

## **Title IX and Pregnancy Discrimination in Higher Education: The New Frontier**

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*Pregnancy discrimination is a little known area covered by Title IX. According to the Title IX regulations, pregnancy discrimination is prohibited in admissions, hiring, coursework accommodations and completion, pregnancy leave policies, workplace protection 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. The same pattern of dropout can be seen in all fields, including the professional schools.*

*This article will address new efforts by the United States Department of Education and the Federal agencies to seek compliance relating to Title IX and pregnancy discrimination. It will also deal with private action lawsuits under Title IX. Title IX private action suits have transformed athletics for women, and more recently has been applied in sexual harassment cases. Pregnancy discrimination is the new frontier.*

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## Introduction

Established by Congress in the peak years of the women's rights movement,<sup>1</sup> Title IX promised to overturn years of bias by banning sex discrimination in federally funded schools and colleges and universities ("recipients").<sup>2</sup> Now, more than 40 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 seriously sexual harassment of all kinds including student on student.<sup>3</sup>

Title IX's specific protection against pregnancy discrimination, however, has largely been ignored. According to the Title IX regulations,<sup>4</sup> pregnancy discrimination is prohibited in admissions, hiring, coursework accommodations and completion, pregnancy leave policies, workplace protection and health insurance coverage in educational programs and activities.<sup>5</sup> Some judicial attention 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

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<sup>1</sup> *Title IX Legal Manual*, UNITED STATES DEPARTMENT OF JUSTICE, 16 (Jan. 11, 2001), <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf>.

<sup>2</sup> 20 U.S.C. § 1681(a) (1972) (The statute 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 . . . .").

<sup>3</sup> See discussion *infra* Part II.A.2.

<sup>4</sup> See 34 C.F.R. Part 106 (1980) (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.); See 34 C.F.R. § 106.31- 106.43 (1980) (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.).

<sup>5</sup> See 34 C.F.R. § 106.31- 106.43 (1980) (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.).

(“postdocs”) who are in their prime childbearing years are probably unaware that Title IX covers pregnancy discrimination.<sup>6</sup>

This may change. As part of its commemoration of the 40th 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. 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 obligations . . . .<sup>7</sup>

Specifically recommended as a model for ensuring Title IX compliance is the 2012 NASA toolkit, *Title IX and STEM: A Guide for Conducting Self-Evaluations*.<sup>8</sup> This guide

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<sup>6</sup> *Title IX at 40: Working to Ensure Gender Equity in Education*, NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION 23, 59 (July 26, 2009), <http://www.ncwge.org/PDF/TitleIXat40.pdf>.

<sup>7</sup> *Obama Administration Commemorates 40 Years of Increasing Equality and Opportunity for Women in Education and Athletics*, The White House: Office of the Press Secretary (June 20, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/20/obama-administration-commemorates-40-years-increasing-equality-and-oppor>.

<sup>8</sup> *Title IX & STEM: A Guide for Conducting Title IX Self-Evaluations in Science, Technology, Engineering and Mathematics Programs*, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, (June 2012), [http://odeo.hq.nasa.gov/documents/TITLE\\_IX\\_STEM\\_Self-Evaluation.pdf](http://odeo.hq.nasa.gov/documents/TITLE_IX_STEM_Self-Evaluation.pdf).

focuses on pregnancy discrimination, among other forms of discrimination, as a major concern for women scientists who are students and trainees.<sup>9</sup>

Obama's initiative is focused on women scientists, but serious effort 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 their dreams for college and graduate and professional degrees.

In the STEM fields, preventing pregnancy discrimination is critical because women are not advancing in the field at the same rates as men, largely because of pregnancy and family concerns. Women [now] represent a large part of the talent pool for research science, but many data sources indicate that they are more likely than men to 'leak' out of the pipeline in the sciences before obtaining tenure at a college or university.<sup>10</sup> The National Science Foundation's Survey of Doctorate Recipients, a comprehensive longitudinal survey of all those who have received a Ph.D. since 1973,<sup>11</sup> shows that family formation—most importantly marriage and childbirth—accounts for the largest leaks in the pipeline between Ph.D. receipt and the acquisition of tenure for women in the sciences.<sup>12</sup> “Specifically, women who are married with children in the sciences are 35 percent less likely to enter a tenure track position after receipt of their Ph.D. than married men with children, and they are 27 percent less likely than their male

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<sup>9</sup> *See id.* at 1.

