The Shaping and Reshaping of Title IX

Instability Complicates School Compliance

By Kalani Linnell

Title IX of the Education Amendments of 1972 requires recipients of federal funding, like K-12 schools, to ensure non-discriminatory educational programs and activities, including by having internal grievance procedures for reports of sex-based discrimination and harassment. The meaning of Title IX has been shaped by its implementing regulations, agency guidance and case law. This article will dissect the key moments in Title IX's history in order to give readers an idea of the possibilities and limitations of the law under the second Trump administration.

A 2021 study published in the *Journal of Sexual Violence* found that 85% of K-12 schools claimed to have no reports of sex-based harassment. Statistically, however, 40% of boys and 56% of girls in grades 7-12 experience sex-based harassment during any given year. Consequently, the data collection reveals a severe underreporting problem and a distinct possibility of a dereliction of duties by schools to properly process those reports that schools do receive.

At the time of the passage of Title IX in 1972, Congress was concerned with addressing disparate treatment and disparate impact discrimination on the basis of sex. It has been incredibly effective in doing so, with educational outcomes and program access for girls and women having positively increased over the last 50 years. Early cases focused on discriminatory practices like enrollment quotas for women in medical schools. Early regulations focused on athletics and access to quality programming.

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What's considered discrimination on the basis of sex has evolved since 1972 and now includes sexual harassment and assault as forms of discrimination. It wasn't until 1984 in *Meritor Savings Bank v. Vinson*, a Title VII employment discrimination case, that the Supreme Court articulated the principle that sexual harassment is a form of prohibited sex discrimination. Later, in *Franklin v. Gwinnett County Pub. Sch.* in 1992, the court confirmed that sexual harassment constitutes sex discrimination under Title IX as well.

Because of the concept that sexual harassment and assault are forms of sex discrimination, Title IX has taken on a whole new life. Rather than focus on vanilla discrimination — that is, discrimination that can be seen plainly on its face or by its impact — Title IX application has shifted to home in on sexual harassment. This shift can especially be seen on college campuses.

In the 1990s, two key cases emerged in which the Supreme Court held that K-12 schools could and should be held liable for a Title IX violation for instances of intentional discrimination through sexual harassment between adults and students. Intentional discrimination exists when an employee of the school district has actual knowledge about an adult's misconduct and is deliberately indifferent in its response to that knowledge. A deliberately indifferent response includes agreeing to drop an investigation into an employee's misconduct with a student in exchange for a letter of resignation. However, where the only employee who knew about the harassment was the harasser, then actual knowledge is not imputed onto the school.

While it was properly settled by the early 1990s that an adult's misconduct could be imputed onto the school under certain circumstances, no redress existed in the law for instances of student-on-student sexual harassment until the turn of the century. In 1999, the Supreme Court opened the door for student-on-student cases in *Davis v. Monroe County Bd. of Ed.* The rule that emerged from *Davis* is that damages may be recovered by a student for peer-on-peer sexual harassment where the district had actual knowledge of the peer-on-peer sexual harassment that was so severe, pervasive and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit and the district was deliberately indifferent in its response to that knowledge.

The dissent in *Davis*, authored by Justice Anthony Kennedy and joined by Chief Justice John Roberts, Justice Antonin Scalia and Justice Clarence Thomas, criticized the majority rule as being unworkable for the courts and schools to apply. The dissent predicted that the majority's rule would "sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life" because the standard of actionable conduct was indistinguishable from mere schoolyard teasing.

The floodgates of Title IX litigation never opened. Especially in the K-12 school context, Title IX appears to be severely underlitigated. There are less than 7,000 total cases, most of them from institutions of higher education, citing Title IX at 20 U.S.C. § 1681 whereas Title VII, the employment discrimination statute, has seen a subsequent demonstrable increase in litigation with over 240,000 cases citing 42 U.S.C. § 2000e.

One of the types of sexual harassment that the court was concerned about in the employment context is "hostile environment" claims. Under Title VII, an employee can make a claim for hostile environment discrimination when the underlying misconduct is so severe or pervasive, subjectively offensive from the complainant's view, and objectively offensive, as to negatively alter the person's employment and create an abusive working environment. When the harasser is not a supervisor, the person must show that the employer knew or should have known about the harassment by a fellow employee and failed to take immediate and appropriate corrective action.

When the court created a hostile environment cause of action under Title IX, it departed from the standard that it announced in the Title VII context. Unlike the employment context, a hostile environment is created in school only when the misconduct is so severe *and* pervasive *and* objectively offensive that it limits or denies a student's ability to benefit or participate in the school's educational program or activity. The "and" standard significantly narrows the scope of conduct that is implicated.

The court explained its reasoning for imposing a different standard in schools versus workplaces. Children are learning how to engage in the world and don't have the insight, self-monitoring or knowledge that adults have. Where conduct would create a hostile environment between adults in the workplace, the same conduct perpetuated by a child may not rise to the level of severity and pervasiveness necessary for a hostile educational environment to arise. An example of this is with foul language. Children are experimenting with language and learning how to use it in context with peers, but an adult should have the experience, judgement and knowledge not to use that language.

The hostile environment standard acknowledges that schools can't necessarily stop bad actors from doing bad things, but schools can and must respond promptly and appropriately when misconduct becomes known to a school employee who can do something to remedy the harms caused by the harassment and curb future misconduct. Thus, the court said that a school district can avoid liability under Title IX even where there was a hostile environment if the school responded to the known peer harassment in a way "that is not clearly unreasonable" in light of the circumstances.

