28/2018 | 10/2/2018 |
| Assistant Dean of Student Development | 8/28/2018 | 10/2/2018 |
| Title IX Coordinator | 8/28/2018 | 10/2/2018 |
| Title IX Investigator | 8/28/2018 | 10/2/2018 |
| OIE Investigator / Deputy Title IX Coordinator | 8/28/2018 | 10/2/2018 |
| Title IX Coordinator | 8/28/2018 | 10/2/2018 |
| Women's Center Assistant Director | 9/4/2018 | 9/11/2018 |
| Health Promotions Specialist-Mental Health | 9/4/2018 | 10/2/2018 |
| Title IX Coordinator | 9/4/2018 | 10/2/2018 |
| Sexual Violence Prevention Educator | 9/4/2018 | 9/11/2018 |
| Director of Equal Opportunity | 9/4/2018 | 9/11/2018 |
| Executive Director, Institutional Equity & Title IX Coordinator | 9/4/2018 | 10/2/2018 |
| Director of Compliance and Title IX Coordinator | 9/11/2018 | 10/15/2018 |
| Director of the Office of Equal Opportunity | 9/11/2018 | 10/2/2018 |
| Executive Director | 9/11/2018 | 10/15/2018 |
| Title IX Coordinator & Equal Opportunity Officer | 9/11/2018 | 10/15/2018 |
| Title IX/EEO Investigator | 9/11/2018 | 10/2/2018 |

| Job Title | Date Posted | Date Removed |
|---|---|---|
| Title IX Coordinator | 9/18/2018 | 10/23/2018 |
| Director of Educational Programs | 9/18/2018 | 10/23/2018 |
| Chief Diversity Equity and Inclusion Officer | 9/18/2018 | 10/23/2018 |
| Title IX Investigator | 9/18/2018 | 10/23/2018 |
| Civil Rights Investigator | 9/18/2018 | 10/23/2018 |
| Equity Compliance Case Manager | 9/18/2018 | 10/2/2018 |
| Title IX District Director | 9/18/2018 | 10/23/2018 |
| Investigator/Senior Investigator | 9/18/2018 | 10/23/2018 |
| The Women's Center Program Coordinator | 10/2/2018 | 11/6/2018 |
| Title IX Program Director | 10/2/2018 | 11/6/2018 |
| Equal Opportunity Compliance Specialist | 10/2/2018 | 11/6/2018 |
| Title IX Coordinator | 10/2/2018 | 11/6/2018 |
| Title IX Investigator | 10/2/2018 | 11/6/2018 |
| Title IX Education Specialist | 10/2/2018 | 11/6/2018 |
| Title IX Investigator | 10/2/2018 | 11/6/2018 |
| Compliance Coordinator | 10/2/2018 | 11/6/2018 |
| Sexual Violence Prevention Coordinator | 10/2/2018 | 11/6/2018 |
| Violence Prevention & Response Program Assistant | 10/2/2018 | 11/6/2018 |
| SUNY's Got Your Back Program Staff Associate | 10/2/2018 | 11/6/2018 |
| Title IX Deputy Coordinator | 10/2/2018 | 11/6/2018 |
| Title IX Investigator | 10/2/2018 | 11/6/2018 |
| Primary Prevention Specialist | 10/2/2018 | 11/6/2018 |
| Associate Director, Programs & Services for Military-Affiliated Communities | 10/2/2018 | 11/6/2018 |
| Title IX Coordinator | 10/2/2018 | 11/6/2018 |
| Title IX Coordinator | 10/15/2018 | 11/13/2018 |
| Sexual Misconduct Officer | 10/15/2018 | 11/13/2018 |
| Title IX Investigator | 10/15/2018 | 11/13/2018 |
| Title IX Deputy Coordinator | 10/15/2018 | 11/13/2018 |
| HR Analyst - Employee & Labor Relations | 10/15/2018 | 11/13/2018 |
| UVA Health Promotion Specialist | 10/15/2018 | 11/13/2018 |
| Director of Compliance and Title IX Coordinator | 10/15/2018 | 11/13/2018 |
| Director of Equal Opportunity | 10/15/2018 | 11/13/2018 |
| Community Education and Deputy Title IX Coordinator | 10/15/2018 | 11/13/2018 |
| Title IX Investigator | 10/15/2018 | 11/13/2018 |
| Title IX Investigator | 10/23/2018 | 11/20/2018 |
| Title IX Coordinator | 10/23/2018 | 11/20/2018 |

