

TITLE IX AND PREGNANCY DISCRIMINATION IN HIGHER EDUCATION: THE NEW FRONTIER

MARY ANN MASON[†] AND JACLYN YOUNGER^{††}

ABSTRACT

Pregnancy discrimination is a little known area covered by Title IX. According to the Title IX regulations, areas of prohibited discrimination include: admissions; hiring; coursework accommodations and completion; pregnancy leave policies and status protection upon return from leave; and health insurance coverage. These regulations will soon get more attention as the Obama Administration insists on Title IX dissemination and compliance in an effort to stop the leaky pipeline for women in the STEM fields. Research shows that pregnancy and childbirth are the major reasons why women drop out of research science in much greater numbers than men; this dropout is most likely to occur among graduate students and postdoctoral fellows who are in their peak childbearing years. A similar pattern of dropout can be seen in all fields, including related professional schools. Research also reveals that there are currently few established policies in higher education which adequately address pregnancy and childbirth in formal policies for students.

This article will address new efforts by the United States Department of Education and the federal agencies to begin to seek compliance relating to Title IX and pregnancy discrimination in educational institutions. It will discuss the recent successful efforts of the U.S. Department of Education's Office for Civil Rights in investigating and settling pregnancy discrimination claims as well as the lessons learned in private action lawsuits under Title IX. Title IX private action suits have transformed athletics for women, and more recently Title IX has been applied in sexual harassment cases. Pregnancy discrimination is now the new frontier.

[†] Mary Ann Mason, Professor of the Graduate School, The University of California Berkeley, and faculty co-director of the Berkeley Law Earl Warren Institute on Law and Social Policy.

^{††} Jaclyn Younger, University of California, Hastings College of the Law, J.D. Candidate 2014.

The authors wish to thank Julie Kim (UC Berkeley, 2014) and Martin Menafee (Brown University, 2013) for their invaluable research assistance; Professor Joan Williams and Robin Devaux at Hastings Center for WorkLife Law for their essential support and feedback; and Sheila O'Rourke, Kristin Luker and Jill Adams, U.C. Berkeley and Professor Stephanie Bornstein, U.C. Hastings for their comments and encouragement.

I.	INTRODUCTION.....	271
II.	TITLE IX DISSEMINATION AND COMPLIANCE	276
	A. Areas of Pregnancy Discrimination Under the Title IX	
	Regulations Concerning Students in Higher Education	276
	1. Admissions	276
	2. Hiring.....	277
	3. Coursework Accommodations and Completion.....	277
	4. Pregnancy Leave and Status Protection upon Return from	
	Leave	277
	5. Health Insurance Coverage.....	278
	B. Lack of Dissemination and Compliance	279
	C. Strategies for Dissemination and Compliance	282
	1. Self-Evaluation	283
	2. Recommendations	285
	D. Title IX Enforcement: Administrative Complaint Procedure	
	Through the United States Department of Education’s Office for	
	Civil Rights.....	286
	1. OCR’s Enforcement Efforts	287
	2. Critiques of OCR’s Complaint and Investigation Procedures.....	290
III.	TITLE IX PRIVATE RIGHT OF ACTION	291
	A. The History of Title IX Judicial Action—Athletics and Sexual	
	Harassment	292
	1. Athletics.....	292
	2. Sexual Harassment	293
	B. Title IX, Pregnancy Discrimination and Judicial Action	294
	1. Title IX Cases under Disparate Treatment and Disparate	
	Impact Analyses	294
	i. Disparate Treatment Analysis	295
	ii. Disparate Impact Analysis.....	296
	2. Benefits of Private Action for Monetary Damages	298
	i. Monetary Damages Achieve Congress’s Two-Fold Purpose	
	for Title IX	298
	ii. Monetary Damages Incentivize Victims of Pregnancy	
	Discrimination to Pursue Litigation.....	299
	iii. The Threat of Monetary Damages Will Also Encourage	
	Universities to Review and Comply with Title IX and its	
	Regulations.....	299
	3. Case Law under Title IX’s Pregnancy Discrimination	
	Regulations	299
IV.	CONCLUSION	304

I.
INTRODUCTION

Established by Congress at the peak years of the women's rights movement in 1972,¹ Title IX promised to overturn years of bias by banning sex discrimination in federally funded educational institutions ("recipients").² Now, more than forty years after its passage, Title IX has fulfilled part of its promise, providing access to sports for millions of women and girls who did not previously have the opportunity. Recently it has also forced schools and colleges to take sexual harassment of all kinds seriously, including harassment committed by students against their peers.³

Title IX's specific protection against pregnancy discrimination, however, has largely been ignored despite the fact that the Title IX regulations related to pregnancy discrimination are comprehensive.⁴ Generally, the regulation related to marital or parental status reads: "A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex."⁵ In this article, we focus on the prohibitions against pregnancy discrimination in five areas: admissions; hiring; coursework accommodations and completion; pregnancy leave policies and status protection upon return from leave; and health insurance coverage.⁶ Some judicial protection has been given to pregnant teenagers so that they may finish high school and presumably go to college, but almost no attention has been given to female students in higher education; in addition, college students, graduate students and postdoctoral fellows ("postdocs") who are in their prime childbearing years are probably unaware that Title IX covers pregnancy discrimination.⁷

1. U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL 16 (2001), available at <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf>.

2. *Id.* See also 20 U.S.C. § 1681(a) (2012). Title IX reads "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." *Id.*

3. See discussion *infra* Part III.A.2.

4. See 34 C.F.R. § 106 (2013). The regulations are divided into six subparts with an appendix containing guidelines for eliminating discrimination in vocational education programs. The first four subparts discuss sex discrimination prohibitions in education programs and activities. *Id.* See also 34 C.F.R. §§ 106.31–106.43 (2013). Examples of areas in which sex discrimination in education programs or activities is addressed include: housing, facilities, access to classes, counseling services, employment assistance, athletics, textbooks, and curricular materials. *Id.*

5. 34 C.F.R. § 106.40(a) (2013).

6. See 34 C.F.R. §§ 106.31–106.43 (2013). Examples of areas in which sex discrimination is specifically addressed by the Title IX regulations include: housing, facilities, access to classes, counseling services, employment assistance, athletics, textbooks, and curricular materials. *Id.*

7. NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 40: WORKING TO ENSURE GENDER EQUITY IN EDUCATION 23, 59 (2009), available at <http://www.ncwge.org/PDF/TitleIXat40.pdf> (citing NWLC, *Pregnant and Parenting Students' Rights*, available at <http://www.nwlc.org/sites/default/files/pdfs/PPStudentRightsUnderTitleIX.pdf>); NWLC, *Pregnant and Parenting Students' Rights: FAQs for College and Graduate Students*, available at <http://www.nwlc.org/sites/default/files/pdfs/PPStudentRightsUnderTitleIX.pdf>).

This may change. As part of its commemoration of the fortieth birthday of Title IX in 2012, the Obama Administration announced measures aimed at further boosting the number of women in the science, technology, engineering and mathematics (“STEM”) fields.⁸ A major focus of Obama’s STEM initiative is to develop common guidance for Title IX compliance among the federal agencies:

Building on the success of previous interagency collaboration efforts on Title IX and STEM, the Department of Education is directed to lead an initiative with the Department of Justice and science & technology agencies (including the Department of Energy, NASA, National Science Foundation, and the Department of Health and Human Services) to develop common guidance for grant recipient institutions to comply with Title IX. These activities will consolidate agency expertise – which currently differs from agency to agency – to help institutions better understand their compliance obligations⁹

The 2012 NASA toolkit: *Title IX and STEM: A Guide for Conducting Self-Evaluations* is a model for ensuring Title IX compliance.¹⁰ This guide focuses on pregnancy discrimination, among other forms of discrimination, as a major concern for female scientists who are students and trainees in research and teaching programs.¹¹

Obama’s initiative is focused on women scientists, but serious efforts to achieve Title IX compliance across all colleges and universities will greatly help all students in higher education, not just in the STEM fields. It would support girls and young women in fulfilling college, graduate and professional degrees.

In the STEM fields, preventing pregnancy discrimination is critical since women are not advancing in the field at the same rates as men, largely because of pregnancy and family concerns.¹² Although they are a major part of the talent pool for research science, women are more likely to “leak” out of the academic

www.nwlc.org/sites/default/files/pdfs/2011_07_21_pregnant_and_parenting_students_rights.pdf).

8. Press Release, Office of the Press Secretary, The White House, Obama Administration Commemorates 40 Years of Increasing Equality and Opportunity for Women in Education and Athletics (June 20, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/06/20/obama-administration-commemorates-40-years-increasing-equality-and-oppor> [hereinafter Obama Administration Commemorates 40 Years].

9. *Id.*

10. NAT’L AERONAUTICS & SPACE ADMIN., *TITLE IX & STEM: A GUIDE FOR CONDUCTING TITLE IX SELF-EVALUATIONS IN SCIENCE, TECHNOLOGY, ENGINEERING AND MATHEMATICS PROGRAMS* (2012), *available at* http://odeo.hq.nasa.gov/documents/TITLE_IX_STEM_Self-Evaluation.pdf.

11. *See id.* at 1.

12. *See generally* MARC GOULDEN, KARIE FRASCH, & MARY ANN MASON, BERKELEY CENTER ON HEALTH, ECONOMIC, & FAMILY SECURITY & THE CENTER FOR AMERICAN PROGRESS, *STAYING COMPETITIVE: PATCHING AMERICA’S LEAKY PIPELINE IN THE SCIENCES I* (Nov. 2009), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2009/11/pdf/women_and_sciences.pdf.

pipeline before obtaining tenure.¹³ The National Science Foundation's Survey of Doctorate Recipients, a comprehensive longitudinal survey of all those who have received a Ph.D. since 1973,¹⁴ shows that family formation (i.e. marriage and childbirth) causes the largest leak in the pipeline.¹⁵ Specifically, women scientists who are married with children are thirty-five percent less likely to enter a tenure track position after earning their Ph.D. than married men with children and are twenty-seven percent less likely to obtain tenure in a tenure-track job.¹⁶ It is the young women scholars, the graduate students and particularly postdocs, who decide to change their career direction based on family concerns.¹⁷

This leak might be explained in large part by the fact that colleges and universities do not provide much support for pregnant graduate and postdoc students. For example, of the sixty-two members of the Association of American Universities (the top research institutions in the country), only twenty-three percent guarantee a minimum of six weeks paid leave for postdocs, and only thirteen percent promised the same to graduate students who work as graduate student researchers.¹⁸ However, fifty-eight percent provide this benefit to women faculty.¹⁹ Many of these universities have no maternity policy at all for graduate students and postdocs who are teaching or working in laboratories.²⁰

Students in medical school, law school and other professional schools are also in their prime childbearing years. However, there is less data available for these programs, in part because almost no universities keep track of their students' pregnancies and pregnancy leaves.²¹

College students have babies also. Particularly vulnerable are the students in community colleges, many of whom are older when they begin their studies.²² According to the National Campaign to Prevent Teen and Unplanned Pregnancy,²³ "61 percent of students who have a child after enrolling in a community college drop out before finishing a degree or credential; this dropout rate is 64 percent higher than that of their counterparts who did not have

13. *Id.*

14. *Id.* at 2 n.9. "The Survey of Doctorate Recipients is a biennial weighted, longitudinal study following almost 170,000 Ph.D. recipients across all disciplines until they reach age seventy-six. The SDR is sponsored by the National Science Foundation and other government agencies." *Id.*

15. *Id.* at 2.

16. *Id.* at 2.

17. *Id.* at 2-3.

18. *Id.* at 18-19.

19. *Id.*

20. *Id.*

21. See discussion *infra* Part II.B.

22. 2014 Fact Sheet, AM. ASS'N COMMUN. COLLEGES http://www.aacc.nche.edu/AboutCC/Documents/Facts14_Data_R2.pdf (citing National Center for Education Statistics (2014), 2011-12 National Postsecondary Student Aid Study (NPSAS:12) (AACC analysis) (Finding that the average age of community college students is twenty-eight years old).