<sup>10</sup> Marc Goulden, Karie Frasch, and Mary Ann Mason, *Staying Competitive: Patching America's Leaky Pipeline in the Sciences*, BERKELEY CENTER ON HEALTH, ECONOMIC, & FAMILY SECURITY & THE CENTER FOR AMERICAN PROGRESS 1 (Nov. 2009), [http://www.americanprogress.org/wp-content/uploads/issues/2009/11/pdf/women\\_and\\_sciences.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2009/11/pdf/women_and_sciences.pdf) (internal citations omitted).

<sup>11</sup> *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 76. The SDR is sponsored by the National Science Foundation and other government agencies.)

<sup>12</sup> *Id.* at 1-3.

counterparts to achieve tenure upon entering a tenure-track job.”<sup>13</sup> Most of this dropout occurs before attaining a tenure track job.<sup>14</sup> It is the young women scholars, the graduate students and particularly postdocs, who decide to change their career direction based on family concerns.<sup>15</sup>

These trends are also evident among non-scientists. The same national study, NSF’s Survey of Doctoral recipients, reveals that 28 percent of married mothers who obtain Ph.ds in all disciplines are less likely to obtain a tenure track job than are married men with children.<sup>16</sup> This statistic might be explained in large part by the fact that colleges and universities do not provide much support for pregnant graduate students. Of the 62 members of the Association of American Universities (the top research institutions in the country), only 23 percent guarantee a minimum of six weeks’ paid leave for working postdocs, and only 13 percent promised the same to employed graduate students compared to 58 percent for women faculty.<sup>17</sup> Many universities have no maternity policy at all for graduate students and postdocs who are teaching or working in laboratories.<sup>18</sup>

Medical school, law school and other professional schools also enroll students in their prime childbearing leaves. However, there are less data available for these programs, in part because almost no universities keep track of their faculties and students’ pregnancies and pregnancy leaves<sup>19</sup> (a new guideline proposed for Title IX<sup>20</sup>).

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<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.* at 13.

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.* at 18-19.

<sup>18</sup> *Id.* at 19.

<sup>19</sup> See discussion *infra* Part I.B.

<sup>20</sup> *Title IX & STEM: A Guide for Conducting Title IX Self-Evaluations in Science, Technology, Engineering and Mathematics Programs*, *supra* note 8, at 14.

College students have babies also. Particularly vulnerable are the students in community colleges, many of whom are older when they begin their studies. According to the National Campaign to Prevent Teen and Unplanned Pregnancy,<sup>21</sup> “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 children.”<sup>22</sup>

Title IX protection is particularly important for employed students because under Title IX, pregnancy leave is required for all educational programs as well as for the workplace.<sup>23</sup> 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. Many law students, medical students and other professional students work in the same teaching or research assistant capacity. Postdocs are full-time researchers who sometimes teach. However, undergraduate, graduate students and postdocs are usually considered students or trainees, rather than employees, and are therefore not under the jurisdiction of Title VII of the Civil Rights Act of 1976 which covers sex discrimination, including pregnancy discrimination, in the workplace.<sup>24</sup> For the same reasons, they are often

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<sup>21</sup> Mary Jacksteit, *Getting Started at Community Colleges: Reducing Unplanned Pregnancy and Strengthening Academic Achievement*, The National Campaign to Prevent Teen and Unplanned Pregnancy (2009), <http://www.thenationalcampaign.org/resources/pdf/pubs/gettingstarted.pdf>.

<sup>22</sup> Daniel Luzer, *Pregnant College Students*, Washington Monthly (Nov. 25, 2009, 12:54 p.m.), [http://www.washingtonmonthly.com/college\\_guide/blog/pregnant\\_college\\_students.php](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 a.m.), <http://www.insidehighered.com/news/2009/11/25/pregnancy>).

<sup>23</sup> See 34 C.F.R. § 106.51(a)(1)(2000) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.”)

<sup>24</sup> 42 U.S.C. § 2000(e), *et. seq.* (1991); see also George E. McCue, *Start a Family or Become a Professor? Parental Leave Policies for Postdoctoral Fellows Training for Academic Careers*

deemed contingent or part-time employees for purposes of the Family Medical Leave Act (“FMLA”)<sup>25</sup> and do not receive the protected pregnancy leave that faculty and other employees receive.<sup>26</sup> Even if they are not technically called employees, for most students, the work they do as researchers or teaching assistants is clearly an extension of their educational programs which are also protected under Title IX. For graduate students and postdocs, it is a requirement of their educational programs.