In the wake of *Davis*, the George W. Bush administration's Department of Education issued *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (January 2001). This guidance focused on the process by which schools must address internal complaints so as not to be deliberately indifferent while preserving the due process protections owed to the involved parties. The goal of Title IX investigations, under this guidance, is to produce "sound and supportable decisions" without undue delay.

This issuance of guidance in 2001 began a cycle of changes that occurred through nonbinding guidance from administration to administration. The Obama administration shifted the focus from process to substance. The first Trump administration rescinded all of the Obama administration guidance in favor of drafting regulations, which would ostensibly provide a greater level of stability regardless of the political persuasion of the relevant presidential administration. Just like Title IX has been effective in leveling the playing field for girls and women, it is also a weapon to combat

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Culturally, the #MeToo movement gained traction in 2017 and significantly changed the discourse around sexual harassment in the workplace. When the Trump administration issued a Notice of Proposed Rule-Making in late 2018, the #MeToo movement demanded that survivors of sexual harassment and assault have redress and that the consequences for misconduct be steep. Conversely, activists criticized the #MeToo movement for believing all survivors without providing a notice and opportunity to be heard for alleged perpetrators. This balance between survivor's rights and alleged perpetrator's rights was a balance that the Trump administration's 2020 regulations tried to strike.

However, the 2020 regulations failed to define "on the basis of sex," let alone clarify whether sexual orientation and gender identity were included. The Supreme Court has since clarified that, in the employment context, sexual orientation and gender identity are protected under "on the basis of sex." Moreover, the 2020 regulations imposed strict procedural requirements on school districts. This required an overhaul of existing structures for processing complaints of this type of misconduct and forced schools to allocate precious resources without funding. Finally, the 2020 regulations distinguished between sexual harassment and sex-based harassment. The former requires the misconduct to be sexual in nature. The latter would include more conduct but raises free speech issues — when a student is untruthfully called a "rapist" for months on end by peers, does that constitute sexual harassment? According to a judge in the Western District of Pennsylvania, the answer is no because, while sex-based, the insults were not sexual.

The Biden administration worked to overhaul the regulations once again, which were published with an effective date of 2024. Those regulations were short-lived. In January 2025, a federal judge in the District of Kentucky, who was appointed by George W. Bush, struck down the entire regulatory scheme promulgated by the Biden administration. Therefore, the 2020 regulations are enforceable by the U.S. Department of Education's Office for Civil Rights and are used by courts as the metric by which deliberate indifference is measured.

The Title IX regulations, both 2020 and 2024, create both a floor for defining a school's response to sexual harassment allegations as well as a ceiling that strictly limits a school's options for response regardless of the nature of the proposed deprivation of education.

In the case of the 2020 regulations, schools are required to dismiss from the formal Title IX process complaints that only articulated severe or pervasive conduct, rather than severe and pervasive conduct. This requires that Title IX coordinators, who are usually administrators serving primarily in a different role, make a threshold legal determination about whether to engage in the laborious Title IX process or whether to respond using typical disciplinary codes of conduct, such as bullying or assault prohibitions. This is in contrast to the 2024 regulations, which would have required schools to respond to all severe or pervasive conduct, deviating from the Supreme Court's "severe and pervasive" standard from *Davis*. The

formal process under the 2024 regulations was required for more conduct than under the 2020 regulations, but the Title IX coordinator was not put in a position of deciding that threshold question.

The 2024 regulations also defined "on the basis of sex" to include sexual orientation and gender identity, which tracks Supreme Court precedent in *Bostock v. Clayton County*. Notably, and what has garnered much scrutiny, was the requirement that any separation of individuals by sex not cause more than de minimis harm, and excluding someone from a facility based solely on the difference between their biological sex and gender identity causes harm that is more than minimal. This principle has existed in the 3rd Circuit since 2018 and derives from *Doe v. Boyertown*. Importantly, facilities usage for transgender individuals in schools has also been affirmed by the 4th, 7th and 9th Circuits, and the Supreme Court has denied certiorari on multiple occasions, including in December 2024, on this Title IX and Equal Protection Clause question.

Therefore, the 2024 Title IX regulations did not change the way schools in the 3rd Circuit handle requests for facilities usage by transgender students. Nevertheless, this major change to the Title IX regulations caused immediate and strong responses from both liberals and conservatives, especially concerning the ability of gender-diverse students to participate on sports teams that align with their gender identity.

Given that the 2020 regulations were the product of the first Trump administration, the Trump II administration will undoubtedly have a lasting impact on Title IX. Now that the 2020 regulations are operative, courts will likely see an uptick in litigation. The formalization of the internal grievance procedure in the K-12 space immediately puts parents and students on edge, spurring them to obtain legal counsel regardless of the severity of the conduct in question. Under Title IX, even minor conduct and nonsexual harassment gets wrapped up into a process that resembles an adversarial, legalistic court proceeding rather than a K-12 discipline process. Even though many K-12 schools seek to use informal resolution measures, such as peer mediation, and assign consequences that are constructive and educational, parents prickle at the formality.

What's clear from looking at the history of Title IX is that K-12 schools need specific and particularized standards that are consistent year over year. Sex-based harassment and discrimination, including hostile environment harassment and sexual assault, continue to be an unfortunate reality in schools. And schools want to respond in a legally compliant and effective way. Without stability in legal obligations, compliance cannot be achieved, as can be seen by the staggering number of schools around the country that do not report instances of sex-based harassment. As awareness and stability of legal obligations occurs, schools will better be able to achieve compliance. ⚖

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