

## **Sexual Harassment on College Campuses: The Insufficiency of Title IX Taylor Puluse\***

Title IX's claim for effective protection of victims is significantly limited as it actively prevents restitutive justice for victims of sexual harassment. The four standards of institutional liability and the preemptions in § 1983 pose monumental hurdles for victims seeking relief for the injustices they have experienced. The Supreme Court of the United States prohibits sexual harassment victims from filing claims against and seeking restitution from both individuals and educational institutions. In addition to the harsh standards of liability that Title IX mandates, the US Department of Education's Office for Civil Rights (OCR) disproportionately prioritizes institutional review over victim's claims. Further, victims are forced to wait years before relief is provided. Essentially, the procedural limitations of Title IX suggest a clear need for structural reform to give victims of sexual harassment the right to restitutive justice and effective protection against sexual harassment.

### **Recognizing the Issues**

To fully understand the insufficiency of Title IX, one must first understand how Title IX fails to provide effective protection to victims of sexual harassment. *Bruneau v. South Kortright Central School District* (1996) reveals the true procedural shortcomings of Title IX. Eve Bruneau was a young girl sexually harassed (with incidents of unwanted touching) by her male classmates. When Bruneau's mother reported the harassment to school officials, they did not take any action to combat the behavior and the harassment continued. When Eve's mother tried to transfer Eve out of the toxic environment and move her to another school, the transfer request was denied. Eve's parents brought a suit claiming protection under Title IX and filed claims under § 1983 against South Kortright Central School District. The claims under § 1983 were denied as the Court felt that Title IX subsumed the § 1983 claims. The case concluded in favor of the school district as the jury felt that the school was not institutionally liable for the harassment Eve experienced. Eve Bruneau received no restitutive relief and was left with nothing but the empty promise of Title IX (*Bruneau v. South Kortright Central School District*, 1996).

Sexual harassment cases plague both male and female students nationwide on college and university campuses. Title IX was passed by Congress in 1972 to create statutes protecting victims from gender based discrimination in educational institutions. Title IX has extensive range and power, as it holds mandates over 3,600 colleges and universities who receive federal funding (Cherner-Ranft, 2003). Current issues are now arising as poor enforcement of Title IX is actively allowing for soaring numbers of sexual harassment cases to go unpenalized. Title IX's narrow liability drastically flips the statute's original aims as it establishes better protection for educational institutions than victims of sexual harassment. Ultimately, Title IX detracts punishment to harassers, and therefore, results in substantial losses for victims.

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The failure to provide restitutive justice for victims makes it clear that Title IX's capacity and ideals are not entirely fulfilled. Whether the situation is because patriarchal power structures are intertwined within the legal system, or the fact that sexual harassment cases are not taken as seriously as they should be, Title IX presents a clear need for restructuring. Title IX is limited by weakened standards of liability and the preemptions in § 1983, which significantly degenerate Title IX's sufficiency. Moreover, the narrow liability accompanying Title IX prevents restitutive justice by providing sexual harassment victims little to no recourse when dealing with educational institutions and their harassers. This paper will demonstrate how the narrow liability corresponding with Title IX actively prevents proper restitution for victims of sexual harassment. Additionally, this paper will discuss the issue in which the US Department of Education's Office for Civil Rights (OCR) concentration on educational institution's systematic reforms significantly inhibits effective protection for victims of sexual harassment. This commentary examines the presence of sexual harassment on college campuses, elaborates on the impact that sexual harassment has on its victims, and addresses the deterioration of the educational environment in which the harassment occurs.

### **Sexual Harassment on College Campuses**

The American Association of University Women defines sexual harassment as any, Unwelcome sexual advances, requests for sexual favors, direct or indirect threats or bribes for sexual activity, sexual innuendos and comments, sexually suggestive jokes, unwelcome touching or brushing against a person, pervasive displays of materials with sexually illicit or graphic content, and attempted or completed sexual assault (Beavers and Halabi, 2017, 558).