This article asserts that it is time to shed light on Title IX as not just a law for mistreated female athletes and victims of sexual harassment but as a statute for those affected by pregnancy discrimination in their educational institutions.

**Part I** will address new efforts by the United States Department of Education and the Federal agencies to seek compliance relating to Title IX and pregnancy discrimination.

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

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*in the Sciences*, 26 WIS. J.L. GENDER & SOC’Y 109, 119 n.70 (Postdocs are given different labels based on their employment status which are confusing and inconsistent from university to university. The different labels include “employees”, “associates”, “fellows”, “trainees”, “researchers”, “scholars” and “appointees.”).

<sup>25</sup> *Family and Medical Leave Act*, United States Department of Labor: Wage and Hour Division, <http://www.dol.gov/whd/fmla/>; McCue, *supra* note 24, at 119 n.70 (Some labels the university provides to students, i.e. associate, fellows, trainees, researchers, scholars and appointees, are not eligible for FMLA protection). (citing *Postdoc Life: Info for Parents and Expectant Parents at the University of Chicago*, UNIV. OF CHI. BIOLOGICAL SCIS. DIV. POSTDOCTORAL ASS’N, [http:// www.bsdpostdoc.uchicago.edu/being-childcare.shtml](http://www.bsdpostdoc.uchicago.edu/being-childcare.shtml))).

<sup>26</sup> Goulden, *supra* note 10, at 26.

pregnancy related issues, to set up complaint and enforcement procedures and to resolve complaints in a timely fashion.<sup>27</sup>

Particular attention will be paid to the NASA compliance guidelines, favored by the administration, which, if disseminated and enforced would greatly change the STEM landscape, particularly for young scientists, graduate students and postdocs. The effect, however, would not be limited to the STEM fields; all undergraduate, graduate and professional schools which receive federal funding would receive the same attention.

**Part II** 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 has been applied in sexual harassment cases and end with arguing that students can file a lawsuit alleging pregnancy discrimination.

In the best case scenario, in a world where Title IX protections were disseminated and enforced in all institutions of higher education, students must still contend with inadequate Title IX grievance procedures in place.<sup>28</sup> For example, a graduate student research assistant who received pay, but also academic research credit, since the project she was working on would also yield her dissertation, would be at a loss if after a medically approved pregnancy leave of three weeks (without pay), her professor told her he found another assistant and recommended she stay at home with her child for the rest of the summer. He said he hoped to get a grant for a new project in the fall. While probably well intentioned, the professor, the gatekeeper to career

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<sup>27</sup> See discussion *infra* Part I.C.1.

<sup>28</sup> See discussion *infra* Part II.B.1.b.

advancement,<sup>29</sup> may have effectively ruined this student’s career—or at least cost her a huge life-long loss in job earnings. The Title IX Grievance Committee could eventually perhaps rule for re-instatement—but probably too little and too late. It is unlikely that they could offer her a similar job or a chance to return to her dissertation project. And this is in an institution that has a functioning grievance procedure. For students experiencing pregnancy discrimination where there is a grievance procedure, a private action lawsuit could provide injunctive relief and compensatory damages to the victim, far more than the grievance procedure would yield, *and* send a clear message to the institution that pregnancy discrimination is illegal. For students without and Title IX officer or a functioning grievance procedure for pregnancy discrimination a private lawsuit would be the only remedy.

Much progress has been made, but the courts have had a difficult time with Title IX enforcement. This section will address the rocky road of Title IX suits, analyze the handful of cases where the courts have specifically addressed pregnancy discrimination and note the current judicial trends.

## **Part I: Title IX Dissemination and Compliance**

To effectively implement the Obama Administration’s initiative<sup>30</sup> and protect female scientists from discrimination based on their pregnancy or parental status, our colleges and universities must adhere to the compliance and dissemination requirements under Title IX. For guidance in complying with this statute, educational institutions can turn to the Title IX

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<sup>29</sup> See McCue, *supra* note 24, at 116-17.