23. MARY JACKSTEIT, THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, GETTING STARTED AT COMMUNITY COLLEGES: REDUCING UNPLANNED PREGNANCY AND STRENGTHENING ACADEMIC ACHIEVEMENT (2009), available at <http://www.thenationalcampaign.org/resources/pdf/pubs/gettingstarted.pdf>.

children.”²⁴

Title IX protection is particularly important because many college students work as research assistants or teaching assistants to help pay for their education; nearly all Ph.D. students work their way through graduate school in this way; in fact, it is often an education requirement for a Ph.D. Postdocs are full-time researchers who sometimes teach. However, undergraduate students, graduate students and postdocs are usually not considered employees²⁵ and may not be covered under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (“PDA”) of 1978, which covers sex discrimination, including pregnancy discrimination, in the workplace.²⁶ For the same reasons, they are often deemed contingent or part-time employees for purposes of the Family and Medical Leave Act (“FMLA”)²⁷ and do not receive the pregnancy leave that faculty and other employees receive.²⁸ Even if they are not technically called employees, for most students, the work they do as researchers or teaching assistants is clearly an extension and requirement of their educational programs, and therefore they should be protected under Title IX.

24. Daniel Luzer, *Pregnant College Students*, WASH. MONTHLY (Nov. 25, 2009, 12:54 PM), http://www.washingtonmonthly.com/college_guide/blog/pregnant_college_students.php (citing David Moltz, *A Different Kind of Pregnant Student*, INSIDE HIGHER ED (Nov. 25, 2009, 3:00 AM), <http://www.insidehighered.com/news/2009/11/25/pregnancy>).

25. George E. McCue, *Start a Family or Become a Professor? Parental Leave Policies for Postdoctoral Fellows Training for Academic Careers in the Sciences*, 26 WIS. J.L. GENDER & SOC’Y 109, 120 (2011). “[A] discussion is often made between postdocs who are paid from general laboratory funding and those who are individually funded. Universities often consider the former ‘employees’ that earn the equivalent of wages through their stipend, and consider the latter ‘trainees’, or non-employees, whose stipends technically originated from the funding source outside the university.” *Id.* (citing Laure Haak, *Postdocs and the Law, Part 3: Are Postdocs Employees?* SCI. CAREERS (Dec. 20, 2002), http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2002_12_20/nodoi.1898940035772141261). Universities give different labels to their postdocs depending on their employment status and the labels are confusing and inconsistent from university to university. Labels include “employees,” “associates,” “fellows,” “trainees,” “researchers,” “scholars,” and “appointees.” *Id.* at 119 n.70 (citing *Postdoc Life: Info for Parents and Expectant Parents at the University of Chicago*, UNIV. OF CHI. BIOLOGICAL SCI. DIVISION POSTDOCTORAL ASS’N, <http://www.bsdpstdoc.uchicago.edu/being-childcare.shtml> (last visited Dec. 6, 2013)) (stating fellows cannot take leave under FMLA provisions); Haak, *supra*).

26. 42 U.S.C. § 2000e(k) (2012). See U.S. Equal Employment Opportunity Commission, *The Pregnancy Discrimination Act of 1978*, <http://www.eeoc.gov/laws/statutes/pregnancy.cfm>. But see McCue, *supra* note 25, at 130 n.149. “The postdoc would need to be found to be an employee for purposes of Title VII.” *Id.* “Because Title VII is not specific as to what constitutes an employee, case law has developed tests such as the Fifth Circuit’s ‘economic realities’ test that looks to factors such as the level of control over the worker and who benefits from the work.” *Id.* (citing *Cole v. Venture Transp., Inc.*, No. 99-3259, 2000 U.S. Dist. LEXIS 4353 at *7 (E.D. La. Mar. 30, 2000)). The district court in *Towers v. State University of New York* “appeared to have no issue with the postdoc plaintiff’s claimed employee status.” McCue, *supra* note 25, at 133 (citing *Towers v. State University of New York*, No. 04-5243, 2007 U.S. Dist. LEXIS 37373 (E.D.N.Y. May 21, 2007)).

27. Family and Medical Leave Act (“FMLA”) of 1993, 29 U.S.C. § 2601 (2012). See also GOULDEN, FRASCH, & MASON, *supra* note 12, at 22.

28. McCue, *supra* note 25, at 119 n.70 (citing *Postdoc Life: Info for Parents and Expectant Parents at the University of Chicago*, *supra* note 25 (stating fellows cannot take leave under FMLA provisions) and Haak, *supra* note 25).

This article suggests that it is time to view Title IX as a statute for those affected by pregnancy discrimination in their educational institutions, not simply as a law for mistreated female athletes or victims of sexual harassment.

Part II will address the recent efforts by the United States Department of Education (“Department of Education”) and other federal agencies to seek compliance relating to Title IX and pregnancy discrimination.

Title IX compliance includes the obligation of universities and federal agencies to disseminate information regarding the rights of pregnant students, to undertake periodic self-evaluations which include the collection of data on pregnancies, withdrawals, complaints and other pregnancy-related issues, to set up complaint and enforcement procedures and to resolve complaints in a timely fashion.²⁹

Particular attention will be paid to the NASA compliance guidelines. If disseminated and enforced, these guidelines, favored by the Administration,³⁰ could greatly change the STEM landscape, particularly for undergraduates, graduate students and postdocs. The effect, however, would not be limited to the STEM fields; all undergraduate, graduate and professional schools that receive federal funding would receive the same attention.

The section also explains the enforcement efforts of the U.S. Department of Education’s Office for Civil Rights (“OCR”). Although it has been critiqued in past studies for the time it takes to resolve complaints,³¹ OCR has recently achieved success in investigating and settling two students’ pregnancy discrimination claims with their colleges.

Part III of this article will deal with private action lawsuits under Title IX. This section will begin by explaining how Title IX private action suits have transformed athletics for women, and more recently been applied in sexual harassment cases.

Although much progress has been made, the courts continue to have a difficult time with Title IX enforcement. This section will also analyze the handful of cases specifically addressing high school, undergraduate and graduate students’ pregnancy discrimination lawsuits and note the current judicial trends. Specifically, one of the issues confronting pregnant students in litigation is that both types of discrimination—disparate impact and disparate treatment (also known as intentional discrimination)—may not be enforceable in a private action under Title IX.³² This section explains the difference between disparate

29. See discussion *infra* Part II.C.1.

30. Press Release, Office of the Press Secretary, The White House, Obama Administration Commemorates 40 Years of Increasing Equality and Opportunity for Women in Education and Athletics, *supra* note 8.

31. Julie A. Davies & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 52 (2007) (citing AM. ASS’N OF UNIV. WOMEN LEGAL ADVOCACY FUND, A LICENSE FOR BIAS: SEX DISCRIMINATION, SCHOOLS, AND TITLE IX 14–15 (2000)).

32. Lucy M. Stark, *Exposing Hostile Environments For Female Graduate Students in Academic Science Laboratories: The McDonnell Douglas Burden-Shifting Framework as a*

treatment and disparate impact in the educational context. It also argues that students subject to pregnancy discrimination should, when appropriate, be able to assert violations of either type of discrimination under Title IX. This practice ensures that students are protected from all forms of discrimination.³³

II.

TITLE IX DISSEMINATION AND COMPLIANCE

To effectively implement the Obama Administration's initiative³⁴ and protect female scientists from discrimination based on their pregnancy status,³⁵ colleges and universities must adhere to the compliance and dissemination requirements of Title IX.³⁶ The Title IX regulations provide guidance in complying with this statute.³⁷ These regulations are supplemented by the policies and recommendations developed by the White House, OCR, and the federal funding agencies: the National Aeronautics and Space Administration ("NASA"), the National Science Foundation ("NSF") and the National Institute of Health ("NIH").³⁸ This section discusses the types of discrimination that affect students in higher education, the ways institutions are lacking in their compliance and dissemination procedures, the potential strategies for Title IX compliance and dissemination and the enforcement efforts of OCR.

A. Areas of Pregnancy Discrimination Under the Title IX Regulations Concerning Students in Higher Education

This section highlights the Title IX regulations that protect pregnant students from discriminatory treatment in the following areas: admissions; hiring; coursework accommodations and completion; pregnancy leave policies and status protection upon return from leave; and health insurance coverage.³⁹

1. Admissions

Admissions procedures for undergraduate, masters and Ph.D. programs must abide by Title IX regulations. When making admissions decisions, recipients cannot apply any rule that treats persons differently on the basis of sex or discriminate or exclude any person on the basis of pregnancy, parental or marital

Paradigm for Analyzing the "Women in Science" Problem, 31 HARV. J.L. & GENDER 101, 124 (2008) (citing 1 Educ. Law § 4.03).

33. See James S. Wrona, *Eradicating Sex Discrimination in Education: Extending Disparate-Impact Analysis to Title IX Litigation*, 21 PEPP. L. REV. 1, 16–17 (1994) (citing Recent Case, *Civil Rights Disparate-Impact Doctrine-Court Prohibits Awarding Scholarships on the Basis of Standardized Tests That Discriminatorily Impact Women—Sharif v. New York State Education Department*, 709 F. Supp. 345 (S.D.N.Y. 1989), 103 HARV. L. REV. 806, 807-08 (1990)).

34. See *supra* p. 2; Obama Administration Commemorates 40 Years, *supra* note 8.

35. 34 C.F.R. § 106.40(a) (2013).

36. See *id.* § 106.4(a).

37. See discussion *infra* Part II.A.

38. See discussion *infra* Part II.C.

39. See generally 34 C.F.R. § 106 (2013).

status.⁴⁰ Additionally, they must treat disabilities related to pregnancy in the same manner and under the same policies as any other temporary disability or physical condition.⁴¹

2. Hiring

When hiring, colleges and universities are prohibited from using a person's pregnancy status as an excuse to discriminate or exclude her from employment.⁴²

3. Coursework Accommodations and Completion

A recipient cannot discriminate against a pregnant student or exclude her from any class or extracurricular activity on the basis of her pregnancy status.⁴³ For example, if a university offers off-campus elements of an education program, such as internships or career rotation, it cannot deny participation to a pregnant student on the basis on her pregnancy.⁴⁴ However, the student can decide to participate in a separate portion of the education program or activity.⁴⁵

4. Pregnancy Leave Policies and Status Protection upon Return from Leave

If a student qualifies for pregnancy leave under the Title IX regulations, she must be allowed leave, according to her physician's recommendation, and her position and status cannot be eliminated while she is on leave.⁴⁶ Upon her return,

40. 34 C.F.R. § 106.21(c)(1)–(3) (2013) (“In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies: (1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex; (2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes; (3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and . . .”).

41. *Id.*

42. 34 C.F.R. § 106.57(b) (2013). (“A recipient “shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.”).

43. *Id.* § 106.40(b)(1) (“A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.”). *See also* 34 C.F.R. § 106.34(a) (2006).

44. National Women's Law Center, *Title IX: Pregnant and Parenting Students' Rights: FAQs for College and Graduate Students*, NWLC.ORG 1 (Oct. 2012), http://www.nwlc.org/sites/default/files/pdfs/pps_fa_q_at_dr_10.24.12.pdf [hereinafter National Women's Law Center, *FAQs*].

45. 34 C.F.R. § 106.40(b)(1) (2013).