| Job Title | Date Posted | Date Removed |
|---|---|---|
| Prevention & Education Advisor for Student Rights & Responsibilities | 10/23/2018 | 11/20/2018 |
| Case Manager for Student Sexual & Gender-Based Misconduct | 10/23/2018 | 11/20/2018 |
| Assistant Director for Education & Prevention | 10/23/2018 | 11/20/2018 |
| Assistant Vice President for Student Success Services | 10/23/2018 | 11/20/2018 |
| Title IX Coordinator | 10/30/2018 | 11/27/2018 |
| Chief Diversity Officer | 10/30/2018 | 11/27/2018 |
| Respondent Support Coordinator | 10/30/2018 | 11/27/2018 |
| Title IX Coordinator & EEO Investogator | 10/30/2018 | 11/27/2018 |
| Director of Compliance | 10/30/2018 | 11/27/2018 |
| Title IX Coordinator | 10/30/2018 | 11/27/2018 |
| Visiting Title IX and Equity Compliance Specialist | 11/6/2018 | 12/4/2018 |
| Director of Title IX Diversity, Equity and Inclusion | 11/6/2018 | 12/4/2018 |
| Director of Title IX and Equity | 11/6/2018 | 12/4/2018 |
| Manager of Equal Opportunity Programs | 11/6/2018 | 12/4/2018 |
| Director of Title IX Policy, Training & Compliance | 11/6/2018 | 12/4/2018 |
| Title IX Specialist | 11/6/2018 | 12/4/2018 |
| Assistant Director of Equal Opportunity | 11/6/2018 | 12/4/2018 |
| Civil Rights Investigator | 11/13/2018 | 12/10/2018 |
| Associate Director – EO Officer and Deputy Title IX Coordinator | 11/13/2018 | 12/10/2018 |
| Sexual and Interpersonal Violence Prevention Coordinator | 11/13/2018 | 12/10/2018 |
| Title IX Coordinator | 11/13/2018 | 12/10/2018 |
| Title IX Coordinator | 11/13/2018 | 12/10/2018 |
| Title IX Civil Rights Investigator | 11/13/2018 | 12/10/2018 |
| Coordinator III | 11/13/2018 | 12/10/2018 |
| Interpersonal Violence Advocate | 11/13/2018 | 12/10/2018 |
| Compliance Officer | 11/13/2018 | 12/10/2018 |
| Equity Compliance Officer | 11/13/2018 | 12/10/2018 |
| Director of Diversity, Equity, & Inclusion & Title IX | 11/20/2018 | 12/17/2018 |
| Director of Human Resources/Title IX and Risk Management | 11/20/2018 | 12/17/2018 |
| Systemwide Title IX Coordinator | 11/20/2018 | 12/17/2018 |
| Civil Rights Investigator | 11/20/2018 | 12/17/2018 |
| Title IX Coordinator | 11/20/2018 | 12/17/2018 |
| Sexual Assault and Violence Education Project Coordinator | 11/27/2018 | 1/2/2019 |