<sup>30</sup> See *supra* pp. 1.

regulations;<sup>31</sup> these are supplemented by the policies and recommendations developed by the White House, the Department of Education’s Office of Civil Rights (“OCR”) and the federal funding agencies National Aeronautics and Space Administration (“NASA”), the National Science Foundation (“NSF”) and the National Institute of Health (“NIH”).<sup>32</sup> This section discusses the types of discrimination that affect college and graduate students and postdocs, the ways recipients are lacking in their compliance and dissemination procedures, particularly for pregnancy discrimination, and the strategies for compliance and dissemination, and administrative enforcement of Title IX by the OCR.

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

Title IX itself is slim. The statute 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.”<sup>33</sup> The Title IX regulations were created by administrative agencies to provide guidance on Title IX enforcement to recipients who administer educational programs or activities.<sup>34</sup> These regulations are given great deference by the courts in determining legislative intent in the framing of Title IX. They are essential for individuals seeking to pursue private action claims alleging pregnancy discrimination against their educational institutions. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>35</sup> the Supreme Court stated that it had “long recognized that considerable weight should be accorded to an executive department’s construction of a statutory

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<sup>31</sup> See discussion *infra* Part I.A.

<sup>32</sup> See discussion *infra* Part I.B.

<sup>33</sup> 20 U.S.C. § 1681(a) (1972).

<sup>34</sup> *Title IX Legal Manual*, *supra* note 1, at 23.

<sup>35</sup> 467 U.S. 837 (1984).

scheme it is entrusted to administer and the principle of deference to administrative interpretations.”<sup>36</sup> Furthermore, when Congress passed Title IX, an unusual regulatory procedure required Congress to review all education regulations before they took effect.<sup>37</sup> According to the Supreme Court in *North Haven v. Bell*,<sup>38</sup> this procedure was designed to provide Congress with an opportunity to examine a regulation and, if found inconsistent with the statutory text, it could disapprove of it in a concurrent resolution.<sup>39</sup>

The regulations are comprehensive with regard to pregnancy discrimination. They specifically protect pregnant students in admissions, hiring, coursework accommodations, leave policies and health insurance coverage in employment, education programs and activities.

## **1. Admissions**

In the admissions procedures for undergraduate, masters and Ph.D. programs, educational institutions must abide by Title IX regulations. When making admissions decisions, the recipient 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 status.<sup>40</sup> Additionally, they must treat

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<sup>36</sup> *Id.* at 844.

<sup>37</sup> David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 246 (2005) (citing 20 U.S.C. § 1232 (d)(1)(1982) *repealed by* Pub. L. No. 98-511, 98 Stat. 2366 (1984)).

<sup>38</sup> 456 U.S. 512 (1992).

<sup>39</sup> Cohen, *supra* note 37, at 246 (citing *North Haven*, 456 U.S. at 531-32).

<sup>40</sup> 34 C.F.R. §§ 106.21(c)(1)-(3) (1980) (“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 . . .”).

disabilities related to pregnancy in the same manner and under the same policies as any other temporary disability or physical condition.<sup>41</sup>

## **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.<sup>42</sup>

## **3. Coursework Accommodation and Completion**

Unless a pregnant student voluntarily decides to participate in a separate portion of her educational program or activity, the college or university cannot discriminate or exclude her from any class or extracurricular activity on the basis of her pregnancy status.<sup>43</sup> If the student takes a leave of absence for childbirth or other pregnancy related conditions she must be re-instated to the status she held when the leave began.<sup>44</sup>

## **4. Employment: Pregnancy Leave and Job Protection on Return From Leave**

Both full-time and part-time employees are covered by Title IX's employment protection regulations.<sup>45</sup> If a student meets the Title IX regulation requirements for taking pregnancy leave, she must be allowed leave, according to her physician's recommendation, and her position

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<sup>41</sup> *Id.*

<sup>42</sup> 34 C.F.R. § 106.57(b) (1980) (Recipients "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.").

<sup>43</sup> 34 C.F.R. § 106.40(b)(1) (2000) ("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.").

<sup>44</sup> 34 C.F.R. § 106.40(b)(5) (2000).

