



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 117
Issue 2 *Dickinson Law Review* - Volume 117,
2012-2013

10-1-2012

The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX's Objectives

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The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX’s Objectives

Alison Renfrew*

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I. INTRODUCTION

In 1972, Congress passed a “landmark civil rights law,”¹ Title IX,² to address inequality between the sexes in the education setting.³ Although Title IX is most commonly associated with athletics,⁴ its application and effect have been far-reaching.⁵ Since its enactment in 1972,⁶ Title IX has enabled women to achieve tremendous progress inside and outside the classroom.⁷

Indeed, Title IX has left an indelible impact on society.⁸ Title IX’s “national commitment to end [sex] discrimination”⁹ has helped to reshape and redefine society’s views towards women.¹⁰ Despite Title

1. Marcia D. Greenberger & Neena K. Chaudhry, *Worth Fighting For: Thirty-Five Years of Title IX Advocacy in the Courts, Congress and the Federal Agencies*, 55 CLEV. ST. L. REV. 491, 491 (2007).

2. See Patsy Takemoto Mink Equal Opportunity in Education Act, 20 U.S.C. §§ 1681-88 (2006).

3. See Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 18 (2003) (stating that prior to the enactment of Title IX, women were “excluded from educational opportunities solely on the basis of sex”); see also Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1264 (1979) [hereinafter *Sex Discrimination*] (explaining that the social policy underlying Title IX was to ensure equal access to education for all Americans, regardless of sex).

4. See NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 30: REPORT CARD ON GENDER EQUITY 14 (June 2002) [hereinafter TITLE IX AT 30], available at <http://www.ncwge.org/PDF/TitleIXat30.pdf> (describing Title IX as “synonymous” with athletics).

5. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (discussing the broad application of Title IX to any program or activity of an institution that receives federal financial assistance).

6. See DEP’T OF EDUC., TITLE IX: 25 YEARS OF PROGRESS 8 (1997) [hereinafter TITLE IX: 25 YEARS] (stating that President Nixon signed Title IX into law on June 23, 1972).

7. See Greenberger & Chaudhry, *supra* note 1, at 491 (noting that Title IX has opened the doors to women in a number of areas including “higher education, employment, and . . . athletics”).

8. From 1971 to 1972, approximately 294,000 high school females participated in athletics. See WOMEN’S SPORTS FOUND., PLAY FAIR: A TITLE IX PLAYBOOK FOR VICTORY 4 (2009), available at <http://www.avca.org/includes/media/docs/Play-Fair-Final.pdf>. In 2007-2008, almost 3 million women participated in high school athletics, an increase of 940%. *Id.* From 1971 to 1972, approximately 30,000 female varsity athletes participated in NCAA sports as compared to approximately 167,000 in 2004-2005, an increase of 456%. See NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 35: BEYOND THE HEADLINES 8 (2008) [hereinafter TITLE IX AT 35], available at <http://www.ncwge.org/PDF/TitleIXat35.pdf>. As of 1997-1998, women earned 57% of all master’s degrees as compared with 41% in 1971-1972. See TITLE IX AT 30, *supra* note 4, at 10. As of 1997-1998, women earned 42% of all doctoral level degrees as compared with 16% in 1971-1972. See TITLE IX at 30, *supra* note 4, at 10.

9. TITLE IX: 25 YEARS, *supra* note 6, at 5.

10. See *id.*

IX's many achievements,¹¹ more work is needed to build upon the gains made thus far.¹² In particular, reforms must be made to strengthen and improve enforcement of Title IX by the U.S. Department of Education's Office for Civil Rights (OCR).

This Comment will address several problems related to the current administrative and enforcement structure. Additionally, this Comment will propose several recommendations to improve the administrative structure of OCR and its enforcement of Title IX.

Part II of this Comment will address the history of Title IX and will describe the legislative struggle to enact a comprehensive sex discrimination statute. In addition, this Part will examine Title IX's objectives and the judiciary's involvement in defining the scope of Title IX. Lastly, Part II will describe the administrative process for filing a Title IX complaint with OCR.

Part III will address several substantive problems with OCR's administrative process. The current administrative process is simply ineffective,¹³ a problem that is compounded by OCR's failure to adequately enforce Title IX. Part III will also suggest several proposals for reforming both OCR's administrative structure and its enforcement of Title IX.

II. BACKGROUND

Title IX's influence and impact has been shaped, in large part, by its history. This Part focuses on the impact that the legislature, judiciary, and OCR have had on Title IX. Although Congress has recognized sex discrimination as a problem in American society,¹⁴ it has struggled to formulate and enact a comprehensive solution.¹⁵

The result was Title IX, a simple statute that sought to eliminate sex discrimination, especially in education.¹⁶ The Supreme Court would later expand the scope of Title IX while providing individuals with a powerful tool to combat sex discrimination.¹⁷ OCR gave practical effect

11. See sources cited *supra* note 8.

12. See Greenberger & Chaudhry, *supra* note 1, at 491 (noting that Title IX's "job is far from finished.").

13. See Suzanne Eckes, *The Thirtieth Anniversary of Title IX: Women Have Not Reached the Finish Line*, 13 S. CAL. REV. L. & WOMEN'S STUD. 3, 33 (2003) (noting that the administrative process was supposed to be "inexpensive, efficient, and effective" for resolving violations of Title IX).

14. *Sex Discrimination Regulations: Hearings Before the House Subcomm. on Post-Secondary Educ. of the Comm. on Educ. & Labor*, 94th Cong. 166 (1975) [hereinafter *Hearings*] (Statement of Rep. Patsy Mink).

15. See *infra* Part II.A.

16. See *infra* Part II.B.

17. See *infra* Part II.C.

to Title IX by creating an administrative process through which complaints could be made and resolved.¹⁸

A. *History of Title IX*

Title IX was enacted as a floor amendment in 1972¹⁹ with little debate²⁰ and no formal hearings²¹ or committee reports.²² However, in the years immediately preceding the enactment of Title IX, Congress made extensive findings, evidencing widespread discrimination against women.²³ These findings would later serve as the basis for Title IX.²⁴

In 1969, President Richard Nixon established the Presidential Task Force on Women's Rights and Responsibilities²⁵ to provide women with equal rights, primarily through legislative and executive action.²⁶ The task force made recommendations that were designed to end sex discrimination, several of which specifically addressed problems in education.²⁷

In 1970, Representative Edith Green, a Democrat from Oregon, chaired a series of hearings before the Special House Subcommittee on Education.²⁸ These were the first hearings devoted to the topic of sex discrimination.²⁹ The evidence presented at the hearings demonstrated that "discrimination against women . . . is still overt and socially

18. See *infra* Part II.D.

19. See Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 557 (1994).

20. See *Sex Discrimination*, *supra* note 3, at 1255 (noting that Title IX passed with little debate).

21. See Matthew L. Daniel, *Title IX and Gender Equity in College Athletics: How Honesty Might Avert A Crisis*, 1995 ANN. SURV. AM. L. 255, 262 (1995).

22. See Claudia S. Lewis, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 FORDHAM L. REV. 1043, 1050 (1983).

23. See Roak J. Parker, *Compensatory Relief Under Title IX of the Education Amendments of 1972*, 68 EDUC. L. REP. 557, 558 (1991) (noting that Congress was presented with substantial evidence documenting sex discrimination in education).

24. See *id.* at 558-59 (explaining that the debate on Title IX relied extensively on evidence previously presented to Congress).

25. See PRESIDENTIAL TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE (1970), available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015000529977;seq=3;view=1up;num=i>.

26. See *id.* at 3-4, 18.

27. See *id.* at 7, 9 (discussing several legislative and executive proposed actions to end sex discrimination); see also *Sex Discrimination*, *supra* note 3, at 1266 (noting the relevance of the Presidential Task Force to the history of Title IX).

28. See Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283, 290 (2000).

29. See TITLE IX: 25 YEARS, *supra* note 6, at 7; see also 148 CONG. REC. H4860 (daily ed. July 17, 2002) (statement of Rep. Patsy Mink) (describing how she and her daughter were denied admission to professional school because they were female).

acceptable within the academic community.”³⁰ Thus, in 1970, Representative Green proposed a bill to amend Title VI of the Civil Rights Act of 1964 to include sex as a protected class.³¹ Despite extensive findings, Congress failed to pass the bill into law.³²

Undeterred, Representative Green introduced a new sex discrimination bill during the next legislative term.³³ Representative Green’s bill attracted the support of Senator Birch Bayh (D-IN), who introduced a similar version in the Senate.³⁴ Instead of amending Title VI, the House and Senate bills proposed a new civil rights statute that would specifically prohibit sex discrimination.³⁵ The House and Senate rejected the bills despite extensive debate.³⁶

In 1972, Senator Bayh and Representative Green reintroduced the bills as additions to the Education Amendments of 1972.³⁷ With little debate,³⁸ Congress passed the Senate version of what is now referred to as Title IX.³⁹

B. *Defining Title IX: A Look at Its Scope and Objectives*

Title IX is a short and relatively straightforward statute.⁴⁰ It states, “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

30. Fact Sheet accompanying Amendment No. 874 to the Higher Education Bill S. 659, 92d Cong., 2d Sess. 118 CONG. REC. 5808-09 (1972), at 5808 (quoting Report on Higher Education, a report for the U.S. Department of Health, Education, and Welfare (HEW), sponsored by the Ford Foundation).

31. See Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 53 (1996) (explaining that Congress initially proposed amending Title VI to include sex as a prohibited form of discrimination).

32. See Parker, *supra* note 23, at 558.

33. See *id.* at 559.

34. See Jurewitz, *supra* note 28, at 290-91 (discussing how Representative Green and Senator Bayh sought to add anti-sex discrimination language to the 1971 Education Amendment bills); see also TITLE IX: 25 YEARS, *supra* note 6, at 7 (noting that there were several bills circulating in Congress and the White House that addressed the issue of sex discrimination).

35. See Parker, *supra* note 23, at 559 (stating that, rather than proposing an amendment to Title VI, the new bill “specifically incorporated a provision disallowing sex discrimination”).

36. See Jurewitz, *supra* note 28, at 291 (noting that Congress engaged in extensive debate, but that neither the House nor the Senate bill passed).

37. See *id.*

38. See Parker, *supra* note 23, at 559 (stating that the lack of debate on Title IX was due to the overwhelming “need for remedial legislation”).