| Job Title | Date Posted | Date Removed |
|---|---|---|
| Coordinator, Title IX Compliance and Senior Civil Rights Investigator | 11/27/2018 | 1/2/2019 |
| Civil Rights Investigator | 11/27/2018 | 1/2/2019 |
| Title IX Investigator | 11/27/2018 | 1/2/2019 |
| Gender-Based Violence Prevention Coordinator | 12/4/2018 | 1/2/2019 |
| Equity and Diversity Investigator | 12/4/2018 | 1/2/2019 |
| Associate Director and Deputy Title IX Officer | 12/4/2018 | 1/2/2019 |
| Title IX/Discrimination, Harassment, and Retaliation Investigator | 12/4/2018 | 1/2/2019 |
| Investigator, Gender Equity & Inclusion | 12/4/2018 | 1/2/2019 |
| Vice President for Diversity, Equity, and Inclusion | 12/10/2018 | 1/9/2019 |
| Director, Center for Awareness, Response and Education (CARE) | 12/10/2018 | 1/9/2019 |
| VP for Diversity, Equity and Inclusion | 12/10/2018 | 1/9/2019 |
| Associate Vice President for Civil Rights and Title IX Education and Compliance | 12/17/2018 | 1.15.19 |
| Prevention Specialist | 12/17/2018 | 1.15.19 |
| Director of Institutional Equity , Inclusion and Compliance/Title IX Coordinator | 12/17/2018 | 1.15.19 |
| Deputy Title IX Coordinator | 12/18/2018 | 1.15.19 |
| Compliance Officer and Title IX Coordinator | 12/18/2018 | 1.15.19 |
| Associate Director, Title IX & Gender Equity | 12/18/2018 | 1.15.19 |
| Title IX Officer | 12/21/2018 | 1.15.19 |
| Equal Opportunity Discrimination Investigator | 1/2/2019 | 1.29.19 |
| Deputy Title IX Coordinator | 1/2/2019 | 1.29.19 |
| Program Coordinator | 1/2/2019 | 1.29.19 |
| Director, Title IX, Diversity, Equity and Inclusion | 1/9/2019 | 2.12.19 |
| Faculty Recruitment and Engagement Specialist | 1/9/2019 | 2.12.19 |
| Prevention Educator and Victim Resource Specialist, Project Safe Center | 1/9/2019 | 2.12.19 |
| Title IX Investigator | 1/9/2019 | 2.12.19 |
| OVW Grant Project Coordinator | 1/9/2019 | 2.12.19 |
| Advocate | 1/9/2019 | 2.12.19 |
| Title IX Investigator | 1/9/2019 | 2.12.19 |
| Title IX Coordinator and Investigator | 1/9/2019 | 2.12.19 |
| Chief Diversity Officer | 1.15.19 | 2.12.19 |
| Program Manager | 1.15.19 | 2.12.19 |
| Staff Clinician/Sexual Assault Services Specialist | 1.15.19 | 2.12.19 |
| Associate Director, Equal Opportunity Officer | 1.15.19 | 2.12.19 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Title IX Coordinator | 1.21.19 | 2.19.19 |
| Director of Institutional Equity | 1.21.19 | 2.19.19 |
| Title IX Administrator | 1.21.19 | 2.19.19 |
| General Attorney | 1.24.19 | 2.27.19 |
| Director of Title IX, Policy, Training & Compliance | 1.24.19 | 2.27.19 |
| Assistant Vice President for Student Success Services | 1.24.19 | 2.27.19 |
| Violence Against Women Prevention Program Coordinator | 1.29.19 | 2.27.19 |
| Investigator - Discrimination and Sex Based Misconduct | 1.29.19 | 2.27.19 |
| Associate Director of the Women's Center | 1.29.19 | 2.27.19 |
| Assistant Vice President of Office of Institutional Equity and Title IX Coordinator | 1.29.19 | 2.27.19 |
| Senior Directorr, Office of Student Conduct | 1.29.19 | 2.27.19 |
| Associate Provost for Equal Opportunity and Equity | 2.5.19 | 3.5.19 |
| Title IX Investigator | 2.5.19 | 3.5.19 |
| Prevention Assistant Director | 2.5.19 | 3.5.19 |
| Senior Student Conduct Coordinator | 2.5.19 | 3.5.19 |
| Equal Employment Opportunity Investigator, Office of Inclusion and Equity | 2.6.19 | 3.5.19 |
| Title IX Investigator/Prevention Specialist | 2.12.19 | 3.11.19 |
| Supportive Measures Specialist | 2.12.19 | 3.11.19 |
| Violence Against Women Prevention Program (VAWPP) Coordinator | 2.12.19 | 3.11.19 |
| Coordinator - Office of Institutional Equity | 2.12.19 | 3.11.19 |
| Systemwide Title IX Coordinator | 2.19.19 | 3.19.19 |
| HR Analyst, Employee and Labor Relations | 2.19.19 | 3.19.19 |
| Assistant Director of Women's, Gender and Sexuality Center (WGSC) | 2.19.19 | 3.19.19 |
| Senior Associate Director of Institutional Equity | 2.27.19 | 3.26.19 |
| Director of Human Services, Employee Relations, Office of Institutional Equity & Title IX | 2.27.19 | 3.4.19 |
| Senior Title IX Investigation & Training Specialist | 2.27.19 | 3.26.19 |
| Civil Rights Investigator | 2.27.19 | 3.26.19 |
| Deputy Director, Title IX & ADA, AA: Office of Institutional Equity | 2.27.19 | 3.26.19 |
| Sexual Misconduct Prevention Educator | 2.27.19 | 3.26.19 |
| Title IX Deputy Coordinator | 3.5.19 | 4.2.19 |