Sexual harassment is a serious offense that leaves victims with lasting detrimental effects on their physical and mental health, as it carries a devastating emotional impact. Sexual harassment holds a prevalent stigma in which victims feel dishonored and outcasted from their social groupings. The harassment alters the mindset of victims, as many face self-blame, coupled with feelings of shame, denial, guilt, and embarrassment (Beavers, 2017). Victims of sexual harassment also develop major hesitations about reporting incidents. Victims commonly misconceive that people will not believe their story since most incidents leave little to no evidence to support the victim's claims.

Moreover, sexual harassment considerably impacts the educational environment. Victims of sexual harassment experience extensive behavioral changes and it impacts their academic experience. Meghan Cherner-Ranft observes

Regardless of whether the sexual harassment experienced is physical or nonphysical, following such incidents students often talk less in class, stay home and skip school, find it hard to concentrate in school, and experience a loss of appetite and inability to sleep (2003; 1896).

Sexual harassment acts as a strong obstacle for victims to achieve their educational goals. Campus sexual harassment cases establish the educational institution as a place of danger, where victims feel they relive their experiences by being in the environment in which the incident occurred (Cherner-Ranft: 2003; 1896). In some cases, victims drop out of universities and abandon their academic pursuits (Petersen and Ortiz,

2016). Therefore, Title IX recognizes that the loss of educational benefits is a significant injury that should be restituted by law (Cullitan, 2010).

College campuses and universities have an abundance of sexual harassment cases that go unreported and overlooked. According to the article “Official Campus Statistics for Sexual Violence Mislead” by Jennifer Freyd, one out of five women will experience some form of sexual violence in their college career (2014). The discrepancies in such cases of sexual harassment centralize around the fact that the reporting rates show no correspondence with the actual harassment rates. Victims already possess strong hesitations when reporting their traumas, and then face an even harsher reality when their reports are met by institutional oppositions. Freyd states in reference to institutional opposition,

Colleges and universities have a perverse incentive to discourage sexually victimized students from reporting assault, due to the reputational hit colleges experience if their reported rates of violence are higher than those of their competitors (2014).

In this manner, the discrepancies in reporting rates suggest that universities with higher rates of reported sexual harassment offer more protection to students rather than universities with lower rates (Freyd, 2014). Universities with higher rates at least recognize that sexual harassment that is occurring on their campuses rather than covering the incident to save reputation.

### **Title IX**

Title IX was enacted in 1972 as a measure to protect against sexual harassment and encourage equal treatment of both sexes in educational institutions. Title IX provides

No person in the United States shall, on the basis of sex, be excluded from participations in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance (Cherner-Ranft, 2003; 1897).

Title IX maintains its power by withholding and regulating federal funding from educational institutions that have proven to discriminate on the basis of sex. The U.S. Department of Education's Office for Civil Rights (OCR) monitors and delegates sexual discrimination cases that fall under Title IX.

Since sexual harassment is a form of sex discrimination, it is unreservedly forbidden under Title IX. Sexual harassment in educational institutions is denounced “as a form of disparate treatment that impedes access to an equitable education” (Cherner-Ranft, 2003; 1896). More importantly, Title IX proposes two essential goals within its statutes. The first statutory aim of Title IX is to “avoid the use of federal resources to support discriminatory practices” (Peterson, 2016; 2135). The second statutory aim is “to provide individual citizens effective protection against those practices” (Peterson, 2016; 2135). The OCR is also entrusted to oversee institutional policies to provide effective protection to individuals.

### **Realizing the Need for Relief for Victims**

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In the landmark court case of *Cannon v. University of Chicago*, the Supreme Court established a private right for victims of sexual harassment to seek restitution under Title IX. In *Cannon*, a female student seeking entrance into medical schools claimed that she was denied admission because of her gender. Following an investigation, the Supreme Court found that she was denied admission into the programs because of her sex and the medical school decision violated the complainant's Title IX rights. This specific Supreme Court decision was monumental, as it provided sexual harassment victims with more autonomy and agency (Cherner-Ranft, 2003). Cherner-Ranft states, in reference to the case, "The Supreme Court changed the landscape of Title IX jurisprudence in holding that Title IX allowed a plaintiff to bring a private suit against a discriminating institution because it produced a practical way of redressing a specific incident of sex discrimination" (2003; 1903).