39. See Jurewitz, *supra* note 28, at 291.

40. See Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 333 (1999) (noting Title IX’s “facially clear” language).

discrimination under any education program or activity receiving Federal financial assistance."⁴¹

Title IX has been interpreted as having two primary objectives: (1) to prohibit sex discrimination by any institution receiving federal funding; and (2) to provide individuals with effective remedies against such discrimination.⁴² Title IX must be construed broadly to effectuate the goals and purpose of the statute.⁴³ Indeed, even the Supreme Court has recognized that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."⁴⁴

C. *Title IX and the Judiciary: A Private Cause of Action is Born*

Immediately after Title IX's enactment, courts began grappling with the issue of whether individuals could bring a private cause of action under Title IX.⁴⁵ Neither the language of Title IX⁴⁶ nor its legislative history⁴⁷ provided an affirmative answer.⁴⁸ As a result, courts interpreted Title IX in different ways and created a patchwork of conflicting decisions.⁴⁹ In *Cannon v. University of Chicago*,⁵⁰ the

41. 20 U.S.C. § 1681 (2006).

42. See Lewis, *supra* note 22, at 1046 (discussing Title IX's two objectives).

43. See 118 CONG. REC. 5803, 5806-07 (1972) (statement of Sen. Birch Bayh) (noting that Title IX was intended to be "a strong and comprehensive measure" that was necessary to eliminate sex discrimination); see *Hearings*, *supra* note 14 (statement of Caspar Weinberger) (stating that the broad language of Title IX dictates the statute's broad scope of coverage).

44. *United States v. Price*, 383 U.S. 787, 801 (1966).

45. See Melody Harris, *Hitting 'Em Where it Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57, 65 (1994) (noting that courts have interpreted Title IX to "foreclose any private right of action by individuals"). *But see* Parker, *supra* note 23, at 562 (noting that a number of lower courts had concluded that Title IX provided for a private cause of action).

46. See Patsy Takemoto Mink Equal Opportunity in Education Act, 20 U.S.C. §§ 1681-88 (2006).

47. See 118 CONG. REC. 5803, 5806-07 (statement by Sen. Birch Bayh) (noting that Congress intended Title IX to provide legal protection for women in the educational setting).

48. See Parker, *supra* note 23, at 562 (noting that the Supreme Court *inferred* a private cause of action under Title IX) (emphasis added).

49. See *Cannon v. Univ. of Chi.*, 559 F.2d 1063, 1072-73 (7th Cir. 1976), *rev'd*, 441 U.S. 677 (1979) (reasoning that Congress did not intend to create a private cause of action under Title IX because Congress carefully constructed an administrative enforcement scheme to manage complaints of sex discrimination). *But see* Alexander v. Yale Univ., 459 F. Supp. 1, 5 (D. Conn. 1977) (concluding that plaintiffs may bring a private cause of action under Title IX because Congress did not clearly permit or preclude such action).

50. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

Supreme Court resolved the split among the lower courts by holding that Title IX included an implied private cause of action.⁵¹

In its decision, the Court noted that Title IX is silent as to whether a private cause of action exists under the statute.⁵² The Court accepted the Department of Health, Education, and Welfare's ("HEW")⁵³ interpretation that Title IX includes an implied private cause of action.⁵⁴ The Court also reasoned that recognizing a private cause of action would further Title IX's objective of protecting individuals from discrimination.⁵⁵ According to the Court, terminating an institution's federal funding made little sense given the severity of the remedy and its questionable efficiency, especially for isolated incidents of sex discrimination.⁵⁶ Title IX's expressed remedy would thus provide little benefit to the complaining party.⁵⁷ In addition, the Court reasoned that a private cause of action existed under Title IX because the statute was modeled after Title VI,⁵⁸ a statute that courts had previously interpreted to include such a right.⁵⁹ Moreover, the Court noted that Congress referenced Title VI during the Title IX debates,⁶⁰ evidencing an intention

51. *See id.* at 717 (stating that the Court has "long recognized" a private cause of action may be available even though Congress has failed to specify as much).

52. *See Patsy Takemoto Mink Equal Opportunity in Education Act*, 20 U.S.C. §§ 1681-88 (2006); *see also Cannon*, 441 U.S. at 683 (noting that Title IX has no language explicitly authorizing a private cause of action for sex discrimination).

53. At the time that Title IX was enacted, HEW was the principal federal agency in charge of enforcing the provisions of Title IX. *See Lewis, supra* note 22, at 1045 n.12. However, in 1979, Congress divided HEW into the U.S. Department of Education and U.S. Department of Health and Human Services as part of the Department of Education Organization Act of 1979. *See id.* As a result of the division, the Department of Education's Office for Civil Rights was charged with enforcing the provisions of Title IX. *See* 20 U.S.C. § 3413 (2006) (establishing OCR); *see also* 20 U.S.C. § 3441(a)(3) (2006) (transferring HEW's responsibilities to OCR).

54. *See Cannon*, 441 U.S. at 706 (noting that the Court agreed with HEW that there was "no inconsistency" in having both a private and public remedy under Title IX).

55. *See id.* at 705-06 ("The award of individual relief to a private litigant . . . is not only sensible but is also fully consistent with—and in some cases even necessary—to the orderly enforcement of the statute.").

56. *See id.* at 705 (stating that Title IX's public remedy would place a heavy burden on both the individual and HEW, a burden which would be inappropriate for isolated incidents).

57. *See id.* (noting that individuals seek a remedy that benefits them and their situation).

58. *See Cannon*, 441 U.S. at 694-96 (noting that Title VI and Title IX use identical language with the exception of the words "sex" and "race, color or national origin" and that the statutes provide for the same administrative remedy, the termination of federal funding).

59. *See id.* at 696, 702-03 (noting that courts have interpreted Title IX in a manner consistent with that of Title VI).

60. *See id.* at 699-701, 703 (discussing the long-standing assumption made by legislators and courts that Title IX contained a private cause of action).

that the two statutes should be interpreted and applied in the same manner.⁶¹

In *Franklin v. Gwinnett County Public Schools*,⁶² the Supreme Court settled an issue that remained unresolved since *Cannon*:⁶³ the types of remedies available to plaintiffs for a private cause of action under Title IX.⁶⁴ In *Franklin*, the Supreme Court unanimously held that monetary damages were available for intentional violations of Title IX.⁶⁵ The Court noted that, when a private cause of action is recognized, the presumed rule is that all appropriate remedies are available unless Congress has indicated otherwise.⁶⁶ Such a rule has a longstanding history in the common law⁶⁷ as well as in the Court's jurisprudence.⁶⁸ Additionally, the Court reasoned that monetary damages were the only suitable remedy for those Title IX claims brought by students.⁶⁹ To hold otherwise would leave student-plaintiffs with no meaningful remedy.⁷⁰ In its decision, the Court implicitly acknowledged that monetary damages could be useful in furthering Title IX's objectives.⁷¹

As a result of the *Cannon*⁷² and *Franklin*⁷³ decisions, private litigation has flourished and has become an important Title IX enforcement tool.⁷⁴ The mere threat of litigation and the potential for large monetary damage awards serves as a powerful incentive for educational institutions to comply with Title IX.⁷⁵ Despite these

61. See *id.* at 699 (describing Title IX as a "companion" to Title VI).

62. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992).

63. *Cannon*, 441 U.S. at 717.

64. See *Franklin*, 503 U.S. at 65; see also Parker, *supra* note 23, at 563 (noting that the Court in *Cannon* left unresolved the issue of what remedies were available for a private cause of action under Title IX).

65. See *Franklin*, 503 U.S. at 76 ("[A] damages remedy is available for an action brought to enforce Title IX.").

66. See *id.* at 66 ("[T]he Judiciary [has the power] to award appropriate remedies to redress injuries.").

67. See *id.* (noting that this principle derives from English common law).

68. See *id.*

69. See *Franklin*, 503 U.S. at 76.

70. See Susan L. Wright, *Franklin v. Gwinnett County Public Schools: The Supreme Court Implies a Damages Remedy for Title IX Sex Discrimination*, 45 VAND. L. REV. 1367, 1381 (1992) (noting that an award of compensatory damages for a Title IX claim is the most meaningful remedy for students).

71. See *Franklin*, 503 U.S. at 76; see also Wright, *supra* note 70, at 1380 (noting that the availability of monetary damages will help "further the purposes of Title IX. . .").

72. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

73. *Franklin*, 503 U.S. at 76.

74. See Harris, *supra* note 45, at 96 (noting that private litigation is now the greatest threat to educational institutions for violating Title IX).

75. See Brake & Catlin, *supra* note 31, at 60-61 (discussing how the threat of large damage awards can serve as a powerful and effective incentive for educational institutions to comply with Title IX); see also Ellen J. Vargyas, *Franklin v. Gwinnett County Public Schools and Its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373, 384

benefits, private litigation is time-consuming and cost-prohibitive for many individuals.⁷⁶ Moreover, private litigation focuses more on the individual complaint than it does on systemic problems.⁷⁷ If Title IX is to be a “strong and comprehensive”⁷⁸ statute, private litigation may not be the best means of achieving this goal.⁷⁹ To give effect to Title IX’s broad objectives,⁸⁰ complaints under Title IX would be better addressed through an administrative enforcement process.⁸¹

D. The Administrative Process Under Title IX: Filing a Complaint with OCR

Following Title IX’s enactment,⁸² Congress directed HEW to promulgate regulations to implement and enforce Title IX.⁸³ In 1974 and 1975, HEW proposed procedural and substantive regulations for Title IX.⁸⁴ Upon encountering significant pressure from the Senate,⁸⁵ HEW withdrew the proposed procedural regulations⁸⁶ and instead adopted the procedural regulations from Title VI.⁸⁷

The procedural regulations for Title IX permit complaints to be filed directly⁸⁸ with OCR.⁸⁹ Title IX’s procedural regulations state that

(1993) (explaining that, after the *Franklin* decision, the failure to address sex discrimination claims can be costly for educational institutions).

76. See Johnson, *supra* note 19, at 560 (noting the “time, effort, and expense required” for private litigation).

77. See Julie A. Davies & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 43-45 (2007) (noting that private litigation focuses on resolving an individual complaint rather than taking a systemic approach).

78. 118 CONG. REC. 5803 (1972) (statement of Sen. Birch Bayh).

79. See Lewis, *supra* note 22, at 1051 (discussing how “[Title IX] was intended to have an expansive reach”).

80. See Johnson, *supra* note 19, at 557-58.

81. See *infra* Part II.D (discussing the administrative enforcement process under Title IX).

82. See Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391, 394 (1997) (stating that Title IX was enacted on June 23, 1972).

83. See Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (requiring HEW to issue regulations implementing Title IX with respect to education programs).

84. See Parker, *supra* note 23, at 561 (noting the regulations issued by HEW for Title IX).

85. See S. Res. 235, 94th Cong. (1975).

86. See Parker, *supra* note 23, at 561.

87. See 34 C.F.R. § 106.71 (2012) (adopting and incorporating the procedures from Title VI into Title IX).

88. See *id.* § 100.7 (permitting complaints to be filed directly with OCR).

89. Although this Comment does not address the issue of compliance reviews, Title IX does permit OCR to initiate such reviews of educational institutions. See *id.* (discussing compliance reviews).