| Job Title | Date Posted | Date Removed |
|---|---|---|
| Resource and Prevention Specialist, Center for Awareness, Resources and Education (CARE) | 3.5.19 | 4.2.19 |
| Senior Employee Relations Specialist | 3.5.19 | 4.2.19 |
| Chief Inclusion and Diversity Director | 3.11.19 | 4.9.19 |
| Associate Director of Prevention Education | 3.11.19 | 4.9.19 |
| Officer-Compliance: Equal Opportunity Coordinator | 3.11.19 | 4.9.19 |
| Intake Assessment Associate Office of Equal Opportunity and Access | 3.11.19 | 4.9.19 |
| Equity & Title IX Specialist/Office of Institutional Equity | 3.11.19 | 4.9.19 |
| Director, Title IX and Compliance | 3.11.19 | 4.9.19 |
| Director of Identity Centers | 3.19.19 | 4.17.19 |
| Assistant Program Manger, Student Code of Conduct and Title IX | 3.19.19 | 4.17.19 |
| Deputy Title IX Coordinator | 3.19.19 | 4.17.19 |
| Deputy Title IX Coordinator | 3.19.19 | 4.17.19 |
| Women's Center Director, Office of Diversity and Inclusion | 3.19.19 | 4.17.19 |
| Title IX Coordinator | 3.19.19 | 4.17.19 |
| Coordinator of Inclusion & Prevention Education | 3.26.19 | 4.23.19 |
| Equity Investigator | 3.26.19 | 4.23.19 |
| Director of Nondiscrimination Initiatives/Title IX Coordinator/504 Coordinator | 3.26.19 | 4.23.19 |
| Civil Rights & Title IX Coordinator | 3.26.19 | 4.23.19 |
| Title IX Investigator | 3.26.19 | 4.23.19 |
| Equal Employment Opportunity (EEO) Investigator | 3.26.19 | 4.23.19 |
| Sexual Violence Prevention Specialist | 3.26.19 | 4.23.19 |
| Title IX/Civil Righs Investigator | 4.2.19 | 4.29.19 |
| Manager, Equal Opportunity Training and Communications | 4.2.19 | 4.29.19 |
| Executive Director Diversity, Institutional Equity and Title IX Program Administrator | 4.2.19 | 4.29.19 |
| Associate Director at the Women’s Resources Center | 4.9.19 | 4.23.19 |
| Title IX Coordinator/Section 504 Coordinator and Compliance Officer | 4.9.19 | 5.7.19 |
| Violence Prevention and Response Coordinator | 4.9.19 | 5.7.19 |
| Director of the Women’s Center | 4.9.19 | 4.23.19 |
| Director of Compliance & Conflict Resolution | 4.9.19 | 5.7.19 |
| Junior Civil Rights Investigator | 4.9.19 | 5.7.19 |
| Director, Title IX and Compliance | 4.9.19 | 4.23.19 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Title IX Investigator | 4.17.19 | 5.14.19 |
| Equal Opportunity and Civil Rights – Title IX Investigator | 4.17.19 | 5.14.19 |
| Investigator | 4.17.19 | 5.14.19 |
| Office of Diversity and Equity: Diversity Associate | 4.17.19 | 5.14.19 |
| Deputy Title IX Coordinator for Response and Education | 4.23.19 | 5.22.19 |
| Title IX Director | 4.23.19 | 5.22.19 |
| Assistant Director, Equal Opportunity Programs and Diversity | 4.23.19 | 5.22.19 |
| Domestic Violence/Sexual Assault Prevention & Training Specialist | 4.23.19 | 5.22.19 |
| Bystander Empowerment Specialist | 4.23.19 | 5.22.19 |
| Title IX Investigator | 4.29.19 | 5.28.19 |
| Crisis Intervention Counselor | 4.29.19 | 5.28.19 |
| Title IX Coordinator | 4.29.19 | 5.28.19 |
| Associate Director Office of Health Promotion Department of Student Health | 5.7.19 | 6.11.19 |
| Title IX Investigator | 5.7.19 | 6.11.19 |
| Assistant Director for Investigations /Assistant Title IX Coordinator | 5.7.19 | 6.11.19 |
| Equity Consultant and Investigator | 5.7.19 | 6.11.19 |
| Administrative Assistant | 5.7.19 | 6.11.19 |
| Assistant Director, UFMC, BSRC, GIR | 5.7.19 | 6.11.19 |
| Title IX and Equity Compliance Specialist | 5.7.19 | 6.11.19 |
| Head of Strategy & Business Development | 5.7.19 | 6.11.19 |