46. 34 C.F.R. § 106.40(b)(5) (2013) (“In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.”).

she must be reinstated to the status which she held before the leave began.⁴⁷ According to the National Women's Law Center ("NWLC"), an organization committed to protecting and advancing girls' and women's issues,⁴⁸ the recipient must also allow students to make-up the assignments they missed.⁴⁹ This regulation applies to pregnant students even if the college does not have a leave policy in place for students with other temporary conditions.⁵⁰ Some colleges have formal, written pregnancy leave policies, which, according to the regulations, must treat pregnancy the same way they treat any other temporary disability.⁵¹

5. Health Insurance Coverage

In their health insurance policies, educational institutions must treat a student's pregnancy-related conditions or recovery therefrom in the same manner and under the same policies as any other temporary disability.⁵² Recipients are not prohibited from providing family planning services, even though female students may use these services more frequently than male students.⁵³ Additionally, full coverage health services must include gynecological care.⁵⁴

47. *Id.*

48. National Women's Law Center, *Who We Are*, NWLC.ORG, <http://www.nwlc.org/who-we-are> (last visited Feb. 18, 2014).

49. National Women's Law Center, *FAQs*, *supra* note 44, at 1–2.

50. *Id.*

51. 34 C.F.R. § 106.40(b)(4) (2013) ("A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity."). *See, e.g.*, SETH GILBERTSON, THE STATE UNIVERSITY OF NEW YORK, OFFICE OF THE GENERAL COUNSEL, ACCOMMODATING PREGNANT STUDENTS ON SUNY CAMPUSES, EARLY COMPLAINT RESOLUTION AGREEMENT (2013), available at <http://old.suny.edu/counsel/pdf/Accommodating%20Pregnant%20Students%20on%20SUNY%20Campuses.pdf>. As part of its agreement with complainant after complainant experienced pregnancy discrimination, College University of New York ("CUNY") agreed to include the following paragraph into its college student handbooks: "[Insert College] does not discriminate against any student on the basis of pregnancy or related conditions. Absences due to medical conditions relating to pregnancy will be excused for as long as deemed medically necessary by a student's doctor and students will be given the opportunity to make up missed work. Students needing assistance can seek accommodations from the Office of Accessibility [insert contact information] or the Title IX Coordinator [insert name and contact information]."

52. 34 C.F.R. § 106.40(b)(4) (2013) ("A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.").

53. *Id.* § 106.39. Educational institutions are not prohibited "from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services" and if they provide "full coverage health service shall provide gynecological care." *Id.*

54. *Id.*

B. Lack of Dissemination and Compliance

Despite Title IX regulations' clear protections against pregnancy discrimination, this type of discrimination continues to affect female students in educational programs and activities.⁵⁵ Inadequate compliance programs, coupled with minimal dissemination of the statute, have prevented students from advocating for themselves because most do not know they are protected under Title IX.⁵⁶

The lack of dissemination and compliance with Title IX is an issue for almost all recipients. In *Title IX at 40*, the National Coalition for Women and Girls in Education reports that “[s]tudents themselves often have no idea that Title IX prohibits discrimination against pregnant and parenting students. These students are particularly vulnerable if their school gives them incorrect information about enrollment, absence, or other policies.”⁵⁷ For example, in surveys asking about the leave policies for postdocs who had recently experienced childbirth, one university respondent indicated “that they do not provide it, and six indicated that they did not know whether or not it was provided.”⁵⁸ Likewise, recipients are either unaware of the Title IX protections they owe their students or knowingly do not adhere to Title IX dissemination requirements.⁵⁹ For instance, many colleges and universities have not appointed Title IX coordinators.⁶⁰ Title IX coordinators are required because they are supposed to lead the recipient’s response when a student brings a Title IX complaint.⁶¹ A major cause for concern is that the extent of the problem is

55. See e.g., discussion *infra* Part II.D.1.

56. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 7, at 59.

57. *Id.*

58. GOULDEN, FRASCH, & MASON, *supra* note 12, at 5.

59. See 34 C.F.R. § 106.9 (2013) (“Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in the education program or activity extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to §106.8, or to the Assistant Secretary.”).

60. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 7, at 58–59. See also 34 C.F.R. § 106.8 (2013) (“Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.”).

61. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. 1, 7 (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (“The

unknown. According to one commentator, “[n]o reliable data exists on the numbers of pregnant or parenting students or on the numbers of these students who face discrimination in violation of Title IX.”⁶²

When the Federal Demonstration Partnership⁶³ and its Task Force on Parental and Family Leave for Research Trainees examined how several universities interpret Title IX laws and regulations, it found a tangle of rules and policies and a lack of collaboration between recipients and federal agencies to improve the process.⁶⁴ Not only does this result in wasted resources, it also “creates confusion and multiple interpretations of already complicated policies.”⁶⁵

For example, there are many ways in which a recipient’s health care policy could violate Title IX. Recipients may exclude pregnancy coverage, limit that coverage with respect to pregnancy complications, or charge fees for pregnancy coverage that have no counterpart in the pricing of other temporary disabilities.⁶⁶ Most universities provide health care for students but there is limited information on the state of compliance with these policies. One study in 1989 indicated that the vast majority of the policies violated the requirement that they treat pregnancy-related conditions the same as other medical conditions.⁶⁷

Recipients also often allow their professors to set policies in the classroom⁶⁸ and laboratory which can result in illegal policies under Title IX.⁶⁹ It is the recipient’s responsibility to ensure that professors do not use discriminatory practices and policies in their classrooms.⁷⁰ For instance, a professor cannot refuse to accept work submitted after a deadline if the student missed the deadline due to a

[Title IX] coordinator’s responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints.”).

62. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 7, at 58.

63. *About FDP*, FED. DEMONSTRATION P’SHIP, *available at* http://sites.nationalacademies.org/PGA/fdp/PGA_054588 (last visited February 9, 2014) (“The Federal Demonstration Partnership (FDP) is an association of federal agencies, academic research institutions with administrative, faculty and technical representation, and research policy organizations that work to streamline the administration of federally sponsored research.”).

64. Daisy Whittemore, *A Forgotten Class of Scientists: Examining the Parental and Family Benefits Available to Research Trainees* FED. DEMONSTRATION P’SHIP 11, (2012), *available at* http://www.daisywhittemore.com/site/images/docs/fam_leave_report_full_final.pdf.

65. *Id.*

66. *See* 34 C.F.R. §§ 106.40(b)(4), 106.39.

67. Margaret Dunkle & Margaret A. Nash, *Coverage of Pregnancy in Health Insurance for Students Is an Issue That Colleges Should Confront Immediately*, CHRON. HIGHER EDUC., Mar. 15, 1989, at B1. *See also* 34 C.F.R. § 106.40(b)(4) (2000).

68. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 7, at 59.

69. U.S. DEP’T OF EDUC., SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, at 11 (2013), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf>.

70. SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS, *supra* note 69, at 11. *See also* 34 C.F.R. § 106.11 (2000) (“[T]his part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.”).

pregnancy-related absence.⁷¹ Additionally, professors sometimes set policies in their laboratories. As the “boss” and “human resources department” in the laboratory, the principal investigator (“PI”) determines whether postdocs can take parental leave.⁷² The PI may not accommodate her staff member because of the productivity loss to the laboratory.⁷³ For example, for PIs that receive funding from outside sources, their future funding is dependent on their research results.⁷⁴ With the postdoc on leave, the PI suffers a productivity loss and consequently, the laboratory’s funding may be reduced or cut.⁷⁵ To assist postdocs and PIs, some scholars suggest that leave be “sanctioned and supported by the larger institutions – the department, university, and/or funding agency” so that the PI and laboratory do not “absorb the burden.”⁷⁶

Despite Title IX’s requirement that every federal agency providing financial assistance to educational institutions issue Title IX regulations,⁷⁷ only four federal agencies had done so as of 2000.⁷⁸ In 2004, the Government Accountability Office (“GAO”) inquired into the NSF, NASA, the U.S. Department of Energy (“DOE”), and the Department of Education’s efforts in ensuring their recipients’ compliance with Title IX.⁷⁹ The GAO discovered that agencies were not conducting these compliance reviews⁸⁰ and that NSF, NASA, and the DOE had never conducted them.⁸¹ Also, the GAO found that the seventeen agencies who agreed to conduct the Department of Education’s

71. SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS, *supra* note 69, at 11.

72. McCue, *supra* note 25, at 116-17. See 34 C.F.R. §§ 106.40(b)(4), (5) (2013). See also discussion *supra* Part II.A.4.

73. McCue, *supra* note 25, at 117 (citing GOULDEN, FRASCH, & MASON, *supra* note 12, at 32).

74. McCue, *supra* note 25, at 117 (citing Sarah Webb, *Business Sense: Starting an Academic Lab*, SCI. CAREERS (July 17, 2009), http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2009_07_17/credit.a0900088; and Emma Hitt, *Faculty Positions: Seeking the Skills for a Successful Career in Academic*, SCI. CAREERS (Jan. 25, 2008), http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2008_01_25/science.opm.r0800046).

75. McCue, *supra* note 25, at 117 (citing GOULDEN, FRASCH, & MASON, *supra* note 12, at 32).

76. McCue, *supra* note 25, at 117-18.

77. 20 U.S.C. § 1682 (2012) (“Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate [Title IX] by issuing rules, regulations, or orders of general applicability . . .”).

78. GOULDEN, FRASCH, & MASON, *supra* note 12, at 26 (referring to the Department of Education, Department of Agriculture, Department of Energy and Department of Health and Human Services).

79. *Id.* at 27 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-639, GENDER ISSUES: WOMEN’S PARTICIPATION IN THE SCIENCES HAS INCREASED, BUT AGENCIES NEED TO DO MORE TO ENSURE COMPLIANCE WITH TITLE IX (2004), available at <http://www.gao.gov/new.items/d04639.pdf>).

80. GOULDEN, FRASCH, & MASON, *supra* note 12, at 27. See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-639, *supra* note 79, at 11.

81. GOULDEN, FRASCH, & MASON, *supra* note 12, at 27. See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-639, *supra* note 79, at 11.

reviews on its behalf were not performing them.⁸² After GAO issued its report, DOE, NSF and NASA started conducting reviews; however, their findings are not public.⁸³

C. Strategies for Dissemination and Compliance

Title IX requires that federal funding agencies conduct periodic compliance reviews and investigate complaints that allege a recipient is discriminating against women because of their pregnancy status.⁸⁴

The Title IX regulations provide several options for ensuring adequate dissemination. To comply with Title IX, the regulations stipulate that recipients must inform applicants that the university does not discriminate on the basis of sex in its admissions or employment decisions.⁸⁵ One way to work towards achieving the broad mandate under Title IX regulation § 106.9(a)(1) “to apprise such persons of the protections against discrimination assured them by [T]itle IX” is by including “pregnancy discrimination” in the enumeration of its protections in its policies.⁸⁶ Federal agencies could also demand that in order for an application for federal financial assistance to be approved, the applicant or recipient must assure its compliance with Title IX and commitment “to take whatever remedial action is necessary . . . to eliminate . . . discrimination on the basis of sex.”⁸⁷

The Obama Administration has made efforts toward Title IX compliance. In 2011, the White House and the NSF implemented the “NSF Career-Life Balance Initiative” which supports postdocs and faculty in the midst of family formation by providing suspension of grants for parental leave, offering parental supplements for laboratories while PIs are on family leave, and promoting other family friendly policies.⁸⁸ Grant suspensions, also known as “stop the clock” provisions, allow grant recipients on parental leave to suspend their grant during the leave period and extend it “by a comparable duration at no cost.”⁸⁹ For a six month leave, for example, a PI would extend benchmarks or eventual target dates for research completion by six months.⁹⁰ This ensures that students taking

82. GOULDEN, FRASCH, & MASON, *supra* note 12, at 27. See also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-639, *supra* note 79, at 12.

83. GOULDEN, FRASCH, & MASON, *supra* note 12, at 27 (citing *Title IX Compliance Reviews – HSF FAQ*, available at http://www.nsf.gov/od/oeo/freq_questions.pdf (last updated December 9, 2005)).

84. GOULDEN, FRASCH, & MASON, *supra* note 12, at 27 (citing 20 U.S.C. § 1681(a) (2006)). See also 34 C.F.R. §§ 106.4(a) (2013), 106.8(a) (2013).

85. 34 C.F.R. § 106.9(a)(1) (2013).

86. *Id.*

87. *Id.* § 106.4(a).

88. Press Release, Office of the Press Secretary, The White House, The White House and National Science Foundation Announce New Workplace Flexibility Policies to Support America's Scientists and Their Families (Sept. 26, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/26/white-house-and-national-science-foundation-announce-new-workplace-flexi>.