“[a]ny person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint.”⁹⁰

To file a complaint with OCR, the complainant must submit a written summary of the alleged discrimination.⁹¹ The complaint should be as detailed as possible and must be filed within 180 days of the alleged discrimination.⁹² The 180-day deadline for filing may be extended by OCR for good cause.⁹³

OCR's complaint resolution process is substantially similar to the process used internally by many educational institutions.⁹⁴ Upon receipt of a complaint, OCR will promptly acknowledge the complaint,⁹⁵ and will review the complaint to ensure timeliness,⁹⁶ jurisdiction,⁹⁷ and merit.⁹⁸ Failure on any of these three fronts will result in OCR

90. *Id.*

91. See OCR, DEP'T OF EDUC., TITLE IX AND SEX DISCRIMINATION 3 (1998), available at <http://www2.ed.gov/about/offices/list/ocr/docs/tixdis.html>. The complaint may include such information as: (1) an explanation of who was discriminated against and in what way; (2) the identity of the educational institution or individual who committed the discrimination; (3) when the alleged discrimination took place; and (4) contact information for the parties involved. *Id.*

92. *See id.*

93. *See id.*; see also OCR, DEP'T OF EDUC., CASE PROCESSING MANUAL [hereinafter CASE PROCESSING MANUAL], available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrpmp.html> (last modified Jan. 25, 2012) (describing several “good cause” circumstances in which OCR will extend the 180-day filing requirement).

94. Title IX's procedural regulations state that each educational institution receiving federal funding must establish an internal grievance process to administer Title IX complaints. See 34 C.F.R. § 106.8 (2012). The main distinctions between OCR's administrative enforcement structure and the internal grievance procedure are the lack of deadlines to investigate and resolve complaints, and the informal nature of the internal grievance process. See, e.g., *Internal Complaints*, PA. STATE UNIV. AFFIRMATIVE ACTION OFFICE, <http://www.psu.edu/dept/aaoffice/internal.htm> (last modified Feb. 9, 2012); see also *Resolution of Complaints*, PA. STATE UNIV. AFFIRMATIVE ACTION OFFICE, <http://www.psu.edu/dept/aaoffice/resolution.htm> (last modified Feb. 9, 2012); Interview with Kenneth F. Lehrman III, Vice Provost for Affirmative Action, Pa. State Univ., in State College, Pa. (Oct. 18, 2011).

95. *See* CASE PROCESSING MANUAL, *supra* note 93.

96. *See id.* (discussing how a complaint must be filed within 180 calendar days of the date of the last act of alleged discrimination).

97. *See id.* In order for OCR to investigate a complaint, it must have both subject matter and personal jurisdiction. *See id.* Subject matter jurisdiction can be determined based on the nature of the allegations. *See* CASE PROCESSING MANUAL, *supra* note 93. If the allegations implicate a statute that OCR is responsible for enforcing, then OCR has subject matter jurisdiction over the complaint. *See id.* Personal jurisdiction means that OCR has jurisdiction over the institution where the discrimination occurred. *See id.* Under Title IX, OCR has personal jurisdiction over any institution that receives federal financial assistance. *See id.*

98. In regards to merit, OCR is primarily focused on whether the complaint includes sufficient detail to state a violation of law. *See id.*

dismissing the complaint.⁹⁹ If a complaint meets these standards, OCR will then have 90 days to conduct and complete its investigation of the complaint.¹⁰⁰

Following the investigation, OCR will issue Letters of Finding¹⁰¹ to all parties stating whether the educational institution complied with Title IX.¹⁰² A finding of compliance essentially ends the case from OCR's perspective,¹⁰³ although the complainant retains the right to file a lawsuit.¹⁰⁴ If the educational institution is found to be in violation of Title IX,¹⁰⁵ then OCR has an additional 90 days¹⁰⁶ to negotiate a voluntary resolution agreement with the educational institution.¹⁰⁷ When a resolution agreement is successfully negotiated, OCR will generally consider the educational institution to be in compliance with Title IX.¹⁰⁸ Thereafter, OCR may periodically monitor the educational institution to ensure that the resolution provisions are properly implemented.¹⁰⁹

Failure to reach a resolution agreement may result in OCR imposing sanctions on the noncompliant educational institution.¹¹⁰ Sanctions can range from referring the case to the U.S. Department of Justice ("DOJ")¹¹¹ to initiating administrative proceedings in order to suspend or

99. See CASE PROCESSING MANUAL, *supra* note 93 (discussing the various ways in which a complaint can be dismissed).

100. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

101. See CASE PROCESSING MANUAL, *supra* note 93.

102. See *id.*

103. See Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 20 (1992) [hereinafter *Women & Athletics*] (stating that a complaint will be closed or dismissed if OCR determines that no violation occurred).

104. See CASE PROCESSING MANUAL, *supra* note 93.

105. OCR uses a preponderance of the evidence standard when determining whether an institution violated Title IX. See *id.*

106. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

107. See *id.*; see also Davies & Bohon, *supra* note 77, at 51 (noting that, if there is a violation of Title IX, OCR will work with the educational institution to obtain a resolution agreement to ensure future compliance).

108. See Setty, *supra* note 40, at 345 (discussing how OCR automatically designates an institution in compliance after a resolution agreement has been reached); see also Vargyas, *supra* note 75, at 381 (discussing how OCR's general practice is to "negotiate 'assurances' with the institution in which the institution represented that it will come into compliance; on the basis of these assurances find that the institution is in compliance; and to close the case with little, if any, follow-up.").

109. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

110. See CASE PROCESSING MANUAL, *supra* note 93; see also Harris, *supra* note 45, at 95 (discussing how "OCR makes repeated attempts to secure compliance" through voluntary means before it will consider using sanctions).

111. See *Women & Athletics*, *supra* note 103, at 20.

terminate federal funding.¹¹² Thus far, OCR has rarely imposed sanctions on noncompliant institutions,¹¹³ nor has it ever initiated the administrative process to terminate an institution's federal funding.¹¹⁴ OCR's failure to use sanctions will be further addressed in the Part III.

III. ANALYSIS

To say that OCR is overwhelmed would be an understatement. OCR is responsible for monitoring and enforcing Title IX for thousands of educational institutions.¹¹⁵ At the same time, the number of complaints filed with OCR has steadily increased since Title IX's implementation.¹¹⁶ Ideally, OCR should have increased resources, such as more money and investigators, to manage its increasing workload.¹¹⁷ However, today's economic state requires OCR to focus on increasing efficiency using their current resources.¹¹⁸ Additionally, OCR must be cognizant of a changing political landscape because such change can affect the direction and mission of OCR.¹¹⁹ Although these external issues are unlikely to be resolved any time soon, OCR can and should

112. See CASE PROCESSING MANUAL, *supra* note 93.

113. See Davies & Bohon, *supra* note 77, at 41 (describing OCR's "off-kilter" enforcement strategy). Moreover, OCR has stopped using even this limited sanction as no cases have been referred to the DOJ since 1988. See Eckes, *supra* note 13, at 32.

114. See DEP'T OF EDUC., SEC'YS COMM'N ON OPPORTUNITY IN ATHLETICS, OPEN TO ALL: TITLE IX AT THIRTY 27 (2003) [hereinafter OPPORTUNITY IN ATHLETICS], available at <http://www2.ed.gov/about/bdscomm/list/athletics/report.html> (noting concerns that Title IX enforcement is not strong because federal funding has never been withheld from an institution).

115. See DEP'T OF EDUC., ANN. REP. TO CONGRESS OF THE OFFICE FOR CIVIL RIGHTS FISCAL YEAR 2007-08, at 1-2 (2009) [hereinafter CONGRESS], available at <http://www2.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf> (noting that OCR enforced Title IX for 17,618 public elementary and secondary education agencies, as well as 4,276 colleges and universities).

116. See DEP'T OF EDUC., FISCAL YEAR 2012 BUDGET REQUEST BB-12 (2011) [hereinafter FISCAL YEAR], available at <http://www2.ed.gov/about/overview/budget/budget12/justifications/bb-ocr.pdf> (noting that, in 2010 alone, OCR received approximately 7,000 complaints, a 9% increase from the previous year).

117. See Davies & Bohon, *supra* note 77, at 53 (noting that there "would never be enough funds to 'police' all funding recipients . . . much less actually 'walk the walk' with respect to Title IX enforcement"); see also COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? 11 (2004) [hereinafter 10-YEAR CHECK-UP], available at <http://www.usccr.gov/pubs/10yr04/10yr04.pdf> (noting that OCR's staffing levels have decreased approximately 6% over a 7-year period).

118. See FISCAL YEAR, *supra* note 116, at BB-7 (noting the funding levels of OCR since 2003).

119. See Davies & Bohon, *supra* note 77, at 49-50 (noting that political change can lead to shifting priorities and resources within federal agencies); see also Kristen Galles, *Title IX and the Importance of a Reinvigorated OCR*, 37 HUM. RTS. 18, 18 (2010) (noting that the "kind of difference OCR makes depends on who is in charge").

address some of the internal problems with Title IX enforcement.¹²⁰ In particular, this Part discusses problems with the current administrative process by which OCR manages Title IX complaints. This Part also discusses OCR's failure to adequately enforce Title IX. Finally, this Part identifies several proposed reforms that OCR should undertake to address these problems. These proposed reforms are designed to improve the administrative process and OCR's enforcement of Title IX.¹²¹

A. *The Bad, the Ugly, and the Worst: Problems with the Administrative Process and OCR's Enforcement of Title IX*

This section identifies and discusses four main problems with OCR's administrative and enforcement process under Title IX: (1) the limited role that the complaining party has under Title IX's administrative structure; (2) OCR's 90-day deadlines are unworkable and artificial; (3) inconsistent decisions by OCR's regional offices lead to considerable confusion for educational institutions; and (4) OCR's failure in strongly enforcing Title IX despite the availability of several powerful enforcement tools.

1. The Limited Role that the Complainant has in OCR's Resolution Process

One of the problems with OCR's current administrative process is the limited involvement of the complainant.¹²² Apart from filing a complaint with OCR, the complainant is excluded from serving as an active participant in the remainder of the process.¹²³ Even though the complainant has a considerable interest at stake in the matter,¹²⁴ his or her input is sought only when filing a complaint.¹²⁵ Not only will the final resolution agreement have a tremendous impact on the complainant's situation,¹²⁶ the complainant can also provide a firsthand

120. See *infra* Parts III.A.1-4.

121. See *infra* Parts III.B.1-5.

122. See Galles, *supra* note 119, at 21 (stating that the resolution of complaints is often done "without the participation, input, or approval of the injured party").