| Director of Marketing & Communications | 5.7.19 | 6.11.19 |
| Assistant/Associate Director and Title IX Coordinator | 5.7.19 | 6.11.19 |
| Title IX Investigator and Education Coordinator | 5.7.19 | 6.11.19 |
| Associate Vice President, Title IX Coordinator | 5.7.19 | 6.11.19 |
| Title IX Administrator | 5.14.19 | 6.11.19 |
| OED Report and Response Case Manager | 5.14.19 | 6.11.19 |
| Dean of Students | 5.14.19 | 6.11.19 |
| Vice President for Campus Life and Inclusive Excellence | 5.14.19 | 6.11.19 |
| Violence Prevention Program Coordinator | 5.14.19 | 6.11.19 |
| Case Coordinator, Title IX Office | 5.22.19 | 6.18.19 |
| Associate Director, Office of Health Promotion | 5.22.19 | 6.18.19 |
| Director of Title IX | 5.22.19 | 6.18.19 |
| Title IX and Non-Discrimination Investigator | 5.22.19 | 6.18.19 |
| Staff Clinician and Sexual Assault Services Specialist | 5.28.19 | 6.25.19 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Sexual Violence Prevention Education Coordinator | 5.28.19 | 6.25.19 |
| Education Program Specialist | 5.28.19 | 6.25.19 |
| Title IX Contract Investigator | 5.28.19 | 6.25.19 |
| Coordinator for Victim Advocacy | 6.11.19 | 7.3.19 |
| Social Worker 3/Clinical Counselor 3 | 6.11.19 | 7.3.19 |
| Director of OPHD and Title IX Officer | 6.11.19 | 7.3.19 |
| Title IX Coordinator | 6.11.19 | 7.3.19 |
| Assistant Coordinator/OCRIE | 6.11.19 | 7.3.19 |
| Assistant Director, Women's Center | 6.11.19 | 7.3.19 |
| Resolution and Compliance Specialist - General Counsel | 6.11.19 | 7.3.19 |
| Training and Prevention Specialist | 6.11.19 | 7.3.19 |
| Student Conduct Investigator | 6.18.19 | 7.16.19 |
| Director of Gender Equity | 6.18.19 | 7.16.19 |
| Title IX Coordinator | 6.18.19 | 7.16.19 |
| Coordinator for Prevention Education Initiatives and Student Support | 6.18.19 | 7.16.19 |
| Complaint Resolution Officer | 6.18.19 | 7.16.19 |
| Title IX Coordinator | 6.18.19 | 7.16.19 |
| Title IX Deputy Coordinator | 6.18.19 | 7.16.19 |
| Director, Title IX and Compliance | 6.18.19 | 7.16.19 |
| Director of Community Standards and Student Ethics | 6.25.19 | 7.23.19 |
| Senior Title IX Investigator | 6.25.19 | 7.23.19 |
| Assistant Director, AA/EEO and Deputy Title IX Coordinator | 6.25.19 | 7.23.19 |
| Administrative Investigator | 7.3.19 | 7.31.19 |
| Executive Director at End Rape On Campus | 7.3.19 | 7.31.19 |
| Deputy Title IX Coordinator & Investigator | 7.3.19 | 7.31.19 |
| Faculty Equity Specialist | 7.3.19 | 7.31.19 |
| Project Coordinator, Senior | 7.3.19 | 7.31.19 |
| Case Manager- Interpersonal Violence Specialist | 7.3.19 | 7.31.19 |
| Deputy Title IX Officer/Associate Director | 7.3.19 | 7.31.19 |
| Gender and Sexuality Center Program Coordinator | 7.3.19 | 7.31.19 |
| Equity Specialist & Investigator | 7.3.19 | 7.31.19 |
| Title IX Coordinator | 7.3.19 | 7.31.19 |
| William Paterson University | 7.3.19 | 7.31.19 |
| EEO/Title IX Intake Coordinator | 7.3.19 | 7.31.19 |
| Assistant Dean/Associate Director, Women's Community Center | 7.3.19 | 7.31.19 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Title IX Investigator | 7.3.19 | 7.31.19 |
| Equity Associate | 7.3.19 | 7.31.19 |
| Title IX and Compliance Investigator | 7.3.19 | 7.31.19 |
| Assistant Director of Student Rights & Responsibilities | 7.9.19 | 8.22.19 |
| Assistant Director Women's Resource Center | 7.9.19 | 8.22.19 |
| Title IX Graduate Assistant Office of Diversity and Equity | 7.9.19 | 8.22.19 |