The court case *Franklin v. Gwinnett County Public Schools* (1992) further strengthened Title IX's relevance and autonomy of victims. In *Franklin v. Gwinnett County Public Schools*, the Court ruled that a victim has a right to receive monetary damages under the statute of Title IX. The case involved a high school student who filed a Title IX action lawsuit after being sexually harassed by a sports coach/ teacher at her high school. The student alleged that the school administrators had knowledge of the sexual harassment and took no action against her sexual harasser. The Supreme Court decided that monetary damages were available under Title IX as it assured "effective compensatory and remedial options" for plaintiffs. *Cannon v. University of Chicago* and *Franklin v. Gwinnett County Public Schools* established the precedent that victims can receive restitution for the harassment they have experienced. Despite the fact of such progression, the Court later entered standards of "institutional liability" to coexist within the statutes of Title IX, which reasserted crippling hurdles for victims of sexual harassment (Cherner-Ranft, 2003).

### **Title IX's Insufficiency**

In order to hold an educational institution accountable under Title IX's statutes, lawsuits must prove four main standards of liability. The first standard of liability refers to whether the educational institution is a recipient of federal funding. The second standard of liability regards whether sexual discrimination is severe enough to devalue the victim's educational experience. The third standard considers whether an official of the institution has knowledge of the situation and took corrective measures to respond to the victim's complaints. The fourth standard deals with whether or not the institution's response to the discrimination amounts to deliberate indifference. Deliberate indifference concerns whether or not the institution makes use of the knowledge of the occurring sexual harassment and formally addresses the misconduct with no apathy (Cullitan, 2018). Proving deliberate indifference is the most inconsistent standard that victims must satisfy. The victims' struggle to substantiate the standards listed above is what originally sparked Title IX's narrowing liability.

The second issue concerns the preemptions in § 1983 that add to the narrow liability of Title IX. Since Title IX strictly deals with institutions who receive federal funding, victim's claims and relief against sexual harasser/s is limited to § 1983. The Supreme Court ruled that plaintiffs cannot file claims against both institutions and individuals since Title IX subsumes claims under § 1983. The limitation of § 1983 greatly adjusts the manner of accountability for individuals and institutions, and is a

barrier for victims. Title IX is intended to provide “effective protection” for victims, however it is evidently clear that Title IX lacks remedial action against individuals who actively participated in the sexual discrimination (Cherner-Ranft, 2003). Thus, the present disparities regarding Title IX forces victims to choose between seeking restitution from individuals or the institution, but never from both.

The third issue concerning Title IX is that OCR primarily focuses on institutional compliance and does not prioritize relief for victims. The structural reforms require a thorough review of the institution’s policies on sexual harassment to assure compliance, necessary for the continuation of federal funding. However, the process is lengthy, sometimes lasting as long as 2100 days (Peterson, 2016). The lengthy procedures go against Title IX’s aim for effective protection from sexual harassment as victims are either no longer students of the institution, or forced off the campus due to the effects of the sexual harassment on their academic performance.

Further, the OCR takes such a long time to provide relief primarily due to the failure to emphasize the requirements and limitations of Title IX (Bagenstos, 2015). The office is swamped with complaints that hold no institutional liability and hence, burdened with the duty to filter complainants that might not even constitute a claim under Title IX. The OCR claims that the influx of complaints from institutions and university students who claim that they have “been made uncomfortable” in their educational environment does not amount to the severity of sexual discrimination cases that should fall under Title IX (Bagenstos, 2015). Since the victim’s complaints are addressed after institutional review, this strategy fails to provide timely relief to victims.

### **What Can Be Done?**

The multiple issues at hand correspond directly with the prevention of remedial relief for victims of sexual harassment. Addressing the issue of narrow liability encompassing institutions and sexual harassers holds a simple solution. The reforms should further focus on a more effective equilibrium between systematic reform and providing timely relief to victims.