123. See *id.* (describing how the complainant has virtually no right to participate in the investigation of the complaint, nor the right to present evidence or reject any proposed resolutions).

124. See Davies & Bohon, *supra* note 77, at 43 (noting that the complainant seeks to remedy "past wrongs").

125. See Vargyas, *supra* note 75, at 381 (noting the lack of participation afforded to the complainant after a complaint has been filed with OCR).

126. See Setty, *supra* note 40, at 343 (stating that the complainant's input is necessary to ensure that the "violation will be properly addressed").

account of the issues.¹²⁷ OCR's unwillingness or inability to give the complainant a greater voice in the process,¹²⁸ especially as it relates to the negotiation of the resolution agreement, may derive from OCR's goal of ensuring institutional compliance with Title IX.¹²⁹ OCR seeks to redress systemic problems within an educational institution,¹³⁰ an approach that often conflicts with the interests of the complainant who seeks the resolution of his or her individualized complaint.¹³¹

2. The 90-Day Deadlines to Investigate and Resolve Complaints

Historically, OCR has had problems adhering to the 90-day deadlines for investigating and resolving complaints under Title IX.¹³² When initially imposed, OCR's 90-day deadlines were achievable.¹³³ Over time, however, the 90-day deadlines have become unrealistic in most cases;¹³⁴ the deadlines are nothing more than aspirational goals, and OCR is failing miserably.¹³⁵

Notwithstanding the other civil rights legislation that OCR is also responsible for enforcing,¹³⁶ Title IX itself is a "strong and

127. See *id.* (noting that students are often aware of potential violations even before the educational institution).

128. OCR endeavors to keep the complainant informed throughout all stages of the process. See CASE PROCESSING MANUAL, *supra* note 93. However, OCR does not represent the complaining party in the process and will not advocate on their behalf. See *OCR Complaint Processing Procedures*, OCR, <http://www2.ed.gov/about/offices/list/ocr/complaints-how.html> (last modified Jan. 10, 2012).

129. See Davies & Bohon, *supra* note 77, at 43.

130. See Parker, *supra* note 23, at 561 ("[Title IX] place[s] primary emphasis on the systematic monitoring and subsequent correction of discrimination. Less emphasis [is] placed on investigation and correction of individual discrimination.").

131. See Davies & Bohon, *supra* note 77, at 43-44 ("OCR's institutional goal of Title IX compliance differs considerably" from the complaining party where the "focus [is] on the individual complaint.").

132. See *id.* at 52 (criticizing the time it "takes [OCR] to investigate and resolve complaints.").

133. See MAJORITY STAFF OF H.R. COMM. ON EDUC. & LABOR, 100TH CONG., REP. ON THE INVESTIGATION OF THE CIVIL RIGHTS ENFORCEMENT ACTIVITIES OF THE OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION 6 (Comm. Print 1988) [hereinafter H.R. COMM. ON EDUC. & LABOR REPORT] (recommending that OCR establish uniform timeframes for processing complaints).

134. See Davies & Bohon, *supra* note 77, at 52 (noting that it takes OCR on average about six months to resolve complaints).

135. See Sara Lipka & Brad Wolverson, *Title IX Enforcement Called 'Deeply Troubling'*, CHRON. OF HIGHER EDUC., June 29, 2007, available at <http://chronicle.com/article/Title-IX-Enforcement-Called/3779> (discussing how OCR is struggling with its responsibilities under Title IX).

136. See *About OCR*, OCR, <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified Mar. 23, 2005) [hereinafter *About OCR*] (noting that OCR is responsible for enforcing several other substantial civil rights laws including Title VI, the Age Discrimination Act, and the Americans with Disabilities Act of 1990).

comprehensive” statute.¹³⁷ In addition, OCR is responsible for monitoring and enforcing Title IX for thousands of educational institutions.¹³⁸ The increasing caseload¹³⁹ and the complex nature of Title IX complaints¹⁴⁰ render the 90-day deadline unrealistic for most cases.¹⁴¹ Instead, investigations often continue for months or even years.¹⁴² The administrative process is no longer viewed as an expeditious route for resolving Title IX complaints.¹⁴³ OCR must realize that the 90-day deadline, while aspirational, is no longer feasible.¹⁴⁴ Either the quality of the investigation will suffer or the backlog of complaints and investigations will continue to increase.¹⁴⁵ In either case, the result is the same: an administrative process that suffers and a long list of complainants who “want and need” prompt resolution.¹⁴⁶

3. The Patchwork of Conflicting Decisions by OCR

Another problem with OCR’s current administrative process is the lack of uniformity in enforcing Title IX.¹⁴⁷ In part, this uniformity problem stems from the fact that OCR’s 12 regional offices¹⁴⁸ differ

137. 118 CONG. REC. 5803, at 5806-07 (1972) (statement of Sen. Birch Bayh).

138. As of fiscal year 2007-2008, OCR enforced Title IX in over 17,618 public elementary and secondary education agencies, as well as in 4,276 colleges and universities. See CONGRESS, *supra* note 115, at 1.

139. See FISCAL YEAR, *supra* note 116, at BB-12 (projecting that OCR will receive approximately 7,000 complaints in 2012).

140. See Setty, *supra* note 40, at 346 (discussing possible reasons why investigations are so time consuming).

141. See Davies & Bohon, *supra* note 77, at 60 (noting that the “sheer magnitude” of Title IX “makes oversight difficult”).

142. See Katie Thomas, *Long Fights for Sports Equity, Even with a Law*, N.Y. TIMES, July 28, 2011, at A1, available at http://www.nytimes.com/2011/07/29/sports/review-shows-title-ix-is-not-significantly-enforced.html?pagewanted=all&_r=0 (recalling the 13-year investigation of the University of Southern California for a violation of Title IX); see also Lipka & Wolverton, *supra* note 135 (discussing how some complaints have taken up to four years to be resolved).

143. See Setty, *supra* note 40, at 346 (noting that the administrative process was supposed to be a quicker method than litigation).

144. See FISCAL YEAR, *supra* note 116, at BB-7, BB-12 (stating that OCR may have to make do with less even as the number of complaints increases).

145. See *OCR Strategic Plan FY 2000*, OCR, <http://www2.ed.gov/print/about/offices/list/ocr/strategic2000.html> (last updated Mar. 9, 2005) [hereinafter *Strategic Plan*] (discussing OCR’s short term strategies to eliminate case backlogs and improve the complaint process to provide for faster resolution).

146. Davies & Bohon, *supra* note 77, at 52.

147. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 25-27 (noting that several complaints were made about OCR’s regional offices providing inconsistent advice on Title IX compliance).

148. See CONGRESS, *supra* note 115.

significantly in how they investigate and resolve complaints.¹⁴⁹ To help the regional offices evaluate complaints under Title IX, OCR distributes various manuals, such as the Investigator's Manual¹⁵⁰ and the Case Processing Manual.¹⁵¹ These manuals provide important guidance for OCR's regional employees.¹⁵² To be an effective guide, the manuals must be used in a consistent manner across all of OCR's regional offices.¹⁵³ However, some amount of discretion is necessary because no complaints are identical.¹⁵⁴ As a result, the manuals make clear that OCR's regional offices may exercise discretion as needed to account for local or regional differences.¹⁵⁵ OCR's regional offices need to have some discretion in how they enforce Title IX for their particular area,¹⁵⁶ but this same discretion means that no uniform standard exists.¹⁵⁷

This inherent tension has resulted in a patchwork of decisions.¹⁵⁸ In particular, the absence of uniform standards has created significant confusion for many educational institutions.¹⁵⁹ Without "clear and consistent" standards,¹⁶⁰ educational institutions face significant

149. See Setty, *supra* note 40, at 340 (noting that OCR's regional offices use "significantly different standards in determining Title IX violations").

150. See VALERIE M. BONNETTE & LAMAR DANIEL, OCR, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 4 (1990), available at <http://fs.ncaa.org/Docs/genderequity/resourcematerials/AuditMaterial/Investigator%27sManual.pdf>.

151. See CASE PROCESSING MANUAL, *supra* note 93.

152. See BONNETTE & DANIEL, *supra* note 150, at 2 (noting that the manual is designed to assist OCR investigators).

153. See Setty, *supra* note 40, at 340 (suggesting that OCR "implement uniform standards to determine Title IX violations").

154. See BONNETTE & DANIEL, *supra* note 150, at 4 (noting that "compliance problems . . . may vary considerably").

155. See *id.* ("[R]egional offices may exercise discretion . . . as may be necessary for a particular investigation.").

156. See *id.*

157. For example, in one case, the OCR regional office in Atlanta determined there was no violation of Title IX for a 28% disparity between female student enrollment and female athletic participation. See Setty, *supra* note 40, at 340-41. However, the OCR regional office in Boston determined that there was a violation of Title IX for a 6% disparity. See *id.* at 341.

158. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 27 (stating that inconsistency across OCR's regional offices is problematic and should be a high priority to fix).

159. See Jurewitz, *supra* note 28, at 301 (noting that OCR's attempts to provide clarification and guidance for institutions has "failed miserably"); see also Charles Spitz, *Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul?*, 21 SETON HALL LEGIS. J. 621, 631 (1997) (noting that confusion continues to linger in regards to the "scope and application" of Title IX).

160. Eckes, *supra* note 13, at 27 (stating that OCR recognizes that educational institutions "benefit from clear and consistent implementation of Title IX. . .").

obstacles in determining their compliance under Title IX and their ability to make changes as needed.¹⁶¹

4. OCR's Unwillingness to Exercise Its Power

Arguably, one of the most criticized areas¹⁶² regarding OCR is its failure to strongly enforce Title IX.¹⁶³ The problem is largely due to OCR's unwillingness to use available remedies to enforce Title IX.¹⁶⁴

Title IX is one of the few civil rights statutes providing for the ultimate sanction against an educational institution: the termination of federal funding.¹⁶⁵ However, OCR has never used this particular remedy to enforce Title IX,¹⁶⁶ nor has it ever initiated the funding termination process.¹⁶⁷ Although the termination of federal funding must not be a remedy of first resort,¹⁶⁸ OCR should not outright reject it as an enforcement tool.¹⁶⁹ Educational institutions have little incentive to voluntarily address compliance problems¹⁷⁰ or even to take proactive measures under Title IX.¹⁷¹ Moreover, many view the threat of

161. See Johnson, *supra* note 19, at 567 (noting that educational institutions rely on guidelines from OCR to evaluate their compliance under Title IX).

162. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 27 (stating that complaints have been made regarding OCR's enforcement of Title IX).

163. See H.R. COMM. ON EDUC. & LABOR REPORT, *supra* note 133, at 63 (stating that "in its failure to enforce the civil rights laws entrusted to it, the Office for Civil Rights of the Department of Education has caused harm to those whom it was established to protect. . .").