| Director, Office of Civil Rights and Title IX | 7.16.19 | 8.22.19 |
| Institutional Equity Officer | 7.16.19 | 8.22.19 |
| Title IX investigator | 7.16.19 | 8.22.19 |
| Director of Student Disability Services | 7.16.19 | 8.22.19 |
| EEO and Diversity Specialist | 7.16.19 | 8.22.19 |
| Civil Rights Administrator & Title IX Coordinator | 7.16.19 | 8.22.19 |
| Equal Opportunity and Title IX Investigator | 7.23.19 | 8.22.19 |
| Title IX Coordinator | 7.23.19 | 8.22.19 |
| Assistant Director of Technical Assistance | 7.23.19 | 8.22.19 |
| Deputy Title lX Coordinator | 7.23.19 | 8.22.19 |
| Student Conduct and Title IX Coordinator | 7.23.19 | 8.22.19 |
| General Attorney (Civil Rights) | 7.23.19 | 8.22.19 |
| Title IX Coordinator | 7.23.19 | 8.22.19 |
| Title IX Investigator | 7.23.19 | 8.22.19 |
| Title IX Investigator | 7.23.19 | 8.22.19 |
| Civil Rights Investigator | 7.23.19 | 8.22.19 |
| Assistant University Attorney | 7.23.19 | 8.22.19 |
| Executive Director, HR Compliance & Employee/Labor Relations | 7.31.19 | 9.5.19 |
| Staff Associate | 7.31.19 | 9.5.19 |
| Investigator | 7.31.19 | 9.5.19 |
| Investigator | 7.31.19 | 9.5.19 |
| Program Coordinator, Sexual and Relationship Violence Support Services | 7.31.19 | 9.5.19 |
| Investigator for Student Conduct | 7.31.19 | 9.5.19 |
| Title IX Officer | 7.31.19 | 9.5.19 |
| Chief Diversity Officer | 7.31.19 | 9.5.19 |
| Director of Equity and Compliance | 8.9.19 | 9.5.19 |
| Assistant Director for Education, Outreach and Conflict Resolution | 8.9.19 | 9.5.19 |
| Equity Consultant and Investigator | 8.9.19 | 9.5.19 |
| Investigator and Outreach Coordinator | 8.9.19 | 9.5.19 |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Title IX Coordinator | 8.9.19 | 9.5.19 |
| Title IX Coordinator | 8.9.19 | 9.5.19 |
| Director of Staff Equity & Diversity/Deputy Title IX Coordinator | 8.9.19 | 9.5.19 |
| Director of Institutional Equity | 8.22.19 | 9.25.19 |
| Title IX Coordinator | 8.22.19 | 9.25.19 |
| Program Coordinator with the Women's Center | 8.22.19 | 9.25.19 |
| Director, Title IX Compliance and Programs | 8.22.19 | 9.25.19 |
| Investigator | 8.22.19 | 9.25.19 |
| Equity and Access Analyst | 8.22.19 | 9.25.19 |
| Assistant Director for Sexual Violence Prevention & Education | 8.22.19 | 9.25.19 |
| Director of Owls Care Health Promotion | 8.22.19 | 9.25.19 |
| Program Coordinator | 8.22.19 | 9.25.19 |
| Director, Women's Center | 8.22.19 | 9.25.19 |
| Director of Women, Gender, and Sexual Equity | 8.22.19 | 9.25.19 |
| Case Manager | 8.22.19 | 9.25.19 |
| Associate Vice President for Institutional Equity | 9.5.19 | |
| Senior Title IX Investigator | 9.5.19 | |
| Title IX Investigator | 9.5.19 | |
| Deputy Title IX Coordinator | 9.5.19 | |
| University  Investigator | 9.5.19 | |
| Deputy Director of ADA, EEO, Title IX Compliance and Training | 9.5.19 | |
| Associate Vice Chancellor for Equal Opportunity | 9.5.19 | |
| Investigator | 9.5.19 | |
| Assistant Director for Advocacy & Education | 9.5.19 | |
| Women, Gender, and Sexual Equity Director | 9.5.19 | |
| Executive Director Diversity and Inclusion | 9.5.19 | |
| Title IX Compliance Manager | 9.5.19 | |
| Title IX Specialist | 9.5.19 | |
| Associate Director | 9.5.19 | |
| Investigator | 9.5.19 | |
| Associate Director, Employee Relations | 9.5.19 | |
| Women's Center Program Coordinator | 9.5.19 | |
| Director of Women's and Gender Studies | 9.5.19 | |
| Title IX Coordinator | 9.5.19 | |
| Performance Management Coordinator | 9.5.19 | |