The Court must recognize that sexual harassment has detrimental effects on the educational performance of the victim and the educational environment. Stricter obligations, holding both the institution and perpetrator responsible, is necessary to address the severity of the sexual harassment cases. The preempts of § 1983 should not be allowed to interfere with the victim’s restitution as victims have a right to seek relief from their discriminators and from the institution that allowed the discrimination to occur. Title IX claims should not subsume § 1983 claims as the harassment is enabled by both individuals and institutions. Increasing the standards of protection and encouraging direct communication from the OCR to complainants will provide restitutive justice to deserving victims. Further, investigations should be completed within a specific time period. Victims should not be forced to wait for systematic issues to be fixed before gaining relief for their trauma. Systemic reforms should be implemented after the victims is provided with reparations for their trauma. The OCR must provide effective protection; therefore, victims should be given direct relief once an institution is deemed liable for sexual discrimination. The requirements and limitations of Title IX should be publicly emphasized by the OCR to reduce the influx of cases that do not fall under the statute’s standards. The OCR should be required to

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establish a more proportionate approach that places victim's concerns ahead of systematic reforms.

Conclusively, Title IX was instituted to protect men and women against sexual discrimination in federally funded educational institutions. The weakened status of Title IX creates insufficient protection by ineffectively providing victims with restitution for the harassment they experienced. The narrow liability of institutions combined with the preempts of § 1983 create immense impediments for victims to overcome in order to receive proper justice. It is unjust for a student to be obligated to wait for their educational institution's response to be able to file a case under Title IX. The issue at hand is complex in that the standards of Title IX actively prevent restitutive justice, which goes against what Title IX was originally intended to do, to prevent gender based discrimination. To fully accomplish the statutory aims of Title IX, the OCR must restructure standards to promote an equal balance between systemic reforms and provide proper relief to victims in a timely manner. Effective protection will never be entirely successful under Title IX unless victims can receive restitutive justice for their suffering from both their educational institution and those who participated in the harassment.

#### *References:*

Bagenstos, Samuel R. (2015). "What Went Wrong With Title IX?" *Washington Monthly* 47(9). Accessed April 2018.

Beavers, Jenelle M., and Sam F. Halabi.(2017). "Stigma and the Structure of Title IX Compliance". *The Journal of Law, Medicine & Ethics* 45(4), 558-68. Accessed April 9, 2018.

Bruneau Schofield v. South Kortright Central School District, 1996 935 F. Supp. 162 (N.D.N.Y 1996).

Bruner, Darlene Y.(2018). "*Cannon v. University of Chicago*". Encyclopædia Britannica. February 07, 2018. Accessed April 24, 2018.  
<https://www.britannica.com/topic/Cannon-v-University-of-Chicago>.

Cherner- Ranft, Meghan E.(2003). "The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption In Schools Sexual Harassment Cases." *Northwestern University Law Review* 97 (4), 1891-926. Accessed April 9, 2018.

Cullitan, Caitlin M. (2010). "Im His Coach, Not His Father." A Title IX Analysis of Sexual Harassment in College Sports." *Texas Review of Entertainment and Sports Law* 12 (1), 53-76. Accessed April 2018.

*Franklin v. Gwinnett County Public Schools*, 503 US 60 (1992).  
<https://www.law.cornell.edu/supremecourt/text/503/60>.

Freyd, Jennifer J.(2014). "Official Campus Statistics for Sexual Violence Mislead." Al Jazeera America. July 14. Accessed May 2018.

<http://america.aljazeera.com/opinions/2014/7/college-campus-sexualassaultsafetydatawhitehousegender.html>.

Peterson, Alyssa, and Olivia Ortiz (2016). "A Better Balance: Providing Survivors of Sexual Violence with 'Effective Protection' Against Sex Discrimination Through Title IX Complaints." *The Yale Law Journal* 125(7), 2132-155. Accessed April 2018.