164. See Spitz, *supra* note 159, at 633 (stating that Title IX's ultimate penalty, the termination of federal funding, is *always* available and yet, OCR has *never* chosen to use it) (emphasis added).

165. See Davies & Bohon, *supra* note 77, at 69-70 (noting that Titles VI and IX were exceptions to most civil rights statutes because they "possessed a very strong enforcement mechanism from the outset – funding cut-off. . .").

166. See *id.* at 70 (explaining that terminating federal funding is "draconian" and is one of the main reasons why OCR is reluctant to use it).

167. See Eckes, *supra* note 13, at 32 ("[S]ince 1988 the OCR ha[s] never performed an administrative enforcement proceeding . . . or decided to withhold federal funds from an institution not in compliance with Title IX.").

168. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 27 (noting the numerous and far-reaching effects that may occur if an institution's federal funding was terminated).

169. See Galles, *supra* note 119, at 21 (noting that "OCR has initiated some enforcement proceedings for other statutes"); see also Eckes, *supra* note 13, at 32 (noting that OCR "must punish" those who violate Title IX).

170. See Vargyas, *supra* note 75, at 381 (noting that without enforcement by OCR, institutions have no real incentive to address problems under Title IX).

171. See Setty, *supra* note 40, at 345 (discussing how strong enforcement of Title IX can improve compliance because it "would force schools to realize that penalties for non-compliance are a real possibility").

terminating federal funding as illusory;¹⁷² it is merely an empty threat from OCR.¹⁷³

Apart from terminating federal funding,¹⁷⁴ OCR does have other powerful tools with which to enforce Title IX.¹⁷⁵ One such alternative is for OCR to conduct administrative hearings.¹⁷⁶ Similar to the termination of federal funding, however, this option has rarely been used by OCR.¹⁷⁷ Another enforcement tool available to OCR is to refer the complaint to the DOJ.¹⁷⁸ Once again, though, OCR has referred very few Title IX cases to the DOJ.¹⁷⁹

B. The Need for Reform: Improving the Administrative Process and Strengthening Title IX Enforcement

This section proposes several reforms to improve OCR's administrative structure and strengthen its enforcement of Title IX.¹⁸⁰ OCR should seek any approval from Congress that may be required to implement the proposed reforms.¹⁸¹ First, the complainant must be more involved with OCR's complaint resolution process.¹⁸² This involvement could be accomplished through periodic updates or, alternatively, by permitting the complainant to intervene as a party to a case brought by or on behalf of OCR.¹⁸³ Second, OCR must strengthen its enforcement of Title IX by using a variety of intermediate sanctions, including fines and public awareness campaigns.¹⁸⁴ Third, OCR must investigate and resolve complaints in a timely manner.¹⁸⁵ To achieve timeliness, OCR

172. See Galles, *supra* note 119, at 21 (suggesting that schools do not know that OCR is "serious" about enforcement and so they do not fear the threat of defunding).

173. See Harris, *supra* note 45, at 95 (noting that the "twenty-year standing threat of withdrawing federal funds has done little to bring" educational institutions into compliance with Title IX).

174. See 34 C.F.R. § 100.8 (2012) (describing the enforcement tools available to OCR).

175. See Eckes, *supra* note 13, at 32 (noting other remedies that are available to OCR under Title IX).

176. See *Women & Athletics*, *supra* note 103, at 19-20.

177. See *id.* at 20 (stating that only one Title IX case was given an administrative hearing).

178. See CASE PROCESSING MANUAL, *supra* note 93.

179. See Galles, *supra* note 119, at 21 ("OCR has referred only one case for litigation—nearly thirty years ago.").

180. See *infra* Parts III.B.1-5.

181. See H.R. COMM. ON EDUC. & LABOR REPORT, *supra* note 133, at 9 (stating that each Committee must review, on a continuing basis, whether "Federal agencies" are administering and executing the laws in accordance with congressional intent).

182. See *infra* Part III.B.1.

183. See *infra* Part III.B.1.

184. See *infra* Part III.B.2.

185. See *infra* Part III.B.3.

should lengthen the current deadlines beyond 90 days and ensure that investigators receive periodic reminders of ongoing investigations.¹⁸⁶ Fourth, OCR should seek the assistance of state and local education agencies in enforcing Title IX.¹⁸⁷ Lastly, OCR should centralize responsibility of Title IX to at least one designated regional office.¹⁸⁸

1. Reforming the Complaint Resolution Process

As previously discussed, the resolution of a complaint is largely left to the discretion of OCR and the educational institution to work out an agreement.¹⁸⁹ OCR should revise its administrative process so that the complainant is more involved in the investigation and resolution of his or her complaint.¹⁹⁰ This involvement could be accomplished by simply providing regular updates about any ongoing discussions, but should, at a minimum, include an opportunity for the complainant to comment on any proposed resolution agreement.¹⁹¹ Furthermore, the complainant should be given an opportunity to provide input on recommended actions for resolving the complaint.¹⁹² Ultimately, OCR's complaint resolution process will be more effective if the complainant is more actively involved.¹⁹³ The complainant can provide a firsthand account of the situation at that particular institution.¹⁹⁴ Additionally, the personal nature of discrimination, and particularly sex discrimination, cannot and should not be discounted.¹⁹⁵ By relegating the complainant to the background, OCR is continuing to harm the complainant.¹⁹⁶ Ultimately,

186. See *infra* Part III.B.3.

187. See *infra* Part III.B.4.

188. See *infra* Part III.B.5.

189. See *supra* Part II.D.

190. See Vargyas, *supra* note 75, at 381 (noting the limited role that the complaining party has under OCR's administrative process).

191. See Galles, *supra* note 119, at 21 (describing how most complaints are resolved between OCR and the educational institution without the "participation, input, or approval" of the complaining party).

192. See *id.* (noting that the complaining party cannot presently reject any resolution proposed by OCR or the educational institution); see also Interview with Kenneth F. Lehrman III, *supra* note 94 (discussing how complainants are permitted to make suggestions for resolving their complaints).

193. See Setty, *supra* note 40, at 343 (arguing that "student input is *essential*" to ensure that violations are being properly addressed) (emphasis added); see also Vargyas, *supra* note 75, at 383.

194. See Setty, *supra* note 40, at 343 (noting that students are often more aware of potential violations of Title IX than school administrators).

195. See *id.* (noting that OCR investigators need student input to "meaningfully [understand] the students' experience").

196. See Vargyas, *supra* note 75, at 381 (noting that the current administrative process leaves "victims of sex discrimination in education . . . [with] no meaningful remedy. . .").

any resolution agreement will not only affect future students but will also directly affect the complainant.¹⁹⁷

Alternatively, OCR could permit the complainant to intervene in a suit¹⁹⁸ brought by the DOJ on behalf of OCR.¹⁹⁹ This proposed solution would work in much the same way as Title VII.²⁰⁰ The DOJ, on behalf of OCR, would bring a lawsuit against the alleged discriminatory educational institution.²⁰¹ The complainant could then intervene as a party to the case.²⁰² Through intervention, the complainant would have an opportunity to introduce evidence and “argue [his or her] case” during the proceedings.²⁰³

Allowing a complainant to intervene as a party to a case offers multiple benefits to both OCR and the complaining party. First, this policy would reinforce OCR’s commitment to ending sex discrimination.²⁰⁴ Second, intervention would be particularly appropriate for those cases in which the discrimination is more subtle and pervasive.²⁰⁵ By its very nature, such discrimination is difficult to eliminate.²⁰⁶ Moreover, intervention would provide for a large scale, systemic resolution of such subtle discrimination.²⁰⁷ Third, permitting the complaining party to intervene could reduce the number of individual lawsuits brought under Title IX.²⁰⁸ As discussed previously, private

197. See Setty, *supra* note 40, at 347 (noting that “changes within an educational institution . . . endure after students have graduated.”).

198. See Davies & Bohon, *supra* note 77, at 70.

199. See *Women & Athletics*, *supra* note 103, at 20.

200. See 42 U.S.C. § 2000e (2006) (defining who is a “complaining party”); see also 42 U.S.C. § 2000e-2 (2006) (stating that the rules for intervention remain the same). See generally Davies & Bohon, *supra* note 77, at 70 (suggesting that OCR should have the government bring litigation on behalf of the complaining party in a manner similar to the powers given to EEOC).

201. See CASE PROCESSING MANUAL, *supra* note 93 (noting that OCR can refer actions to the DOJ).

202. See 42 U.S.C. § 2000e (2006) (defining who is a “complaining party”); see also 42 U.S.C. § 2000e-2 (2006) (permitting intervention).

203. See Galles, *supra* note 119, at 21.

204. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 34 (recommending that OCR “aggressively enforce” Title IX); see also Lewis, *supra* note 22, at 1046 (discussing Title IX’s broad objectives).

205. See Davies & Bohon, *supra* note 77, at 30 (“[S]ystemic sex discrimination in education persists in ways that are diffuse and often difficult to redress.”).

206. See Whitney Beckett, *Title IX Hearing Sparks Debate*, CHRON., Oct. 10, 2002, available at <http://dukechronicle.com/article/title-ix-hearing-sparks-debate> (noting that subtle forms of discrimination continue to exist).

207. See Galles, *supra* note 119, at 21 (noting the importance of “systemic change”).

208. See Davies & Bohon, *supra* note 77, at 70 (noting that intervention or government litigation on behalf of the complaining party may also lead to a decrease in the costs associated with litigation); see also Vargyas, *supra* note 75, at 383 (noting that Title IX litigation has increased since *Franklin*).

litigation under Title IX has flourished due to the perception that OCR is unresponsive to complaints of sex discrimination.²⁰⁹

Despite these potential benefits, this proposed solution has some disadvantages. Litigation is costly and time-consuming,²¹⁰ adding more parties to litigation will only compound the cost and time required to litigate.²¹¹ Moreover, OCR has a longstanding history of rarely using the enforcement tools available under Title IX.²¹² Indeed, OCR has referred only one case to the DOJ.²¹³ For intervention to work, OCR must demonstrate a stronger commitment to referring complaints to the DOJ.

2. A Show of Force: New Enforcement Remedies

Another problem²¹⁴ with the current system is OCR's failure to strongly enforce Title IX.²¹⁵ The threat of terminating federal funding is always present, yet as noted above, OCR has rarely, if ever, invoked its power.²¹⁶ OCR has also under-utilized other enforcement tools available under Title IX.²¹⁷ Accordingly, many institutions have little reason to fear that OCR will enforce Title IX.²¹⁸

To remedy these problems, OCR should take several actions. First, OCR must do more than merely acknowledge that its Title IX enforcement strategy is problematic.²¹⁹ Despite widespread criticism,²²⁰

209. See *supra* Part II.C.

210. See Galles, *supra* note 119, at 21 (“Litigation . . . is expensive and takes far too long.”).

211. See Davies & Bohon, *supra* note 77, at 70 (noting the potential expense of intervention or government litigation).

212. See *supra* Part III.A.4.

213. See Galles, *supra* note 119, at 21.

214. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 27 (noting complaints regarding OCR's enforcement strategy of Title IX).