89. *Id.*

90. McCue, *supra* note 25, at 127.

or returning from parental leave do not experience “undue pressure for taking time off.”⁹¹ To standardize these leave policies, federal funding agencies should tell each recipient to follow and use them as guidelines in its institution.⁹²

In 2010, the U.S. Department of Justice (“DOJ”) coordinated a Title IX Interagency Working Group that included representatives from the NSF, NASA, DOE and Department of Education to focus on effective strategies for Title IX compliance reviews of STEM programs.⁹³ On June 20, 2012, the Obama Administration announced that federal agencies plan to consolidate agency expertise on Title IX compliance and highlighted the fact that many federal agencies are actively engaged in investigations to ensure such compliance.⁹⁴ President Obama helped crystallize the importance of compliance with Title IX by admitting that women still face barriers in education, which can be resolved if more progress is made under Title IX.⁹⁵

1. Self-Evaluation

Under Title IX regulations, a recipient must evaluate its own policies and procedures concerning Title IX compliance.⁹⁶ This practice is meant to allow a recipient to identify Title IX violations in its admissions process and treatment of students.⁹⁷ With this information, recipients can implement “stronger outreach and recruitment efforts”, create “greater transparency in program policies and practices,” and modify policies and practices so that they adhere to Title IX.⁹⁸ Utilizing the results from periodic self-evaluations can help improve the overall inclusiveness in educational programs and activities.⁹⁹

The NASA guidelines, which have been recommended by the Obama Administration,¹⁰⁰ suggest recipients inquire about their

Applications, admissions, matriculations, retention, and degrees earned rates . . . [c]riteria for assignment of graduate students to researchers and advisors; [f]unding of students through

91. McCue, *supra* note 25, at 127 (citing Joan Williams, Distinguished Professor of Law, Univ. of Cal Hastings, Denise D. Denton Distinguished Lecture at the Univ. of Wis. – Madison (Oct. 2, 2009), available at <http://mediasite.engr.wisc.edu/Mediasite/Viewer/?peid=bd6dcd1d4db4719b813b6d4b5a3445b>).

92. McCue, *supra* note 25, at 128.

93. Jessie DeAro, *Bringing Title IX to Classrooms and Labs*, WHITE HOUSE COUNCIL ON WOMEN & GIRLS (June 24, 2010), <http://www.whitehouse.gov/blog/2010/06/24/bringing-title-ix-classrooms-and-labs>.

94. Obama Administration Commemorates 40 Years, *supra* note 8.

95. Press Release, Office of the Press Secretary, The White House, President Obama Reflects on the Impact of Title IX (June 23, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/23/op-ed-president-obama-president-obama-reflects-impact-title-ix>.

96. 34 C.F.R. § 106.3(c) (2013).

97. NAT’L AERONAUTICS & SPACE ADMIN., *supra* note 10, at 24. See also 34 C.F.R. § 106.3(c)(1) (2013).

98. NAT’L AERONAUTICS & SPACE ADMIN., *supra* note 10, at 24.

99. See *id.*

100. Obama Administration Commemorates 40 Years, *supra* note 8.

assistantships, fellowships, and scholarships; [a]llocation of lab space and experiences in the lab and classroom; [o]pportunities to . . . apply for research grants; and [p]eriodic campus climate and culture surveys.¹⁰¹

In regards to admissions and enrollments, recipients should review: the total numbers of applications, acceptances and new enrollment rates by gender; the number of enrolled students who left the institution by gender; the total amount of financial assistance given to male and female program “scholarships, fellowships, research assistantships and teaching assistantships”; and “graduation rates and/or degrees earned by gender.”¹⁰² They should also analyze whether their admissions criteria has an adverse impact on gender.¹⁰³

Furthermore, in regards to their pregnancy leave policies, recipients should track the:

Number of graduate students, by gender, who have requested leave for child-bearing and/or dependent care, and number approved for such leave; [s]tatus (e.g., graduated, still enrolled, changed major, left program) of students, by gender, who were approved or not approved for childbearing and/or dependent care; [and] [n]umber of students, by gender, who have received childcare subsidies, grants, or scholarships to assist with childcare costs.¹⁰⁴

Recipients should also pay attention to documents and statistics regarding their “non-discrimination and anti-harassment policies and grievance procedures for students.”¹⁰⁵ NASA recommends recipients ask:

Are the procedures easily accessible to the student body? For example, may they be easily found through a search on the university Web site? Is the Title IX coordinator identified in written materials, and is the Web site for the Title IX coordinator’s office easily found? Are steps taken to ensure that the procedures and related policies are appropriately disseminated to students on a regular basis (e.g., handbooks, posters, brochures, e-mails)?¹⁰⁶

Not only should recipients evaluate the policies to ensure they are accessible and informative, they should also keep track of the number of grievances and complaints made by students against faculty, staff and other students.¹⁰⁷ Lastly, recipients should note any trends in their data and determine the appropriate

101. NAT’L AERONAUTICS & SPACE ADMIN., *supra* note 10, at 3.

102. *Id.* at 6.

103. *Id.* at 8.

104. *Id.* at 14.

105. *Id.* at 11.

106. *Id.* at 13 (internal citations omitted).

107. *Id.* at 11.

steps needed to address related issues.¹⁰⁸

If their policies and procedures do not comply with Title IX requirements, recipients must modify them to bring them into compliance and remedy any discrimination that resulted from the non-compliant policies.¹⁰⁹ In addition, recipients must document the modifications and remedial steps taken to resolve any violations.¹¹⁰ These documents should be kept for three years and be available to their funding agency upon request.¹¹¹

In The Center for American Progress's 2009 report, *Staying Competitive: Patching America's Leaky Pipeline in the Sciences*, researchers recommend that recipients review whether their existing and future policies "are effective in meeting researchers' needs and comply with Title IX."¹¹² By collecting systematic longitudinal data, colleges and universities can make informed decisions and respond effectively to complaints.¹¹³ To assist in their future reviews, they can start building and maintaining the necessary datasets now in order to thoroughly examine whether their policies are effective and compliant.¹¹⁴ For example, they should track data relating to "how much . . . [the effects of family formation] explain the drop off of women in federal funding rates at each successive training/career level[.]"¹¹⁵ Because most of these types of reviews are under-assessed, federal funding agencies should offer more grant programs that assist with recipients' efforts.¹¹⁶

2. Recommendations

Through its comprehensive review of STEM programs' compliance with Title IX, NASA discovered promising practices implemented at colleges and universities.¹¹⁷ Among them, recipients established strong Title IX coordination efforts, internal complaint procedures, ongoing self-evaluation efforts and family friendly policies and programs.¹¹⁸ NASA ultimately concluded that "strong Title IX coordination efforts, especially broad dissemination of information and effective education and awareness efforts, can assist educational institutions to address issues of gender in STEM."¹¹⁹

108. *Id.* at 13.

109. U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 109. *See also* 34 C.F.R. § 106.3(c) (2013).

110. U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 109.

111. U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 109. *See also* 34 C.F.R. § 106.3(d) (2013).

112. GOULDEN, FRASCH, & MASON, *supra* note 12, at 42.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. NAT'L AERONAUTICS & SPACE ADMIN., TITLE IX & STEM: PROMISING PRACTICES FOR SCIENCE, TECHNOLOGY, ENGINEERING, & MATHEMATICS 4 (June 2009), *available at* http://odeo.hq.nasa.gov/documents/71900_HI-RES.8-4-09.pdf.

118. *Id.* at 4, 24.

119. *Id.* at 27.

Most recommendations stress the importance of collaboration between research universities and federal funding agencies. The Federal Demonstration Partnership's Task Force on Parental and Family Leave for Research Trainees recommends:

- (1) collaboration and partnerships;
- (2) further research into existing and efficacious programs and their costs;
- (3) policy reform, including a minimum baseline for all research trainees;
- (4) institutional climate change and support, including transparency, zero tolerance for discrimination, and mentoring programs;
- and (5) increased outreach and dissemination of clear policies at academic institutions and federal agencies.¹²⁰

In response to the Federal Demonstration Partnership's suggestions, the Obama Administration could convene a panel to "hammer out baseline policies that would become mandatory for all grant agencies and universities."¹²¹ The policies could mimic those offered by other federal agencies, such as the NSF's salary supplements to the grant for childbirth leave and the NIH's support for re-entry training after family leave of more than a year.¹²²

D. Title IX Enforcement: Administrative Complaint Procedure Through the United States Department of Education's Office for Civil Rights

To exercise their legal protections under Title IX outside the court system, students can either file a complaint with the recipient's Title IX coordinator¹²³ or OCR. OCR can enact an Early Complaint Resolution ("ECR"),¹²⁴ through which OCR may serve as a facilitator to resolve the complaint.¹²⁵ OCR will monitor the ECR to ensure that, if it is unsuccessful, OCR's investigation of the complaint will proceed in a timely fashion.¹²⁶ Upon completion of the investigation, OCR will rule whether the recipient has complied with Title IX.¹²⁷

120. Whittemore, *supra* note 64, at 3.

121. Mary Ann Mason, *The Next Step for Female Scientists*, CHRON. HIGHER EDUC. (Feb. 13, 2012), <http://chronicle.com/article/The-Next-Step-for-Female/130717/>.

122. *Id.*

123. 34 C.F.R. § 106.8(a) (2013). Each recipient must have one employee that ensures it is in compliance with Title IX. Her/his responsibilities can include investigating complaints that allege the recipient is noncompliant. This coordinator should be accessible and as such, the recipient must inform all students of his/her name, office address and telephone number. *Id.* See also § 106.8(b) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.").

124. *OCR Case Processing Manual*, U.S. DEP'T OF EDUC. Article II (Jan. 2010), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>. An "ECR may take place at any time during the investigative process. OCR does not sign, approve, or endorse any agreement reached between the parties. However, OCR will assist both parties in understanding pertinent legal standards and possible remedies." *Id.*

125. *Id.* at § 201.

126. *Id.* at § 205.

127. *Id.* at § 303.

OCR will also inform both parties that “[t]he complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.”¹²⁸ The complainant can also appeal OCR’s findings.¹²⁹ If OCR makes a determination of non-compliance then it “will attempt to secure the recipient’s willingness to negotiate a resolution agreement.”¹³⁰ To be considered resolved, the recipient must enter into an agreement, which if fully performed, will remedy the problem.¹³¹

If a recipient deemed to be in non-compliance is unwilling to voluntarily resolve the complaint, then OCR will send a Letter of Impending Enforcement Action.¹³² Then, if the parties cannot reach a resolution agreement post-Letter, OCR may “suspend, terminate, or refuse to grant or continue” federal assistance to the recipient.¹³³ Scholars in 2002 indicated that OCR has never used this remedy.¹³⁴ It may also refer the matter to the DOJ, which may seek injunctive relief, specific performance, or other remedies against the recipient.¹³⁵

1. OCR’s Enforcement Efforts

In June 2012, OCR released a report highlighting its enforcement efforts.¹³⁶ It noted that, in the span of three fiscal years, there were 3,000 Title IX-related complaints and more than thirty-five investigations.¹³⁷ These investigations addressed a broad range of Title IX issues, including comparable educational opportunities, right to equal treatment, athletics, sexual violence, and sexual- and gender-based harassment.¹³⁸ In fiscal years 2009-2010 and 2010-2011, the issue of pregnancy discrimination against pregnant and parenting students was raised a total of forty-three times in Title IX complaints.¹³⁹ The report did not reveal how these issues were resolved.¹⁴⁰

128. *Id.*

129. *Id.* at § 306.

130. *Id.* at § 303(b).

131. *Id.* at § 304.

132. *Id.* at § 305 (The Letter of Impending Enforcement Action can include “[c]onclusions for each issue that reference the relevant facts, the applicable regulation, and the appropriate legal standards.”)

133. *Id.* at Article IV. *See also* § 401.