<sup>45</sup> 34 C.F.R. § 106.51(2000) ("No person shall, on the basis of sex be excluded from participation in, benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full or part-time, under any education program or activity operated by a recipient which receives Federal assistance.").

cannot be eliminated while she is on leave.<sup>46</sup> Upon her return, she must be reinstated to the status which she held before the leave began.<sup>47</sup>

## **5. Health Insurance Coverage**

In their medical or hospital policies, educational institutions must treat a student's pregnancy or recovery therefrom in the same manner and under the same policies as any other temporary disability.<sup>48</sup> Although it may be used by a different proportion of students of one sex than of the other, recipients are not prohibited from providing family planning services to their students.<sup>49</sup> Additionally, full coverage health services must include gynecological care.<sup>50</sup>

### **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, activities and worksites. Because of the lack of dissemination of information and inadequate compliance

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<sup>46</sup> 34 C.F.R. § 106.40(b)(5) (2000) ("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."); *see also* Joan C. Williams & Cynthia Thomas Calvert, *WorkLife Law's Guide to Family Responsibilities Discrimination*, CENTER FOR WORKLIFE LAW (2006).

<sup>47</sup> 34 C.F.R. § 106.40(b)(5) (2000).

<sup>48</sup> 34 C.F.R. § 106.40(b)(4) (2000) ("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.").

<sup>49</sup> 34 C.F.R. § 106.39 (1980) (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.").

<sup>50</sup> *Id.*

programs, students cannot begin to advocate for themselves because most do not know they are protected under Title IX.

The lack of dissemination and compliance with Title IX is an issue for almost all university and college campuses. The National Coalition for Women and Girls in Education reports in *Title IX at 40* 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.”<sup>51</sup> Likewise, recipients are either unaware of the Title IX protections they owe their students or knowingly do not adhere to Title IX dissemination requirements.<sup>52</sup> A study by the Federal Demonstration Partnership and its Task Force on Parental and Family Leave for Research Trainees<sup>53</sup> examined how several universities interpret Title IX laws and regulation.<sup>54</sup>

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<sup>51</sup> *Title IX at 40: Working to Ensure Gender Equity in Education*, *supra* note 6, at 59.

<sup>52</sup> See 34 C.F.R. § 106.9 (2000) (“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.”).

<sup>53</sup> Daisy Whittemore, *A Forgotten Class of Scientists: Examining the Parental and Family Benefits Available to Research Trainees*, FEDERAL DEMONSTRATION PARTNERSHIP (Jan. 24, 2012), available at [http://sites.nationalacademies.org/PGA/COSEPUP/Postdoc-2011/PGA\\_068405](http://sites.nationalacademies.org/PGA/COSEPUP/Postdoc-2011/PGA_068405).

<sup>54</sup> Mary Ann Mason, *The Next Step for Female Scientists*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 13, 2012), <http://chronicle.com/article/The-Next-Step-for-Female/130717/> (citing Whittemore, *supra* note 53).

It found a tangle of rules and policies at different universities.<sup>55</sup> While some institutions are independently ensuring compliance with Title IX, there is a lack of collaboration between educational institutions and federal agencies to improve the process.<sup>56</sup> Not only is this a case of wasted resources, it also “creates confusion and multiple interpretations of already complicated policies.”<sup>57</sup> For example, there are many ways in which a recipient's health care policy could violate Title IX. Recipients (colleges and universities) may exclude pregnancy coverage, limit that coverage with respect to complications, or charge fees for pregnancy coverage that have no similar counterpart in the pricing of other temporary disabilities. Most universities provide health care for students but there is limited information on the state of compliance with these policies.<sup>58</sup> The only studies of compliance, which are not recent, indicate that a vast majority of the policies violated the requirement that they treat pregnancy the same as other medical conditions.<sup>59</sup> There is no reason to believe that this issue has been addressed in recent years.

Many colleges and universities may be in violation of Title IX because they have not appointed Title IX coordinators.<sup>60</sup> Colleges and universities often do not understand their full responsibility under Title IX, and allow their professors to set policies in the classroom.<sup>61</sup> For

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<sup>55</sup> Mason, *supra* note 55.

<sup>56</sup> *Id.* (quoting Whittemore, *supra* note 54, at 11).

<sup>57</sup> Mason, *supra* note 55 (citing Whittemore, *supra* note 54, at 11).

<sup>58</sup> See discussion *supra* Part I.A.5.

<sup>59</sup> Margaret Dunkle & Margaret A. Nash, *Coverage of Pregnancy in Health Insurance for students is an issue that colleges should confront immediately*, CHRONICLE OF HIGHER EDUCATION, Mar. 15, 1989, at B2.

<sup>60</sup> *Title IX at 40: Working to Ensure Gender Equity in Education*, *supra* note 6, at 58-59; see also 34 C.F.R. § 106.8 (1980) (“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.”).