215. See Davies & Bohon, *supra* note 77, at 41 (describing OCR's enforcement style as “off-kilter”); see also Eckes, *supra* note 13, at 32 (noting that strong enforcement of Title IX will require OCR to “punish . . . offenders”).

216. See Spitz, *supra* note 159, at 633 (noting that OCR has never terminated federal funding for an institution despite its availability as a remedy under Title IX).

217. See *supra* Part III.A.4.

218. See Galles, *supra* note 119, at 21 (“[M]any schools fear the NCAA more than courts or the OCR because although OCR has the ‘ultimate club’ in terms of terminating federal funding, that ‘club only works if schools fear that OCR will use it.’”).

219. See GERALD REYNOLDS, OCR, FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE 3 (2003), available at <http://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (stating that OCR will “aggressively enforce Title IX sanctions, including implementing sanctions for institutions that do not comply.”).

220. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 27 (noting complaints regarding OCR's enforcement strategy of Title IX); see also Harris, *supra* note 45, at 95 (stating that Title IX's remedies “have proved worthless, perhaps because the OCR has failed to take a hard line with noncomplying educational institutions.”).

OCR has failed to put into action concrete changes that will improve and strengthen Title IX enforcement.²²¹ Thus, OCR itself is currently an obstacle that is hindering Title IX's ultimate objective of ending sex discrimination.²²² Second, OCR must be willing to use the enforcement tools provided under Title IX.²²³ Strong enforcement of Title IX requires a reinvigorated and committed OCR.²²⁴ Only then will educational institutions have an incentive to comply fully with Title IX.²²⁵ With a strong and committed OCR, Title IX will achieve its stated objectives.²²⁶ Even initiating the process of terminating federal funding or referring a case to the DOJ may demonstrate OCR's serious commitment to Title IX enforcement.²²⁷

In addition to the enforcement tools expressly provided under Title IX,²²⁸ OCR should begin exploring the use of new intermediate sanctions.²²⁹ Intermediate sanctions could take many forms such as fines²³⁰ and public awareness campaigns.²³¹ The benefits of intermediate sanctions are two-fold: (1) intermediate sanctions can help strengthen

221. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 27 (noting that the threat of sanctions has done little to foster compliance with Title IX).

222. See Vargyas, *supra* note 75, at 381 (noting that Title IX was intended to eliminate sex discrimination, but that the law has not had this effect because of little enforcement by OCR).

223. See 34 C.F.R. § 100.8 (2012) (describing the enforcement tools available to OCR); see also *Women & Athletics*, *supra* note 103, at 19-20 (noting the enforcement tools available to OCR under Title IX).

224. See Galles, *supra* note 119, at 21 (suggesting that OCR needs to renew its commitment to Title IX).

225. See Setty, *supra* note 40, at 345-46 (noting that "more forceful action is necessary" because educational institutions "have had over twenty years to comply" with Title IX and yet, too few have done so). But see KRISTIN JONES, CTR. FOR PUB. INTEGRITY, LAX ENFORCEMENT OF TITLE IX IN CAMPUS SEXUAL ASSAULT CASES (2010), available at <http://www.publicintegrity.org/investigations/campusassault/articles/entry/1946/> (noting that an "adversarial stance could be counter-productive").

226. See Lewis, *supra* note 22, at 1046 (discussing Title IX's broad objectives).

227. See Setty, *supra* note 40, at 345 (noting that strong enforcement of Title IX is necessary to "force schools to realize that penalties for non-compliance are a real possibility").

228. See 34 C.F.R. § 100.8 (2012) (describing the enforcement tools available to OCR).

229. See Davies & Bohon, *supra* note 77, at 54, 69 (noting that OCR lacks intermediate level enforcement options); see also Eckes, *supra* note 13, at 33 (recommending that OCR consider using other sanctions to enforce Title IX).

230. See Eckes, *supra* note 13, at 33 (noting the need for economic sanctions); see also JONES, *supra* note 225 (noting that OCR cannot presently issue fines to noncompliant institutions).

231. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 23 (noting that OCR already engages in some educational outreach).

and diversify the current enforcement tools available under Title IX,²³² and (2) intermediate sanctions would reinforce OCR's commitment to strong enforcement of Title IX while resulting in fewer negative consequences for educational institutions.²³³ As discussed, OCR has rarely, if ever, used any of the enforcement tools under Title IX.²³⁴ OCR's reluctance to use these enforcement tools has stemmed in part from the "draconian nature" of Title IX's remedies.²³⁵ In addition, many of Title IX's enforcement tools contain many time-consuming procedural hurdles.²³⁶

OCR must consider these intermediate sanctions when determining whether to use the enforcement tools available under Title IX. To be effective, intermediate sanctions need to be quick and efficient.²³⁷ Moreover, the goal of intermediate sanctions should be to minimize any potential harm to students or educational institutions.²³⁸ However, by its very nature, any sanction necessarily entails some punitive element.²³⁹ That punitive element will reinforce to educational institutions the seriousness of violating Title IX.²⁴⁰

In regards to fines, OCR should implement a sliding scale to determine the amount of the fine based on the degree and severity of noncompliance with Title IX.²⁴¹ Such factors regarding the degree and severity of noncompliance might include: (1) whether the educational institution has previously violated Title IX; (2) whether there have been

232. See JONES, *supra* note 225 ("The lack of available penalties isn't lost on the office itself; in its 2000 Strategic Plan, OCR identified a long-term goal of developing 'proposals for remedial powers other than complete de-funding of recipients.'").

233. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 27 (noting the numerous and far-reaching effects that may occur if an institution's federal funding were terminated). *But see* Setty, *supra* note 40, at 345 (noting that penalties can be used to show educational institutions that there are consequences for non-compliance).

234. See *supra* Part III.A.4.

235. See Davies & Bohon, *supra* note 77, at 70.

236. See 20 U.S.C. § 1682 (2006) (describing the process for terminating federal funding); see also Wright, *supra* note 70, at 1379 (discussing how OCR is required to provide notice to educational institutions before any remedial action can be taken to address Title IX violations).

237. See Eckes, *supra* note 13, at 33.

238. See Setty, *supra* note 40, at 345 (noting that defunding "would inevitably cause harm to students").

239. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 34 (suggesting that Title IX's remedies are punitive).

240. See Katrina A. Pohlman, *Have We Forgotten K-12? The Need for Punitive Damages to Improve Title IX Enforcement*, 71 U. PITT. L. REV. 167, 169 (2009) (noting that the punitive remedies can deter future harmful conduct); see also Davies & Bohon, *supra* note 77, at 46, 69-70 (suggesting that Title IX was given the defunding remedy because Congress recognized that sex discrimination is a serious problem).

241. See Setty, *supra* note 40, at 345 (suggesting that OCR use its enforcement tools for those "extreme" violations).

previous violations and the nature and severity of those violations;²⁴² (3) whether the educational institution has policies regarding Title IX;²⁴³ (4) whether the educational institution has a resolution agreement with OCR currently in effect;²⁴⁴ (5) whether the educational institution has negotiated in good faith with OCR to resolve previous violations;²⁴⁵ and (6) whether the educational institution has enacted the resolution agreement in a timely manner.²⁴⁶

Additionally, OCR must establish and provide educational institutions with clear guidelines for when intermediate sanctions will be used.²⁴⁷ To that end, OCR should continue to resolve Title IX violations through the administrative process described in the statute.²⁴⁸ OCR should not consider fines as a remedy of first resort.²⁴⁹ Fines should be levied if warranted by the circumstances, determined in part by the enumerated factors.

In addition to fines, OCR should use the media to publicize Title IX.²⁵⁰ First, the media can be a relatively inexpensive and effective tool.²⁵¹ Second, OCR could use the media publicity to spotlight educational institutions that have failed to comply with Title IX.²⁵²

242. *See id.*

243. *See* 34 C.F.R. § 106.8 (2012) (describing how federal funding recipients must establish internal grievance policies under Title IX).

244. *See* Johnson, *supra* note 19, at 559.

245. *See* Galles, *supra* note 119, at 21.

246. *See* *Women & Athletics*, *supra* note 103, at 19 (noting that educational institutions must act within “specified time frames” under a resolution agreement).

247. *See* Johnson, *supra* note 19, at 567 (noting that universities rely on guidelines published by OCR).

248. *See supra* Part II.D.

249. *See* Eckes, *supra* note 13, at 33 (“[I]f a school is not complying with Title IX, the OCR should seek economic sanctions.”); *see also* Wright, *supra* note 70, at 1379 (discussing how educational institutions must receive notice of a Title IX violation before punitive action can be taken).

250. *See* JONES, *supra* note 225 (noting that OCR “does not routinely make public its investigations”).

251. *See* Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 124 (2010) (“[S]ustained media attention . . . [is] instrumental in securing a favorable Title IX settlement.”). *See generally* TITLE IX at 35, *supra* note 8 (listing a small sample of articles written about Title IX in the last few years).

252. *See* ALLISON KASIC, WOMEN’S INDEP. FORUM, TITLE IX AND ATHLETICS: A CASE STUDY OF PERVERSE INCENTIVES AND UNINTENDED CONSEQUENCES 4 (2010), available at <http://www.iwf.org/files/8fc3dc20d277ff96968266aaab0add0a.pdf> (noting that educational institutions are “eager to avoid” the negative media attention that would result from an OCR investigation); *see also* JENNY LEE, FEMINIST MAJORITY FOUND., TITLE IX INFRACTIONS: LEGAL OPTIONS AND WINNING CASES 1 (2006), available at <http://feminist.org/education/pdfs/JL%20Winning%20cases%20paper%2011-29-06.pdf> (stating that failure to comply with Title IX leaves educational institutions at risk of negative publicity).

However, OCR should judiciously use the media to spotlight those educational institutions that have repeatedly violated Title IX or those violations that are egregious.²⁵³ The resulting negative publicity generated would undoubtedly serve as a powerful incentive for institutions to act quickly to correct any violation.²⁵⁴ In addition, such negative publicity can serve as an effective warning to other institutions.²⁵⁵ The result may be that institutions begin taking proactive, rather than reactive, measures to ensure their compliance with Title IX.²⁵⁶

Third, the media can be an invaluable source of information for educational institutions and individuals.²⁵⁷ OCR could educate educational institutions and make them aware of persistent Title IX violations,²⁵⁸ as well as any new issues that may emerge.²⁵⁹ Indeed, this expanded use of the media represents a natural extension of OCR's responsibilities under Title IX.²⁶⁰ Currently, OCR does produce some educational materials.²⁶¹ These materials, however, are generally limited in their scope and audience as they primarily explain the rights and responsibilities of educational institutions under Title IX.²⁶² OCR can also use the media to educate individuals about their rights under Title

253. See Thomas, *supra* note 142 (chronicling the 13-year investigation of the University of Southern California for a violation of Title IX).