134. Jonathan M.H. Short, “*Something of a Sport: The Effect of Sandoval on Title IX Disparate Impact Discrimination Suits*,” 9 WM. & MARY J. WOMEN & L. 119, 123 (2002) (citing Joanna Grossman, *The Supreme Court’s Recent Disparate Impact Case And Its Implications For Gender Equity*, FINDLAW (May 8, 2001), <http://writ.news.findlaw.com/grossman/20010508.html>).

135. *OCR Case Processing Manual*, *supra* note 124, at § 402; U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 165.

136. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX ENFORCEMENT HIGHLIGHTS (June 2012), available at <http://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf>.

137. *Id.* at 2.

138. *Id.* at 2-3.

139. *Id.* The numbers of complaints and issues will not necessarily match: “A single complaint can raise multiple issues; therefore, the total number of issues raised will exceed the number of complaints received.” *Id.*

140. *See id.*

A year later in 2013, OCR released a “Dear Colleague Letter”¹⁴¹ and pamphlet outlining pregnant students’ legal rights under Title IX.¹⁴² Although focused on secondary schools, the pamphlet applies to all educational institutions subjected to Title IX’s requirements.¹⁴³

OCR has recently become more proactive. In the past year, the NWLC achieved positive results on behalf of two students who were subjected to pregnancy discrimination in higher education. First, it filed a complaint with OCR on behalf of Stephanie Stewart, a college student at one of the colleges in the City University of New York (“CUNY”) system.¹⁴⁴ In the complaint, the NWLC explained that Stewart’s college discriminated against her when it “refused to excuse absences related to her pregnancy and retaliate[ed] when she complained.”¹⁴⁵ Specifically, her professor informed Stewart that she could not make-up tests or assignments missed during her pregnancy-related absences.¹⁴⁶ In addition, college administrators recommended that she drop the class because her delivery date was before the end of the term.¹⁴⁷ After filing the complaint, the parties reached an agreement through OCR’s Early Complaint Resolution Agreement.¹⁴⁸ In the agreement, CUNY agreed to reimburse Stewart for her tuition-related expenses and reinstated her tuition scholarship.¹⁴⁹ CUNY also promised “to adopt a new university-wide policy addressing the rights of pregnant and parenting students under Title IX, publish and disseminate that policy to its faculty, conduct training so that faculty members understand their obligations, and include the policy in the student handbook.”¹⁵⁰ In the spring of 2013, CUNY released a memorandum outlining “the University’s obligations not to discriminate against students on the basis of pregnancy, childbirth and related conditions.”¹⁵¹

141. Letter from Seth Galanter, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (June 25, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf>.

142. SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS, *supra* note 69.

143. *Id.* at 2.

144. Administrative Complaint, U.S. Department of Education, Office for Civil Rights, http://www.nwlc.org/sites/default/files/pdfs/stewart_complaint_redacted_redacted.pdf.

145. *Id.*

146. National Women’s Law Center, *City University of New York Settles Pregnant Student’s Discrimination Complaint Initiated by NWLC*, NWLC.ORG (May 1, 2013), <http://www.nwlc.org/press-release/city-university-new-york-settles-pregnant-students-discrimination-complaint-initiated-> [hereinafter *City University of New York Settles Pregnant Student’s Discrimination Complaint*].

147. *Id.*

148. GILBERTSON, *supra* note 51.

149. *Id.* at 2. See also *City University of New York Settles Pregnant Student’s Discrimination Complaint*, *supra* note 146.

150. *City University of New York Settles Pregnant Student’s Discrimination Complaint*, *supra* note 146.

151. Memorandum from the City University of New York to Faculty and Staff: Non-Discrimination of Students on the Basis of Pregnancy, Childbirth and Related Conditions, (May 9, 2013), available at http://www1.cuny.edu/mu/vc_la/2013/05/09/memo-to-faculty-and-staff/.

Although the form of settlement is unclear, NWLC also secured a promising agreement with Logan University in Missouri after it filed a complaint with OCR.¹⁵² The complainant, Brandi Kostal, was a student at Logan University's graduate chiropractic program and masters' program in Nutrition and Human Performance.¹⁵³ Kostal experienced pregnancy discrimination in the spring of 2013 in her chiropractic program when she was told "that Logan's policy was not to excuse absences related to pregnancy or childbirth, and that she had the option to withdraw from her doctorate-level classes, be penalized for missing classes, or return to school immediately."¹⁵⁴ Furthermore, a professor in one of her masters-level courses, refused to "give her incompletes so she could take the midterms and final exams for those classes post-recovery from childbirth."¹⁵⁵ Kostal explained how the discrimination affected her:

My academic future has suddenly been threatened and since I have a family to support, there's a lot at stake. I've always been goal-oriented, but having two children has made me work even harder to achieve a secure future for my family. It shocked me that I was penalized for being pregnant. I realize now that I'm probably not alone. How many other pregnant students are being pressured to drop courses when they simply need to make up missed work?¹⁵⁶

According to NLWC, the settlement was similar to the one between CUNY and Stewart:

Logan has agreed to adopt a policy that addresses the rights of pregnant and parenting students under Title IX under which all pregnancy-related absences will be excused for as long as medically necessary and Logan will work with each student on an individualized plan for making up missed work. Logan also agreed to conduct annual, mandatory trainings so that faculty members understand their Title IX obligations and include the policy on its website and in the student handbook. Logan also will remove the failing grades from Kostal's transcript, allow her

152. National Women's Law Center, *Missouri College Settles Pregnant Student's Discrimination Complaint Initiated by NWLC*, NWLC.ORG (Dec. 10, 2013), available at <http://www.nwlc.org/press-release/missouri-college-settles-pregnant-students-discrimination-complaint-initiated-nwlc> [hereinafter *Missouri College Settles Pregnant Student's Discrimination Complaint*]. See also Complaint by Brandi Kostal to the U.S. Department of Education's Office for Civil Rights against Logan University (July 30, 2013), available at <http://www.nwlc.org/sites/default/files/pdfs/20130731KostalvLoganOCRComplaint.pdf> [hereinafter *Complaint of Brandi Kostal*].

153. Complaint of Brandi Kostal, *supra* note 152, at 1.

154. National Women's Law Center, *NWLC Files Title IX Complaint Against College in Missouri for Discriminating Against a Pregnant Student*, NWLC.ORG (July 31, 2013), available at <http://www.nwlc.org/press-release/nwlc-files-title-ix-complaint-against-college-missouri-discriminating-against-pregnant>.

155. *Id.*

156. *Id.*

to complete the two Masters Courses at no cost and reimburse her tuition payments for the period during which she was pregnant and recovering from childbirth.¹⁵⁷

2. Critiques of OCR's Complaint and Investigation Procedures

Despite its awareness efforts and the positive results in recent settlements, OCR has also been critiqued for its performance. In a study spanning from 1993 to 1997, the American Association of University Women ("AAUW") gave OCR a fairly negative evaluation.¹⁵⁸ The study was particularly critical of how OCR handles Title IX complaints.¹⁵⁹ For example, OCR copied Title VII's requirement that complainants must file with OCR within 180 days of an alleged violation,¹⁶⁰ which means OCR can and does refuse to investigate many complaints that do not fall within that statute of limitations.¹⁶¹ With poor Title IX compliance among educational institutions, some students do not understand how the law pertains to them and therefore do not file within the timeframe.¹⁶²

The study also criticized the amount of time OCR takes to resolve complaints when it does investigate them.¹⁶³ "Even though OCR's latest reports indicate that it is resolving cases within six months, students . . . want and need a speedier resolution."¹⁶⁴ AAUW also noted OCR focuses on complaint processes rather than compliance reviews and therefore it does not know which recipients are compliant with the statute.¹⁶⁵ Lastly, the study found that OCR spends

157. *Missouri College Settles Pregnant Student's Discrimination Complaint*, *supra* note 152.

158. Davies & Bohon, *supra* note 31, at 51–52 (citing AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 31, at 14–15).

159. Davies & Bohon, *supra* note 31, at 52.

160. *Id.* (citing 34 C.F.R. § 100.7(b) (1980), 29 C.F.R. § 1601.13 (2005)).

161. Davies & Bohon, *supra* note 31, at 52 (citing AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 31, at 51–57 ("During the AAUW investigation, OCR received 2,000 complaints, but took no investigative action in over half, due either to lack of jurisdiction or filing outside of the 180 day window.")).

162. *Id.*

163. *Id.* (citing AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 31, at 14–15 ("The AAUW Study, which spanned four years, 1993–1997, found that the length of time required to complete an investigation seemed to vary by region.")). *But see* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT TO CONGRESS: FISCAL YEAR 2004, at 3 (2005), available at <http://www2.ed.gov/about/reports/annual/ocr/annrpt2004/annrpt2004.doc>. OCR's fiscal year 2004 statistics reveal that it resolved ninety-one percent of the complaints it received within 180 days, which exceeded its goal of 80%. *Id.*

164. Davies & Bohon, *supra* note 31, at 52. *See also* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT TO CONGRESS: FISCAL YEAR 2004, *supra* note 163.

165. Davies & Bohon, *supra* note 31, at 52, (citing AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 31, at 13 (OCR conducted less than 20 compliance reviews related to sex discrimination during the AAUW survey period); U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT TO CONGRESS: FISCAL YEAR 2004, *supra* note 163, at 5 (In fiscal year 2004, OCR conducted fifty-three compliance reviews and resolved twenty-nine. Fifteen of those "involved reviews of state departments of education to ensure that Title IX coordinators were designated and trained and that Title IX nondiscrimination policies and other information were published in accordance with regulations.")).

disproportionately fewer time and resources on sex discrimination cases compared to the number of complaints it receives.¹⁶⁶

An alternative to filing a complaint with OCR is pursuing private action under Title IX, which has also proved successful for students.¹⁶⁷

III.

TITLE IX PRIVATE RIGHT OF ACTION

In 1979, the U.S. Supreme Court recognized an implied private right of action under Title IX in *Cannon v. University of Chicago*.¹⁶⁸ This means that private litigants have a cause of action under Title IX¹⁶⁹ and therefore can pursue their rights under the statute in court. The Court reasoned that because Title VI,¹⁷⁰ the model for Title IX,¹⁷¹ granted an implied private right of action, Congress intended Title IX to contain an implied private right of action as well.¹⁷² An individual can pursue litigation under Title IX even without exhausting her administrative remedies¹⁷³ and with legal protection against retaliation.¹⁷⁴

Thirteen years after *Cannon*, the Court ruled that monetary damages were available in a Title IX suit for intentional sex discrimination in the sexual

166. Davies & Bohon, *supra* note 31, at 53 (citing AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 31, at 30–31 (“Of compliance reviews during the four-year investigation period, 3.2% dealt with sex discrimination, while sex discrimination constituted 10% of the total complaints received.”)). *But see* U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX ENFORCEMENT HIGHLIGHTS, *supra* note 136, at 2–3 (discussing positive steps taken by OCR to end sex discrimination in schools).

167. *See* Short, *supra* note 134.

168. *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979) (holding that a plaintiff who alleged that the University of Chicago Medical School discriminated against her on the basis of her sex after she was denied admission to its program could maintain her private lawsuit).

169. *Id.*

170. Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964) (codified at 42 U.S.C. § 2000d (2012)) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

171. *See also* U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 8–10.

172. *Cannon*, 441 U.S. at 694–98 (noting that because Congress was aware that Title VI included an implied private right of action when it enacted Title IX and patterned Title IX after Title VI, it must have created Title IX to include a private cause of action). *See also* Sean Campbell, *Civil Rights—Title IX—Compensatory Damages Are Not Available for a Title IX Violation Without a Showing of Intentional Discrimination*, *Homer v. Kentucky High School Athletic Ass’n*, 206 F.3d 685 (6th Cir. 2000), cert. denied, 121 S. Ct. 69 (2000), 11 SETON HALL J. SPORT L. 177, 182 n. 44 (2001) (explaining the Court’s reasoning in *Cannon*).