| **Job Title** | **Date Posted** | **Date Removed** |
|---|---|---|
| Senior Equity & Employee Relations Training Specialist | 9.5.19 | |
| EEO Investigator | 9.5.19 | |
| EEO/ADA Coordinator | 9.5.19 | |
| Title IX Investigators | 9.5.19 | |
| Title IX Coordinator | 9.5.19 | |
| Vice President for Diversity and Inclusion | 9.5.19 | |
| Deputy Civil Rights & Title IX Coordinator | 9.13.19 | |
| Associate General Counsel | 9.13.19 | |
| Director of Title IX Coordination | 9.13.19 | |
| Investigator | 9.13.19 | |
| Deputy Title IX Coordinator | 9.13.19 | |
| Title IX Coordinator | 9.13.19 | |
| Tittle IX Coordinator | 9.13.19 | |
| Assistant Director for Diversity, Equity and Inclusion | 9.13.19 | |
| Program Coordinator | 9.13.19 | |
| Title IX Investigator/Compliance Coordinator | 9.13.19 | |
| Director: Title IX, Office of Equal Opportunity Services | 9.25.19 | |
| Equity & Access Compliance Investigator | 9.25.19 | |
| UMS Coordinator of Title IX Services | 9.25.19 | |
| Title IX Coordinator | 9.25.19 | |
| ADA Compliance Officer | 9.25.19 | |
| Compliance Investigator | 9.25.19 | |
| Senior Compliance Investigator | 9.25.19 | |
| Equal Opportunity Complaint Investigator | 9.25.19 | |
| Affirmative Action Officer and Civil Rights & Title IX Investigator | 9.25.19 | |
| Executive Director for Gender Equity & Inclusion | 9.25.19 | |
| Title IX/Public Records Coordinator | 9.25.19 | |
| Director of the Office of Title IX and Equal Opportunity | 9.25.19 | |