254. See JONES, *supra* note 225 (“When a school doesn’t fear getting sanctions, it fears embarrassment or shame. . . .”); see also Walker, *supra* note 251, at 131 (stating that negative publicity “is the strongest force driving schools to the bargaining table”).

255. See Jordi Gasso, *Yale Not Alone in Title IX Probe*, YALE DAILY NEWS, Apr. 15, 2011, available at <http://www.yaledailynews.com/news/2011/apr/15/yale-not-alone-in-title-ix-probe/> (“[An investigation] at Yale might wake up a lot of schools to do something. . . .”).

256. See JONES, *supra* note 225 (noting that there is no pressure for educational institutions to take Title IX violations seriously).

257. See Gasso, *supra* note 255 (“[An investigation] at Yale might wake up a lot of schools to do something. . . .”); see also Marjorie Connelly, *Few Americans Familiar with Title IX, Though Most Approve of It*, N.Y. TIMES, Apr. 26, 2011, available at <http://www.nytimes.com/2011/04/26/sports/26titleixpoll.html> (noting a recent poll indicating that most Americans know little about Title IX).

258. *But see* Gasso, *supra* note 255 (noting that similar problems at other institutions have largely gone unnoticed).

259. See Galles, *supra* note 119, at 18 (noting that OCR publishes policy guidelines and letters to educate and explain the law to educational institutions).

260. See REYNOLDS, *supra* note 219, at 1 (noting the guidance function of the letter to educational institutions).

261. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 4-5 (recommending that OCR “provide clear, consistent and understandable written guidelines for implementation of Title IX and make every effort to ensure that the guidelines are understood, through a national education effort.”).

262. See Setty, *supra* note 40, at 347 (suggesting the need for increased communication to individuals and educational institutions).

IX.²⁶³ Knowing one's rights is often the first step toward enforcing them.²⁶⁴ Moreover, OCR can use the media to spotlight the fact that sex discrimination remains a problem in the United States.²⁶⁵

3. More Timely Investigations

OCR should also strive to implement ambitious, yet realistic, deadlines for resolving complaints.²⁶⁶ OCR's current 90-day deadlines fail on both counts.²⁶⁷ OCR has even acknowledged problems with the 90-day deadlines.²⁶⁸ The long resolution process unnecessarily harms the institution and the complainant, both of whom desire a relatively prompt resolution.²⁶⁹

Given OCR's inability to process and manage all of the complaints,²⁷⁰ OCR should experiment with longer timeframes by gradually increasing the deadlines. Because the 90-day deadlines have proven to be problematic,²⁷¹ OCR should increase the deadlines to 120 days.²⁷² OCR should then monitor the effectiveness of these new deadlines. To make this determination, OCR should consider several factors: (1) the average length of time for a complaint to be investigated, (2) the average length of time for a complaint to be resolved,²⁷³ (3) the total number of complaints received each year,²⁷⁴ (4) the number of

263. See Galles, *supra* note 119, at 20 (stating that there are plans in the works to have OCR "play a bigger role in educating students about their rights"); see also Setty, *supra* note 40, at 347 (suggesting the need for increased communication to individuals and educational institutions).

264. See generally *Know Your Rights*, OCR, <http://www2.ed.gov/about/offices/list/ocr/know.html> (last modified Dec. 30, 2011) (discussing an individual's rights under Title IX).

265. See Beckett, *supra* note 206 (noting that subtle forms of discrimination continue to persist).

266. See Setty, *supra* note 40, at 346 (noting the need for OCR to resolve complaints in a more expeditious manner).

267. See *supra* Part III.A.2.

268. See *Strategic Plan*, *supra* note 145 (stating that OCR recognizes the need to improve the complaint process to provide for faster resolution); see also Davies & Bohon, *supra* note 77, at 52 (noting criticisms that have been made regarding the length of time it takes OCR to investigate and resolve complaints).

269. See Thomas, *supra* note 142 ("[OCR] has a responsibility to both students and institutions not to let the cloud of these open cases hang over their head. . . .").

270. See *supra* Part III.A.2.

271. See *supra* Part III.A.2.

272. See Setty, *supra* note 40, at 346 (suggesting that OCR adopt a 180-day deadline).

273. See CONGRESS, *supra* note 115, at 4 (stating that 91% of new complaints were resolved within 180 days in the 2008 fiscal year). *But see* Davies & Bohon, *supra* note 77, at 52 (stating that it takes OCR about six months to resolve complaints).

274. See FISCAL YEAR, *supra* note 116, at BB-12 (noting that OCR received 6,933 complaints in 2010 and expects to receive approximately 7,000 complaints in 2012).

complaints received alleging a violation of Title IX,²⁷⁵ and (5) surveys from OCR investigators on the new deadlines and the quality of the work product.²⁷⁶ Based on the results, OCR would be in a better position to determine the optimum deadline period for investigating and resolving complaints.

Additionally, OCR should send periodic reminders to investigators. OCR could send these reminders to OCR investigators in intervals of 30, 60, or 90 days, as determined by the date in which the complaint was filed.²⁷⁷ Sending regularly scheduled reminders could help the OCR investigator determine whether he or she is investigating and resolving the complaint in a timely manner.²⁷⁸ Moreover, reminders could serve as a useful prompt for the OCR investigator to follow-up as needed on a complaint.²⁷⁹

OCR could also be more expeditious and efficient by “bundling” certain complaints together during the resolution process.²⁸⁰ For example, “bundling” would be especially appropriate for complaints that have similar allegations and facts, as well as when there are multiple complaints filed against one educational institution.²⁸¹ However, OCR should only bundle fully investigated complaints that are ripe for disposition.²⁸² Expediency should never compromise the quality of an investigation.²⁸³ “Bundling” complaints is important for OCR to maximize its limited resources.²⁸⁴

275. *See id.* at BB-17 (noting that sex discrimination complaints accounted for approximately 6% in 2010).

276. *See Strategic Plan, supra* note 145 (noting the backlog of cases).

277. *See generally OCR Complaint Forms*, OCR, <http://www2.ed.gov/about/offices/list/ocr/complaintintro.html> (last modified Nov. 30, 2011) (noting that complaints can be made electronically to OCR).

278. *See Thomas, supra* note 142 (“[OCR] has a responsibility to both students and institutions not to let the cloud of these open cases hang over their head. . .”).

279. *See id.* (recalling OCR’s 13-year investigation of the University of Southern California for a violation of Title IX).

280. *See Eckes, supra* note 13, at 33 (noting that the administrative process was designed to be efficient); *see also Setty, supra* note 40, at 346 (recommending that OCR resolve complaints “in a more expeditious manner”).

281. *See Davies & Bohon, supra* note 77, at 60-61 (2007) (suggesting that OCR needs to rethink its current enforcement strategy given its limited resources).

282. *See supra* Part II.D.

283. *See Setty, supra* note 40, at 346 (noting that certain complaints are necessarily time-consuming because of the amount of data and facts needed to investigate the matter).

284. *See FISCAL YEAR, supra* note 116, at BB-9, BB-12 (noting the number of educational institutions OCR is responsible for monitoring and the anticipated number of complaints for 2012).

4. Strengthening State and Local Level Enforcement

In addition to improving its own processes, OCR should explore new measures for strengthening community outreach at the state and local level.²⁸⁵ The importance of state and local education agencies to the enforcement of Title IX cannot be underestimated.²⁸⁶ As the number of complaints filed continues to increase,²⁸⁷ OCR may have to rely more heavily on state and local education agencies.²⁸⁸

One suggestion for OCR would be to shift some of the responsibility of enforcing Title IX to state and local education agencies.²⁸⁹ OCR should make use of state and local education agencies to alleviate some of the pressure.²⁹⁰ These education agencies possess the resources and capabilities necessary to manage Title IX complaints.²⁹¹ In addition, these agencies have the added benefit of knowledge and familiarity with the educational institutions in that particular area.²⁹² State and local education agencies interact with educational institutions on a regular basis.²⁹³ Accordingly, educational institutions are more likely to resolve complaints amicably and in a

285. See Paul Steinbach, *College Coaches Still Lack Title IX Knowledge*, ATHLETIC BUS., July 2010, available at <http://athleticbusiness.com/articles/article.aspx?articleid=3583&zoneid=8> (arguing that enforcement must “come from the bottom up,” not just “the top down”); see also 10-YEAR CHECK-UP, *supra* note 117, at 24 (stating that OCR makes “numerous presentations throughout the country to state officials. . .”).

286. See Davies & Bohon, *supra* note 77, at 74 (noting that state and local employees currently “play the major role in carrying out Title IX’s mandate”).

287. See generally FISCAL YEAR, *supra* note 116, at BB-12 (noting the increased number of complaints filed with OCR over the last several years).

288. See 10-YEAR CHECK-UP, *supra* note 117, at 24 (recommending that OCR “provide additional outreach and education to help state and local education agencies. . .”).

289. See Davies & Bohon, *supra* note 77, at 68 (discussing the need to “[partner] with the people on the front lines of enforcement.”). But see *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government cannot “conscript” a State’s executive officers to enforce a federal regulatory program). However, OCR might avoid this prohibition if it can demonstrate that state and local education agencies are not being conscripted, but rather are implementing measures that are conditions upon federal funding. See *Printz*, 521 U.S. at 917-18.

290. See FISCAL YEAR, *supra* note 116, at BB-9, BB-12 (noting the number of educational institutions OCR is responsible for monitoring and the anticipated number of complaints for 2012).

291. See Davies & Bohon, *supra* note 77, at 71 (noting that state and local agencies have the “knowledge and skill to assist” educational institutions in complying with Title IX).

292. See *State Education Agency (State Department of Education)*, DEP’T OF EDUC., <http://wdcrobcolp01.ed.gov/Programs/EROD/orglist.cfm?categoryID=SEA> (last visited Jan. 12, 2012) (noting that these organizations provide “information, resources, and technical assistance on educational matters to the schools and the residents.”).