173. *See Cannon*, 441 U.S. at 706 n.41; U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 156. *But cf.* U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 112 (noting that there is no private right of action for a recipient’s failure to implement a Title IX grievance procedure because “failure to meet this requirement, by itself, does not amount to discrimination on the basis of sex” but that funding agencies can enforce this requirement administratively (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998))).

174. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005) (finding Title IX’s implied private right of action includes retaliation suits “because retaliation falls within the statute’s prohibition of intentional discrimination on the basis of sex”).

harassment case *Franklin v. Gwinnett County Public Schools*.¹⁷⁵ This was the first time the Court allowed monetary damages in a private Title IX action.¹⁷⁶ The Court relied on the “longstanding rule” that, without an express limitation by Congress, the existence of a cause of action (either expressly or impliedly) gives courts the power to grant all appropriate remedies.¹⁷⁷ Furthermore, during the years before and after Congress passed Title IX, the Court has found that the denial of a remedy is the exception rather than the rule.¹⁷⁸

A. The History of Title IX Judicial Action—Athletics and Sexual Harassment

Since the advent of Title IX in 1972, female athletes and victims of sexual harassment have brought lawsuits under Title IX to challenge sex discrimination in their high schools and universities.

1. Athletics

The data show a substantial expansion in the number of female athletes since Title IX’s passage: in the 1971-72 school year, the number of girls participating in high school sports was 294,015; in 2012, there were 3,173,549 girls involved in their schools’ sports programs.¹⁷⁹ At the college level, the number of female athletes has increased 560% since 1972.¹⁸⁰

Many of the cases enforcing equal access to sports under Title IX have been brought by plaintiffs attempting to block a university from eliminating or demoting an existing women’s sports team. For example, in *Roberts v. Colorado State Board of Agriculture*, the Tenth Circuit upheld the district court’s permanent injunction ordering Colorado State University to reinstate its varsity women’s softball team as well as hire a coach and recruit new team members.¹⁸¹

175. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75, 76 (1992). See also Ellen Vargyas, *Franklin v. Gwinnett County Public Schools And Its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373, 377 (“Although *Franklin* presented only the question of compensatory damages, the Court’s analysis strongly suggests that punitive damages are also available.”).

176. Campbell, *supra* note 172, at 183 (citing *Horner v. Kentucky High School Athletic Ass’n*, 206 F.3d 685 (6th Cir. 2000)).

177. U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 157 (citing *Franklin*, 503 U.S. at 66, 70–71).

178. *Franklin*, 503 U.S. at 66, 71–72 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 375 (1982)).

179. Robert B. Gardner & Rick Wulkow, *Celebrating Title IX 40 Years Later*, NAT’L FED’N STATE HIGH SCH. ASS’NS, <http://www.nfhs.org/content.aspx?id=6910> (last visited Apr. 3, 2014). “While there are still 1.3 million fewer girls than boys in high school sports, the gap has closed remarkably from the 3 million deficient 40 years ago. And if the sport of football (1,134,000) was removed from the boys participation totals, the numbers would be almost identical.” *Id.*

180. *Title IX Myths and Facts*, WOMEN’S SPORTS FOUND., <http://www.womenssportsfoundati.org/en/home/advocate/title-ix-and-issues/what-is-title-ix/title-ix-myths-and-facts> (last visited Apr. 3, 2014).

181. See *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 825, 834 (10th Cir. 1993). The district court can order the university to “provide equipment and uniforms”, hire a coach, “prepare a field for the softball team’s use”, and recruit members in order to ensure the “program receives

Similarly, the U.S. District Court for the Western District of Pennsylvania issued a preliminary injunction to reinstate the gymnastics and field hockey teams for female athletes in *Favia v. Indiana University of Pennsylvania*.¹⁸²

One case that was filed but not resolved in the court system addressed pregnancy discrimination in the athletics context. In a 2003 lawsuit, female athlete, Tara Brady, alleged she was discriminated against on the basis of her pregnancy.¹⁸³ After her pregnancy was revealed, Brady claims she was asked to leave the basketball team by her coach who called her a “distraction” and the university denied her request for “medical redshirt” despite the fact that this status is typically given to other injured athletes so that they can keep their athletic scholarships.¹⁸⁴ Since the case settled out of court on undisclosed terms, it did not create any legal precedent on the accommodation that recipients are required to provide for pregnant athletes.¹⁸⁵ However, OCR’s June 25, 2007 “Dear Colleague Letter,” issued after the media reported instances of recipients terminating athletic scholarships because of an athlete’s pregnancy, provided some guidance on how recipients should accommodate pregnant athletes.¹⁸⁶ Specifically, it reminds recipients that they must treat pregnancy in the same manner as they treat any other temporary disability.¹⁸⁷

2. Sexual Harassment

Another cultural transformation brought about by Title IX occurred in the area of sexual harassment. Prior to the passage of Title IX, “[m]aking sexual innuendos, calling people sexually charged names, spreading rumors about sexual activity, or touching someone inappropriately used to be dismissed as ‘boys will be boys’ type of behavior at best, and rude or crude at worst.”¹⁸⁸ After Title IX’s passage, the Supreme Court ruled that schools “must prevent and address harassment against students, regardless of whether the harassment is

all the incidental benefits of varsity status.” *Id.* at 834 (citing 34 C.F.R. §§ 106.41(c)(2), (5), (7) (2000)).

182. See *Favia v. Ind. Univ. of Penn.*, 812 F. Supp. 578, 579-580 (W.D. Pa. 1993).

183. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217 (2005) (citing Complaint at 25, *Brady v. Sacred Heart Univ.* (D. Conn. filed Mar. 24, 2003) (No. 3:03-CV-514) (on file with author), available at http://www.womenslawproject.org/Briefs/brady_complaint.pdf).

184. Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, 31 HARV. J.L. & GENDER 323, 326-27 (2005) (citing Amy Rainey, *What Athletes Can Expect When They’re Expecting: Many Colleges Are Ill-Prepared for Pregnant Athletes— and Some Players Suffer as a Result*, CHRON. HIGHER EDUC. (May 26, 2006), at A42).

185. *Id.*

186. Brake, *supra* note 184, at 340-45. See also Dear Colleague Letter, Dept. of Education, Office for Civil Rights (June 25, 2007), available at <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070625.html>.

187. Dear Colleague Letter, Dept. of Education, Office for Civil Rights (June 25, 2007), available at <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070625.html>. See also 34 C.F.R. § 106.40(b) (4) (2013).

188. *Sexual Harassment*, TITLEIX.INFO, <http://www.titleix.info/10-Key-Areas-of-Title-IX/Sexual-Harassment.aspx> (last visited Dec. 6, 2013).

perpetrated by peers, teachers, or other school officials.”¹⁸⁹

In *Gebser v. Lago Vista Independent School District*, a high school student sued her school district after her teacher sexually harassed her.¹⁹⁰ The Court held that the school district could be liable for damages only if a district official with the authority to implement “corrective measures” had actual notice but was deliberately indifferent to the harassment.¹⁹¹

The Supreme Court has also ruled on sexual harassment cases where another student is the perpetrator. In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the Court ruled that a school is liable for damages if the recipient is deliberately indifferent to the harassing conduct and the harassment is “so severe, pervasive, and objectively offensive” that it interferes with the victim’s access to educational opportunities or benefits.¹⁹²

U.S. courts have examined Title IX in many contexts over the past four decades. Plaintiffs have used the statute successfully in alleging gender inequity in athletics and sexual harassment. Few suits, however, have been based on pregnancy discrimination.¹⁹³ This may be due, in part, to the fact that many people do not know their rights under the statute.¹⁹⁴

B. Title IX, Pregnancy Discrimination and Judicial Action

Title IX, and its regulations prohibiting pregnancy discrimination, can and should be an important tool for female students combating pregnancy discrimination in academia. This section explains the history and application of disparate treatment and disparate impact theories in Title IX pregnancy discrimination cases, discusses the benefits of private action for monetary damages for victims of pregnancy discrimination, and highlights Title IX pregnancy discrimination cases.

1. Title IX Cases under Disparate Treatment and Disparate Impact Analyses

In discrimination lawsuits, courts may analyze the facts under disparate treatment and/or disparate impact theories.¹⁹⁵ Some scholars have argued that disparate impact may no longer be an option under Title IX after the 2001 U.S. Supreme Court decision in *Alexander v. Sandoval*.¹⁹⁶ This section discusses the implications of *Sandoval* and argues that students subject to pregnancy

189. *Id.*

190. *Gebser v. Lago Vista Indep. Sch. Dist*, 524 U.S. 274, 277-79 (1998).

191. *Id.* at 277.

192. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

193. See Michelle Gough, *Parenting and Pregnant Students: An Evaluation of the Implementation of the “Other” Title IX*, 17 MICH. J. GENDER & L. 211, 220-48 (2011). As of January 2010, eighteen cases have been brought related to Title IX and pregnant and parenting students, thirteen of which explicitly alleged Title IX violations. Few cases were decided in favor of students. *Id.*

194. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 7, at 59.

195. See *Chipman v. Grant County School Dist.*, 30 F. Supp. 2d 975, 978 (E.D. Ky. 1998).

196. 532 U.S. 275, 281, 293 (2001). See also Stark, *supra* note 32.

discrimination should, when appropriate, be able to assert violations of *either* type of discrimination under Title IX.

i. Disparate Treatment Analysis

To prove disparate treatment, or intentional discrimination, plaintiffs must demonstrate that the university treated them differently than similarly situated individuals because of, or on the basis of, their sex.¹⁹⁷ This means “the decision maker was aware of the complainant’s sex and took action at least in part” because of it.¹⁹⁸ But the recipient need not necessarily have dishonorable motives when it treats the complainant differently; Title IX prohibits unjustified sex-based distinctions regardless of the university’s motives.¹⁹⁹

In making a disparate treatment claim under Title IX, plaintiffs can follow the burden-shifting framework established in the U.S. Supreme Court case *McDonnell-Douglas Corp. v. Green*.²⁰⁰ Under this framework, the plaintiff must first make a *prima facie* case for discrimination.²⁰¹ Depending on the facts of the case, this often involves meeting four elements:

- 1) that the aggrieved person was a member of a protected class; 2) that this person applied for, and was eligible for, an educational program operated by a recipient of federal financial assistance that was accepting applicants; 3) that despite the person’s eligibility, he or she was rejected; and, 4) that the recipient selected applicants of the complainant’s qualifications of the other sex- or that the program remained open and the recipient continued to accept applications from other applicants.²⁰²

If the plaintiff can prove these elements, then the university must demonstrate a legitimate, nondiscriminatory reason for the challenged action²⁰³ or policy.²⁰⁴ If she has evidence that the real reason for the university’s actions

197. See U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 58.

198. *Id.*

199. See *id.* at 58–59.

200. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 59. “Direct proof of discriminatory intent is often unavailable. In the absence of such evidence, claims of intentional discrimination under Title IX may be analyzed using the Title VII burden-shifting framework established by the Supreme Court in [*McDonnell Douglas*].” (citation omitted). *Id.* The principles similar to those underlying the *McDonnell Douglas* framework may be used to analyze claims alleging that a recipient “engaged in a ‘pattern or practice’” of discrimination). *Id.* at 61.

201. See U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 59–60.

202. *Id.* at 60. See e.g., *Hogan v. Ogden*, No. CV-06-5078-EFS, 2008 U.S. Dist. LEXIS 58359, at *25–*26 (E.D. Wash. July 30, 2008) (The plaintiff applied the framework to her coursework accommodation case).

203. See U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 61 (citing *Int’l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 336 (1977)); *McDonnell Douglas*, 411 U.S. at 802.