(Provided courtesy of ATIXA)

Appendix D: Certificate of Completion from "A Campus-Wide Response to Sexual Misconduct Best Practices" Webinar

# Appendix E: Email of Permission to Reproduce Chart provided by LexisNexis

PLEASE PRINT A COPY OF THIS NOTE FOR YOUR RECORDS

January 22, 2020

Dear Matthew Marino,

Thank you for your permission request.

LexisNexis hereby grants you permission to reproduce and distribute the material you requested, as identified here and attached to this letter for your dissertation.

- Page 2 of *Shepard's Signal Indicators and Treatments* (chart showing colors and meaning)

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Sincerely,

Emma Dickinson

Emma Dickinson

Appendix F: Email of Permission to Reproduce Table 1 provided by The Brookings Institution

**Monday, April 27, 2020 at 10:13:06 Eastern Daylight Time**

**Subject:** RE: Permission to Reproduce Table: The Transformation of Title IX: Regulating Gender Equality in Education
**Date:** Monday, April 27, 2020 at 10:09:15 AM Eastern Daylight Time
**From:** Permissions
**To:** Matthew F Marino

Hi Matthew,

Permission is granted to use table 10.5 in your dissertation. Please let me know if you need anything else!

Best,
Kristen

Kristen Spina Harrison
Rights Manager and Editorial Associate, Brookings Institution Press
BROOKINGS, 1775 Massachusetts Ave. NW Washington, DC 20036
Email kharrison@brookings.edu | Phone 202.536.3604
http://www.brookings.edu

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**From:** Matthew F Marino <Matthew.Marino@shu.edu>
**Sent:** Monday, April 27, 2020 9:22 AM
**To:** Permissions <Permissions@brookings.edu>
**Subject:** Permission to Reproduce Table: The Transformation of Title IX: Regulating Gender Equality in Education

Hello,

I am a Ph.D. student at Seton Hall University and am finishing my dissertation, the topic of which is Title IX. More specifically, I'm looking at how a sample set of appellate court opinions show variation in how institutions respond to TIX incidents and whether courts and schools are aligned with respect to due process and immunity issues.

I read *The Transformation of Title IX: Regulating Gender Equality in Education* by R. Shep Melnick (Copyright 2018), and I would like permission to use (in adapted form to fit the document) Table 10.5, OCR v. the Supreme Court, in my dissertation document. I bought the Kindle book, so I don't have an exact page number, but the table is in Chapter 10. The table speaks to my discussion on the differences between the courts, the ED, and institutions of higher education.

I reached out to Dr. Melnick (he said it was okay), but I know I need your permission as well. Please let me know if you will grant me permission to use the table in my dissertation. Thank you very much.

Sincerely,
Matthew Marino
Seton Hall University

Appendix G: Email of Permission to Use Job Board Data Provided by ATIXA for Appendix C

**To:** Matthew Marino <mm2671@rbhs.rutgers.edu>
**Subject:** Re: ATIXA Job Board

Matthew,

Yes, we have that information. I've blinded our tracker and attached it for you!

Regards,
MegC

**Take advantage of the last Title IX Coordinator & Administrator Level One Training & Certification Course for 2019! Register now for this ATIXA East Annual Conference Pre & Post-Conference Training & Certification Course.**

**The Team at ATIXA**
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p. (610) 644.7858 | f. (610) 993.0228
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1109 Lancaster Ave | Berwyn, PA 19312

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**From:** Matthew Marino <mm2671@rbhs.rutgers.edu>
**Date:** Monday, August 12, 2019 at 4:09 PM
**To:** ATIXA Info <info@atixa.org>
**Subject:** ATIXA Job Board

Hello,

I am doing a dissertation on Title IX and was wondering if you tracked the number of jobs posted to your website over a period of time. If so, do you have the approximate number of jobs that have been posted within the past year? I would love to have that information if you collect it. Thank you!

Sincerely,
Matt Marino