293. See Davies & Bohon, *supra* note 77, at 67-68 (2007) (noting the lack of consistent and regular contact with OCR).

timely manner if they are negotiating with a familiar person or agency.²⁹⁴ Given their close interaction with educational institutions, state and local education agencies are the most logical choice for monitoring compliance with Title IX.²⁹⁵ These education agencies will likely know of any potential violation before OCR receives a complaint.²⁹⁶

Alternatively, OCR could transfer the responsibilities of education outreach to state and local education agencies.²⁹⁷ OCR would maintain some oversight, but the majority of OCR's time and effort would be devoted to resolving complaints and otherwise ensuring strong enforcement of Title IX.²⁹⁸ Because state and local agencies already work closely with educational institutions,²⁹⁹ they are in an ideal position to easily assume this additional responsibility. These state and local education agencies would be responsible for making presentations³⁰⁰ and providing the necessary educational tools to institutions.³⁰¹ In addition, the state and local education agencies could help review compliance policies under Title IX.³⁰² They could also provide guidance³⁰³ and

294. See Setty, *supra* note 40, at 348 (“[A]ny compliance plan drawn up . . . will most likely be a stronger and longer-lasting compliance plan that helps prevent future Title IX violations.”).

295. See CHRIS UNGER ET AL., EDUC. ALLIANCE AT BROWN UNIV., HOW CAN STATE EDUCATION AGENCIES SUPPORT DISTRICT IMPROVEMENT? A CONVERSATION AMONGST EDUCATIONAL LEADERS, RESEARCHERS, AND POLICY ACTORS 6 (2008), available at <http://www.lab.brown.edu/pubs/csri/Symposium.pdf> (noting that state education agencies monitor schools for compliance).

296. See Davies & Bohon, *supra* note 77, at 71.

297. See 10-YEAR CHECK-UP, *supra* note 117, at 24 (recommending that OCR “provide additional outreach and education to help state and local education agencies. . .”).

298. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 34 (recommending that OCR “aggressively enforce” Title IX).

299. See NAT'L NETWORK OF STATEWIDE AFTERSCHOOL NETWORKS, ENGAGING STATE EDUCATION AGENCIES, available at <http://www.statewideafterschoolnetworks.net/content/engaging-state-education-agencies> (last visited Jan. 12, 2012) (noting that these organizations provide “information, resources, and technical assistance” to educational institutions).

300. See 10-YEAR CHECK-UP, *supra* note 117, at 24 (noting the “numerous presentations” that OCR makes to secondary and community colleges, as well as parents and students).

301. See WILLIAM A. HOWE ET AL., TITLE IX COORDINATOR ROLES AND RESPONSIBILITIES LOCAL SCHOOL DISTRICTS 2, available at <http://dese.mo.gov/divcareer/CivilRights/TitleIXCoordinatorRolesandResponsibilities.pdf> (last visited Jan. 12, 2012) (noting that Title IX coordinators are responsible for “disseminating information about Title IX educational resources”).

302. See NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AND GENDER EQUITY RESPONSIBILITIES OF STATE EDUCATION AGENCIES (SEAS), available at <http://www.ncpublicschools.org/federalprograms/titleIX/resources/sea> (last visited Jan. 12, 2012) (noting that state education agencies work “directly with school district personnel in the [area] of policy development. . .”).

respond to questions that educational institutions may have regarding OCR's enforcement of Title IX.³⁰⁴

These proposed reforms are compatible with OCR's mission.³⁰⁵ Although Title IX is a federal statute and should be applied in a uniform and national manner,³⁰⁶ OCR's use of state and local education agencies would further Title IX's objective of ending sex discrimination.³⁰⁷ Moreover, these state and local education agencies are well suited to assist OCR because they perform similar work and have similar goals.³⁰⁸

5. Centralizing Responsibility for Title IX

OCR should also consider reorganizing its internal structure. OCR currently has 12 regional offices that are responsible for enforcing several prominent federal civil rights laws.³⁰⁹ This organizational structure is sometimes problematic because enforcement varies among regional offices.³¹⁰ Therefore, OCR should consider designating responsibility of all Title IX complaints to specific regional offices. Centralizing responsibility at certain regional offices will ensure greater uniformity by minimizing inconsistent Title IX decisions.³¹¹ Moreover, this solution would be particularly beneficial to both educational institutions and individuals.³¹² The specifically designated regional offices would be experts on issues relating to Title IX, thus resulting in a

303. See FREDERICK M. HESS ET AL., AM. ENTER. INST., STATE EDUCATION AGENCIES AS AGENTS OF CHANGE (2011), available at <http://www.aei.org/papers/education/state-education-agencies-as-agents-of-change-paper/> (noting that state education agencies provide guidance to schools).

304. See HOWE ET AL., *supra* note 301.

305. See *generally About OCR*, *supra* note 136 ("The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.").

306. See Eckes, *supra* note 13, at 27 (noting that educational institutions "benefit from clear and consistent implementation of Title IX. . .").

307. See Lewis, *supra* note 22, at 1046 (discussing Title IX's broad objectives).

308. See HESS ET AL., *supra* note 303 (noting that state education agencies provide guidance to schools). *But see* JANIS E. JACOBS & ALLAN WIGFIELD, AM. EDUC. RESEARCH ASS'N, SEX EQUITY IN THE SCHOOLS: THE ROLE OF RESEARCH 4 (1986), available at <http://www.rcgd.isr.umich.edu/garp/articles/jacobs86.pdf> (noting the different goals for federal, state, and regional Title IX programs).

309. See *generally About OCR*, *supra* note 136 (noting OCR's regional offices and the laws that it enforces).

310. See Setty, *supra* note 40, at 340 (noting that OCR's regional offices "use significantly different standards in determining Title IX violations.").

311. See *id.*

312. See OPPORTUNITY IN ATHLETICS, *supra* note 114, at 25-27 (noting that several complaints were made regarding inconsistent decisions and advice from OCR's regional offices).

more efficient and effective means of enforcing Title IX.³¹³ Centralizing responsibility would also enable the Title IX specific regional offices to more readily identify emerging issues or patterns of discrimination.³¹⁴

For each federal civil rights law that OCR enforces, there must be at least one designated regional office. At a minimum, then, there must be six regional offices that enforce the different federal civil rights laws.³¹⁵ As for the remaining regional offices, OCR should consider the total number of complaints received for each of the federal civil rights laws.³¹⁶ Given that Title IX currently accounts for approximately six percent of all complaints,³¹⁷ OCR should designate only one regional office for enforcement of Title IX. Based on the current statistics, OCR should designate responsibility of Title IX enforcement to the regional office in either Dallas or Cleveland because they receive a greater proportion of Title IX claims.³¹⁸ OCR should, however, undertake periodic reviews to assess the designated regional office's ability to investigate and resolve complaints in a timely and efficient manner.³¹⁹ If warranted, OCR should consider increasing the number of regional offices that are responsible for enforcing Title IX.

One potential disadvantage to this proposed reform concerns complaints that allege violations of multiple civil rights laws. These complaints currently account for approximately 15 percent of the total number of complaints received by OCR in a given year.³²⁰ Complaints that allege violations of multiple civil rights laws are particularly challenging because the allegations may not be easily separated.³²¹ For that reason, OCR should carefully scrutinize complaints that allege violations of multiple civil rights laws before determining which regional office is best suited to manage the complaint. To the best of its ability,

313. See NAT'L WOMEN'S LAW CTR., BARRIERS TO FAIR PLAY 5 (2007), available at <http://www.nwlc.org/sites/default/files/pdfs/barrierstofairplay.pdf> (noting that two regional offices received almost 30% of all Title IX complaints filed with OCR).

314. See 10-YEAR CHECK-UP, *supra* note 117, at 9 (stating that OCR is "responsible for preventing, identifying, ending, and remedying discrimination against the nation's students.").

315. See *generally About OCR*, *supra* note 136 (noting OCR's regional offices and the laws that it enforces).

316. See FISCAL YEAR, *supra* note 116, at BB-17 (graphing caseload by jurisdiction based on complaints filed).

317. See *id.*

318. See NAT'L WOMEN'S LAW CTR., *supra* note 313 (noting that the Dallas and Cleveland regional offices received almost 30% of all Title IX complaints filed with OCR).

319. See Galles, *supra* note 119, at 21 (stating that OCR's administrative process is *supposed* to quickly resolve complaints) (emphasis added).

320. See FISCAL YEAR, *supra* note 116, at BB-17.

321. *But see* CASE PROCESSING MANUAL, *supra* note 93 (describing OCR's procedure for multiple complaints).

OCR should review the complaint and determine the key allegations;³²² that is, do the allegations focus on one particular federal civil rights law? If the key allegation can be reasonably determined, then OCR should assign the complaint to that designated regional office.

IV. CONCLUSION

Title IX signaled Congress's "national commitment"³²³ to eliminating sex discrimination.³²⁴ Yet, Title IX's goal is still out of reach.³²⁵ Ending sex discrimination requires adequate enforcement of Title IX. Adequate enforcement requires a reinvigorated and committed OCR, one that recognizes the problems with the current system and is willing to initiate reforms. Specifically, OCR must reform the administrative process by which complaints are made.³²⁶ OCR must ensure that complaints are resolved in a consistent and timely manner and that the complainant has more involvement in the process.³²⁷

Additionally, OCR must rethink its current enforcement strategy.³²⁸ Although it is OCR's hope that educational institutions will voluntarily comply with Title IX, the reality is that few choose to do so.³²⁹ Educational institutions know that OCR will not use any of the strong enforcement tools at its disposal.³³⁰ A strongly enforced Title IX will require OCR to employ new techniques in establishing intermediate sanctions, enlisting the assistance of state and local educational agencies, and centralizing responsibility to specifically designated field offices.³³¹ Ultimately, the future impact of Title IX depends on OCR. A strong and committed OCR will translate to a strong Title IX.³³² Only then can Title IX achieve its goal of ending sex discrimination.³³³

322. *See id.* (describing OCR's procedure for reviewing and processing complaints).

323. *See* TITLE IX: 25 YEARS, *supra* note 6, at 5.

324. *See* 118 CONG. REC. 5803 (1972) (statement of Sen. Birch Bayh).

325. *See* Greenberger & Chaudhry, *supra* note 1, at 491 (noting that Title IX's "job is far from finished").

326. *See supra* Parts III.A.1-3.

327. *See supra* Parts III.B.1., III.B.3.

328. *See supra* Part III.A.4.

329. *See* Harris, *supra* note 45, at 95 (suggesting that OCR uses sanctions as a last resort).

330. *See id.* (noting that the "twenty-year standing threat of withdrawing federal funds has done little to bring" educational institutions into compliance with Title IX).

331. *See supra* Parts III.B.2., III.B.4-5.

332. *See In Their Own Words: Underenforcement Threatens Continued Vitality of Title IX*, HARV. C.R.-C.L. L. REV. (Aug. 24, 2011, 8:35 AM), <http://harvardcrcl.org/2011/08/24/in-their-own-words-underenforcement-threatens-continued-vitality-of-title-ix/> (noting that strong enforcement depends on OCR's commitment to Title IX).

333. *See* Lewis, *supra* note 22, at 1046 (discussing Title IX's objectives).