204. See U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 62 (citing *Int’l Bhd. of Teamsters*, 431 U.S. at 362).

was discrimination based on sex, then the plaintiff can argue that the institution's reason is a pretext for discrimination.²⁰⁵

With respect to students in higher education, universities may be liable for intentional actions such as (1) not allowing a student to continue in the position she held before her pregnancy leave;²⁰⁶ (2) not allowing a pregnant student to finish a course,²⁰⁷ causing a delay in her education and/or forcing her to leave school; (3) denying work or funding to a pregnant student because she is taking too long to finish her research; (4) not renewing a pregnant student's postdoctoral fellowship position for an additional year, while a male postdoc in the laboratory (who began his postdoctoral fellowship at the same time) is invited to continue his fellowship,²⁰⁸ and (5) not "stopping the clock,"²⁰⁹ which can be damaging to graduate students and postdocs.

ii. Disparate Impact Analysis

In contrast to disparate treatment, the focus in disparate impact claims is whether a recipient's "facially neutral practice . . . had a disproportionate impact on the basis of sex."²¹⁰ Here, the plaintiff need not prove the recipient had discriminatory intent.²¹¹ If the plaintiff can prove a discriminatory impact, then the university must demonstrate a "substantial legitimate justification" for the challenged practice.²¹² In the education context, the practice must be an "educational necessity."²¹³ Even if the practice is a necessity, the recipient may still be liable if the plaintiff proves another practice or policy can be equally effective and result in a less disproportionate impact.²¹⁴

If the goal is to prohibit all forms of discrimination (and it certainly should

205. U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 61 (citing *Reeves v. Sanderson Plumbing Prod., Inc.*, 120 S. Ct. 2097, 2108 (2000); *St. Mary's Honor Ct. v. Hicks*, 509 U.S. 502, 514 (1993)).

206. *See* 34 C.F.R. § 106.40(b)(5) (2000). *See also* discussion *supra* Part II.A.4.

207. *See* discussion *supra* Part II.A.3. *See also* *Hogan v. Ogden*, 2008 U.S. Dist. Lexis 58359 (E.D. Wash. July 30, 2008).

208. *See* *McCue*, *supra* note 25, at 132–33.

209. *See* discussion *supra* Part II.C.2. *See also* *McCue*, *supra* note 25, at 126–27.

210. *See* U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 63–65 (citing *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (1993); *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 361–62 (S.D.N.Y. 1989)).

211. *See* U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 64–65 (citing *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 584 (1983); *Alexander v. Choate*, 469 U.S. 287, 293 (1985)).

212. *See* U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 65 (citing *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985)). Title IX's "[s]ubstantial legitimate justification" is similar to the Title VII concept of "business necessity," which involves showing that the policy or practice in question is related to performance on the job." U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 65–66 (citing *Board of Educ. v. Harris*, 444 U.S. 130 (1979)).

213. U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 66.

214. *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

be), then disparate impact analysis should be permitted in Title IX lawsuits, when appropriate.²¹⁵ This would be especially helpful to students seeking to enforce their rights because some scholars argue that OCR is not likely to enforce Title IX's disparate impact regulations.²¹⁶ However, a setback to disparate impact actions occurred with the 2001 U.S. Supreme Court case *Alexander v. Sandoval*.²¹⁷ In *Sandoval*, the Court ruled a private cause of action under Title VI must be based on intentional discrimination and cannot be used to enforce the statute's disparate impact regulations.²¹⁸ Because Title VI was the model of Title IX,²¹⁹ the *Sandoval* decision is widely believed to apply to Title IX as well.²²⁰

The arguments in the *Sandoval* dissent, however, may prove helpful in persuading the Supreme Court to not rule out disparate impact claims under Title IX. The dissent argued that *Cannon*²²¹ was a disparate impact case because its reasoning was "equally applicable" to both disparate treatment and disparate impact claims and moreover, that its holding "certainly applied" to the plaintiff's disparate impact claim.²²² The plaintiff in *Cannon* had argued that the University of Chicago Medical School's admissions policies, which set age limits for applicants, disproportionately affected women "because the incidence of interrupted higher education is higher among women than among men."²²³ In *Cannon*, the Court found a private right of action exists to enforce Title IX and did not specify which type of discrimination, i.e. disparate treatment or disparate impact, was prohibited.²²⁴ The dissent in *Sandoval* therefore concluded that disparate impact claims could be presented under Title IX.²²⁵

Furthermore, pre-*Sandoval*, some lower courts were accepting disparate treatment *and* disparate impact analyses under Title IX. In *Chipman v. Grant*

215. See Wrona, *supra* note 33.

216. Short, *supra* note 134, at 123 (citing Grossman, *supra* note 134).

217. *Alexander v. Sandoval*, 532 U.S. 275, 278-79, 281, 293 (2001) (Plaintiff brought Title VI action against the Alabama Department of Public Safety challenging the Department's official policy of an English-only driver's license examination because it violates federal regulations prohibiting discrimination on the basis of national origin).

218. *Id.* at 284-85, 293.

219. U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, *supra* note 1, at 8.

220. Stark, *supra* note 32. *But see* Grossman, *supra* note 134 (arguing that "Title IX, unlike Title VI, does not seem inherently limited to only intentional discrimination").

221. *Cannon*, 441 U.S. 677 (1979) (plaintiff alleged she was discriminated against on the basis of her sex under Title IX when she was denied admission to the University of Chicago's medical school). See also notes 168-174, *supra*, and accompanying text.

222. *Sandoval*, 532 U.S. at 298 (Stevens, J., dissenting) ("In the context of the entire opinion [*Cannon*] (including both its analysis and its uncontested description of the facts of the case), that single ambiguous phrase provides no basis for limiting the case's holding to incidents of intentional discrimination.").

223. *Id.*

224. See *id.* at 297 (Stevens, J., dissenting). "A private right of action exists for 'victims of the prohibited discrimination.'" *Id.* (citing *Cannon*, 441 U.S. at 703). "Not some of the prohibited discrimination, but all of it." *Sandoval*, 532 U.S. at 297 (Stevens, J., dissenting).

225. See *id.* at 295 (Stevens, J., dissenting).

County School District, the district court found that two pregnant and academically-qualified high school students could allege either discrimination theory under Title IX after they were denied membership in their school's National Honor Society ("NHS") for engaging in premarital sexual activity.²²⁶ For now, however, according to the interpretations of *Sandoval*, only disparate treatment cases can be brought under Title IX.²²⁷

2. Benefits of Private Action for Monetary Damages

Although the administrative complaint process through OCR has recently proven successful, victims of pregnancy discrimination may benefit from pursuing a private cause of action, which carries the possibility of monetary damages.²²⁸ Despite *Franklin*, which permitted monetary damages in intentional discrimination cases,²²⁹ awarding monetary damages in pregnancy discriminations cases does not appear to be common practice.

i. Monetary Damages Achieve Congress's Two-Fold Purpose for Title IX

Title IX, like its model Title VI, sought to accomplish two objectives: Congress aimed both "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices."²³⁰ While terminating federal funding to a university generally serves the first purpose, it "may not provide an appropriate means of accomplishing" the second purpose, especially if "only an isolated violation has occurred."²³¹ Monetary damages advance the second purpose by providing an incentive to eliminate discriminatory practices while simultaneously compensating the student harmed by those practices.²³² As the Supreme Court has noted, individual relief to a private litigant is sensible, consistent with, and necessary to the enforcement of the statute.²³³

226. *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975, 979-80 (E.D. Ky. 1998).

227. Stark, *supra* note 32.

228. See Vargyas, *supra* note 175, at 377 ("Although *Franklin* presented only the question of compensatory damages, the Court's analysis strongly suggests that punitive damages are also available.").

229. *Franklin*, 503 U.S. at 74-76.

230. *Cannon*, 441 U.S. at 704.

231. *Id.* at 704-05.

232. 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, 1380 (1992) (citing Note, Lieberman v. University of Chicago: Refusal to Imply a Damages Remedy Under Title IX of the Education Amendments of 1972, 1983 WIS. L. REV. 181, 207 (1983)).

233. *Cannon*, 441 U.S. at 705-06 (citing 117 Cong. Rec. 30408 (1971); 118 Cong. Rec. 5807 (1972)).

ii. *Monetary Damages Incentivize Victims of Pregnancy Discrimination to Pursue Litigation*²³⁴

The availability of monetary damages under a Title IX suit is a better alternative than equitable relief in many cases because victims will receive a tangible award regardless of where they stand in the academic pipeline at the end of the trial.²³⁵ For example, during the course of a case, some student-plaintiffs will have graduated, dropped out, or switched programs because of the discriminatory behavior, and thus will no longer benefit from equitable relief.²³⁶ Therefore, the availability of monetary damages means that students affected by pregnancy discrimination may be appropriately compensated.²³⁷

iii. *The Threat of Monetary Damages Will Also Encourage Universities to Review and Comply with Title IX and its Regulations*

If victims of pregnancy discrimination pursue monetary damages, recipients unaware of Title IX's coverage may be alerted to its protections through the media or litigation at other universities.²³⁸ Because litigation requires high costs and time, the threat of private "actions will be an effective deterrent against sex discrimination" on campuses.²³⁹ In addition, the threat of having to pay monetary damages may encourage recipients to implement structural changes to their policies, benefitting all students. Ideally, the deterrent effect of the possibility of monetary damages in litigation will induce universities to ensure that their practices are not discriminatory. For now, under *Franklin*, as long as recipients are not intentionally discriminating, they should not be concerned about litigation.²⁴⁰

3. *Case Law under Title IX's Pregnancy Discrimination Regulations*

There have been a handful of suits brought under the Title IX pregnancy

234. See Kendra Fershee, *An Act for All Contexts: Incorporating the Pregnancy Discrimination Act into Title IX To Help Pregnant Students Gain and Retain Access to Education*, 39 HOFSTRA L. REV. 281, 322-23 (2010).

235. See Fershee, *supra* note 234, at 322. See, e.g., Pamela W. Kernie, *Comment: Protecting Individuals from Sex Discrimination: Compensatory Relief under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155, 172 (1992) ("Title IX should afford victims the full panoply of compensatory damages. These damages should include expectation, reliance, and restitution damages, as well as monetary relief for humiliation, pain and suffering, other psychological and physical harm, medical expenses incurred, and other economic losses and out-of-pocket costs.").

236. See Fershee, *supra* note 234, at 322. See Vargyas, *supra* note 175, at 380. "Where the injury was not redressable by an injunction, there was no reason for a student to undertake the litigation process." *Id.* at 380-81. For example, "[b]ackpay does nothing for [a plaintiff if] she was a student when the alleged discrimination occurred." *Franklin*, 503 U.S. at 76.

237. See Wright, *supra* note 232; Fershee, *supra* note 234, at 323.

238. Fershee, *supra* note 234, at 321.

239. Wright, *supra* note 232.

240. See Kernie, *supra* note 235. See also *Franklin*, 503 U.S. at 75, 76.

discrimination regulations over the past forty years.²⁴¹ Although the plaintiffs were not all in higher education, six cases are especially relevant to demonstrate pregnancy discrimination in school settings. The first four cases involve academically qualified students who were denied access to their high schools' NHS chapters because they were pregnant. The NHS fact pattern could be similar to pregnant graduate students or post-docs denied participation in certain education programs or activities on campus.²⁴² The fifth case involves a pregnant student who was denied coursework accommodations at her university despite her ability to complete the assignments.²⁴³ The sixth case, decided in 2013, awarded monetary damages to a student-plaintiff after she proved that her university's decision to terminate her from her masters program was based on her pregnancy status.²⁴⁴

In *Wort v. Vierling*, the plaintiff, a pregnant student, was dismissed from her high school's NHS for deficiency of leadership and character.²⁴⁵ She alleged she was dismissed because she had a premarital pregnancy.²⁴⁶ The judge held the defendants had violated Title IX because they had discriminated against her on the basis of sex and ordered them to reinstate her to the NHS.²⁴⁷ The plaintiff was also granted attorney's fees and costs.²⁴⁸ A similar result occurred in *Cazares v. Barber*,²⁴⁹ where the court issued an injunction allowing the student to participate in the NHS induction ceremony at her school.²⁵⁰

In contrast, the Third Circuit in *Pfeiffer v. Marion Center Area School District* affirmed the lower court's decision that the school did not violate Title IX when it excluded a pregnant student from its NHS.²⁵¹ Unlike *Wort* or *Cazares*, the district court in *Pfeiffer* distinguished between the pregnant student's pregnancy and premarital sexual activity and found that "the plaintiff was not dismissed from the NHS because of her pregnancy but because the faculty council considered premarital sex as setting an example inconsistent with the objectives and standards of the Honor Society."²⁵² Though this decision

241. Gough, *supra* note 193, at 220–48.

242. See 34 C.F.R. § 106.40(b)(1) (2013) ("A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.").

243. See *id.*

244. See *id.*

245. *Wort v. Vierling*, 778 F.2d 1233 (7th Cir. 1985).

246. *Id.*

247. *Id.* at 1234.

248. *Id.*

249. *Cazares v. Barber*, 959 F.2d 753, 755 (9th Cir. 1992) (court found student was denied membership in NHS because she was pregnant, unmarried, and not living with the father of her child).

250. *Id.*

251. 917 F.2d 779, 780 (3rd Cir. 1990).

252. *Id.* at 784–85.

remains good law in the Third Circuit,²⁵³ the court remanded the case in order for the district court to consider the fact that a male student was not dismissed from NHS despite engaging in premarital sexual activity.²⁵⁴

In *Chipman*, two pregnant students who were excluded from their school's NHS filed a discrimination lawsuit against their school district and moved for a preliminary injunction.²⁵⁵ The case introduced the "pregnancy discrimination theory" when it "noted that discrimination against girls in an educational setting based on their pregnancies constituted a violation of Title IX."²⁵⁶ The court referenced two Title IX regulations prohibiting discrimination based on parental status and pregnancy.²⁵⁷ The first prohibited Grant County Schools from creating any rule "concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex"²⁵⁸ and the second prohibited it from discriminating "against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy."²⁵⁹

The court also applied Pregnancy Discrimination Act ("PDA") precedents.²⁶⁰ The PDA, added to Title VII in 1978, prohibits pregnancy discrimination in the workplace.²⁶¹ The *Chipman* court relied on the rulings of *Ilhardt v. Sara Lee Corp.* and *Pfeiffer* to illustrate the similar purposes of Title IX and Title VII's PDA.²⁶² The former case found that the PDA "amended Title VII to clarify that pregnancy discrimination is included in Title VII's prohibition on sex discrimination."²⁶³ *Pfeiffer* also held that "regulations promulgated pursuant to Title IX specifically apply its prohibition against gender discrimination to discrimination on the basis of pregnancy."²⁶⁴ The two laws also contain similar language. The PDA statute defined the terms "'because of sex' or 'on the basis of sex,' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions"²⁶⁵ Title IX also interprets sex discrimination as discrimination on the basis of pregnancy and

253. Gough, *supra* note 193, at 248.

254. See *Pfeiffer*, 917 F.2d at 780, 785 (discussing the district court's failure to consider evidence from a former male student). The results of the case on remand are not known.

255. *Chipman*, 30 F. Supp. 2d 975, 976, 977 (E.D. Ky. 1998).

256. Danielle LeClair, *Let's Talk about Sex Honestly: Why Federal Abstinence-Only-Until Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should Be Overturned*, 21 WIS. WOMEN'S L.J. 291, 318 (2006) (citing *Chipman*, 30 F. Supp. 2d at 977-79).

257. *Id.* at 977-78 (citing 34 C.F.R. §§ 106.40(a), 106.40(b)(1) (2010)).

258. *Chipman*, 30 F. Supp. 2d at 977 (citing 34 C.F.R. § 106.40(a)).

259. *Id.* at 977 (citing 34 C.F.R. § 106.40(b)(1)).

260. *Id.* at 978-80.

261. U.S. Equal Employment Opportunity Commission, "The Pregnancy Discrimination Act of 1978," <http://www.eeoc.gov/laws/statutes/pregnancy.cfm>. See also 42 U.S.C. § 2000e(k) (1978).

262. *Chipman*, 30 F. Supp. 2d at 978.

263. *Id.* at 978 (quoting *Ilhardt*, 118 F.3d at 1154).

264. *Chipman*, 30 F. Supp. 2d at 978 (quoting *Pfeiffer*, 917 F.2d at 784).

265. 42 U.S.C. § 2000e(k) (2012).

other related conditions in its regulations.²⁶⁶ Their health insurance coverage and pregnancy leave regulations similarly require that recipients under Title IX and employers under PDA treat pregnancy-related conditions the same as they treat other disabilities.²⁶⁷

Moreover, the *Chipman* court noted that the use of disparate impact theory was well-recognized in pregnancy discrimination cases under Title VII²⁶⁸ and found that the plaintiffs likely had a case under this theory.²⁶⁹ Despite NHS's argument that decisions were based on the plaintiffs' premarital sexual activity, all students who became visibly pregnant after premarital sex were denied membership to NHS.²⁷⁰ This sharply contrasts with the fact that the policy did not exclude men who engaged in premarital sexual relations or women who engaged in non-marital sexual activity but did not become visibly pregnant.²⁷¹ Because of this "significant adverse impact" and the school district's inability to show the policy was reasonably necessary, the court ruled that the plaintiffs had a very high probability of success in proving their case under a disparate impact theory.²⁷² A similar holding was found under disparate treatment theory—the plaintiffs proved "they were treated differently than similarly situated non-pregnant students,"²⁷³ and the school district could not demonstrate a "legitimate credible non-discriminatory reason for their NHS pregnancy policy."²⁷⁴

In its application of these regulations and PDA precedent, the court decided that NHS's exclusion of two pregnant students was actually based on pregnancy.²⁷⁵ The court, following *Wort* and *Cazares*, ruled that the NHS's exclusion of the students on the basis of pregnancy was illegal sex-based

266. See e.g., 34 C.F.R. § 106.40(b)(1) (2013).

267. See 34 C.F.R. § 106.40(b)(4) (2013) (requiring pregnancy and related conditions be treated "in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity."). See also 29 C.F.R. § 106.40(b) (2013). The PDA mandates that pregnancy-related disabilities be "treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave . . . shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities."

268. *Id.* at 978–979 (citing *Ilhardt*, 118 F.3d at 1156–57, *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810 (5th Cir. 1996); *Smith v. F.W. & Morse Co., Inc.*, 76 F.3d 413 (1st Cir. 1996); *Stockard v. Red Eagle Resources Corp.*, 972 F.2d 357 (10th Cir. 1992) (unpublished); and *Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50*, 867 F.2d 974 (7th Cir. 1988)).

269. *Chipman*, 30 F. Supp. 2d at 979.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 979–80 (citing *Wallace v. Pyro Mining Co.*, 951 F.2d 351 at *1 (6th Cir. 1991) (unpublished)).

274. *Id.* at 980.

275. *LeClair*, *supra* note 256, at 318 (citing *Chipman*, 30 F. Supp. 2d at 978).

discrimination under Title IX.²⁷⁶ The plaintiffs were awarded a preliminary injunction which allowed them admission into their school's NHS.²⁷⁷

In *Hogan v. Ogden*, the plaintiff, a student in her eighth month of pregnancy at Central Washington University, was placed on bed rest by her doctor in late October.²⁷⁸ Her professor encouraged her to drop the class despite the fact that she was proactively seeking to complete all assignments and the other students in the plaintiff's group project expressed to the professor that they wanted the plaintiff to remain in the group.²⁷⁹ Here, the plaintiff established a *prima facie* case against her professor under Title IX, demonstrating that the professor had accommodated other student's schedules and refused to accommodate hers.²⁸⁰ Because she met her *prima facie* case and the defendants did not present any evidence under the Title IX burden-shifting analysis, the district court denied the plaintiff's summary judgment motion on her Title IX claim and ruled that there were still factual issues that warranted a trial.²⁸¹ The case later settled.²⁸²

Finally, in *Varlesi v. Wayne State University*, a pregnant student was terminated from the masters' program at Wayne State University ("WSU") after she received a failing review from her supervisor at Salvation Army ("SA"), her required field placement internship.²⁸³ The plaintiff made out her *prima facie* case because of statements made by a WSU official: (1) when the WSU official learned that Varlesi wished to be reassigned, she told her that if she did not continue working at SA, she would have to "drop out of the program due to [her] pregnancy"²⁸⁴ and (2) when Varlesi was concerned about receiving a negative evaluation from her supervisor later in the semester, the administrator told her that she was "doing great."²⁸⁵ Despite WSU's explanation that she was terminated for poor performance, these statements demonstrated that there might be some connection between her termination and her pregnancy.²⁸⁶ In January 2013, a jury found for Varlesi, awarding her \$849,000 on her pregnancy discrimination action and a retaliation claim, both under Title IX.²⁸⁷

276. *Chipman*, 30 F. Supp. 2d at 978.

277. *Id.* at 980.

278. *Hogan v. Ogden*, 2008 U.S. Dist. LEXIS 58359, at *3 (E.D. Wash. July 30, 2008).

279. *Id.* at *4–*6.

280. *Id.* at *28–*29.

281. *Id.* at *29.

282. Emily McNee, *Pregnancy Discrimination in Higher Education: Accommodating Student Pregnancy*, 20 CARDOZO J.L. & GENDER 63, 72 (2013) (citing *Hogan v. Ogden*, No.CV-06-5078, Stipulated Judgment (10/09/2008)).

283. *Varlesi v. Wayne State Univ.*, 909 F. Supp. 2d 827, 832–38 (E.D. Mich. 2012).

284. *Id.* at 835, 857.

285. *Id.* at 836, 857.

286. *Id.* at 838, 857–58.

287. Jill Lubas, *WSU Student Wins Suit*, S. END WEEKLY (Apr. 5, 2013), http://www.thesouthend.wayne.edu/archives/article_3445bc5d-0648-59eb-9740-7eeb88b630c7.html.

IV. CONCLUSION

Students can file pregnancy discrimination claims under Title IX just as employees currently allege PDA violations under Title VII. Some scholars see the concept behind Title IX as promising: “After three decades of PDA litigation, Americans are more receptive to the claim that discrimination against pregnant women is sex discrimination, and they have come to view it as a claim of fundamental—even constitutional—magnitude.”²⁸⁸ To help ensure students’ success in the academic pipeline, female students should use Title IX as a vehicle for protecting themselves against pregnancy discrimination.

There are many indications that enforcement of the pregnancy discrimination aspects of Title IX could be seriously investigated and enforced in the near future. As described in this article, there is growing recognition of the issue and growing support from both the executive and judicial branches.

The executive push under the Obama Administration to clarify and enforce Title IX, including its pregnancy discrimination regulations, should help keep female scientists in the STEM pipeline and help all students in higher education as well. The first step is the dissemination of information to students and other stakeholders who are largely unaware of the pregnancy discrimination regulations under Title IX. As universities are held accountable for more widespread dissemination of Title IX’s scope, the educational establishment will have to change its policies to accommodate pregnant scholars or suffer loss of federal funding. Enforcing Title IX pregnancy discrimination prohibitions will be a large step forward for all women in educational institutions.

Private lawsuits asserting Title IX pregnancy discrimination violations, which have had a limited and uncertain history, are moving in the direction of providing monetary damages. The dissemination and enforcement of Title IX regulations with language and spirit akin to the PDA could aid plaintiffs in seeking relief. These lawsuits would in turn encourage universities to expand their enforcement of pregnancy discrimination violations and to develop proactive policies.

However, notwithstanding the congressional purpose of Title IX to end sex discrimination in schools, as well as the potential use of the PDA as precedent, students still need to know how to exercise their legal rights under the statute. Furthermore, to better implement *Franklin*’s ruling, more information is needed that explains the availability of monetary damages and in what contexts it can be used. Hopefully, as compliance and dissemination becomes more transparent and accessible, Title IX will become a successful tool for students facing pregnancy discrimination and these questions will be answered. For young women scholars, it may be the difference between pursuing a productive career and being forced to give it up.

288. Neil S. Siegal & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 772, 793 (2010).