<sup>61</sup> *Title IX at 40: Working to Ensure Gender Equity in Education*, *supra* note 6, at 59.

example, when asked by a researcher about the provision of unpaid leave to postdoctoral scholar birth mothers, one university respondent indicated that they do not provide it, and six indicated that they did not know whether or not it was provided.”<sup>62</sup> Graduate students, and sometimes postdocs, are often not covered under the FMLA because they are considered trainees, not employees or because they are part-time, contingent or have not worked long enough to qualify.<sup>63</sup> As the “boss” and “human resources department” in the laboratory, the principal investigator (“PI”) determines whether a pregnant scientist can take maternity leave and for how long.<sup>64</sup> For a variety of reasons, such as productivity loss and funding concerns,<sup>65</sup> the PI may choose to not accommodate a young scientist’s request for leave.<sup>66</sup>

A major cause for concern is that the extent of the problem is 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.”<sup>67</sup> Indeed, compliance with Title IX has been an uphill battle.<sup>68</sup>

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<sup>62</sup> Goulden, *supra* note 10, at 5.

<sup>63</sup> McCue, *supra* note 24, at 120 (Universities often make a distinction between postdocs paid from general laboratory funding and those who are individually funded from outside sources. The former are considered “employees” and the latter “trainees” or “non-employees.”).

<sup>64</sup> *Id.* at 116, 117.

<sup>65</sup> *See id.* at 117 (For PIs that apply for and receive outside laboratory funding, their future funding is dependent on their research results. Without the postdoc, the PIs can suffer productivity loss. Even for postdocs paid through general laboratory funding, “there is a general productivity cost that must be made up elsewhere.” If the postdoc receives her own funding from outside sources and the source allows for two week paid leave/vacation time, the PI may need to cover indirect costs such as providing additional vacation time for maternity leave.).

<sup>66</sup> *Id.* (citing Goulden, *supra* note 10, at 17, 32).

<sup>67</sup> *Title IX at 40: Working to Ensure Gender Equity in Education*, *supra* note 6, at 58.

<sup>68</sup> *See* Nancy Chi Cantalupo, *Burying our heads in the sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 241-42 (2011) (“Only the schools that have been investigated are compelled to come into compliance with Title IX and respond in a fashion that is likely to increase reporting . . . .”); *see also* Jenna Susko, *et al.*, *Nonprofit demands answers over Title IX*, NBC BAY AREA (Nov. 2, 2012), <http://www.nbcbayarea.com/investigations/Nonprofit-Demands-Answers-from-Schools>

Despite Title IX’s requirement that every federal agency providing financial assistance to educational institutions issue Title IX regulations,<sup>69</sup> only four federal agencies had done so by the year 2000.<sup>70</sup> In 2004, the Government Accountability Office (“GAO”) conducted a review of the efforts by several major science agencies (NSF, NASA, United States Department of Energy, and the United States Department of Education) to ensure grantee compliance with Title IX.<sup>71</sup> GAO discovered that compliance reviews of recipients’ academic programs had been “largely neglected by agencies” even though these reviews are required under Title IX and its implementing regulations.<sup>72</sup> GAO found that NSF, NASA, and the U.S. Department of Energy had never conducted Title IX compliance reviews.<sup>73</sup> In addition, their review found that although the U.S. Department of Education had agreements with 17 agencies to conduct Title IX compliance reviews on their behalf, they were not completing them.<sup>74</sup> After the GAO report was issued, DOE, NSF, and NASA began conducting their first-ever compliance reviews; the results of these reviews are not public.<sup>75</sup>

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176881111.html (While the OCR responds to complaints filed, it does not systematically check if schools are complaint with Title IX. The last proactive investigation was four years ago.).

<sup>69</sup> 20 U.S.C. § 1682 (Title IX provides that “[e]ach 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.”).

<sup>70</sup> Goulden, *supra* note 10, at 26 (internal citations omitted).

<sup>71</sup> *Gender Issues: Women's Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE (July 22, 2004), <http://www.gao.gov/new.items/d04639.pdf>.

<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 12.

<sup>75</sup> Goulden, *supra* note 10, at 27 (internal citation omitted).

### C. Strategies for Dissemination and Compliance

Title IX requires federal funding agencies to conduct periodic compliance reviews and investigate complaints that allege a recipient may be engaging in gender discrimination.<sup>76</sup> Secretary of Education Arne Duncan, in discussing the U.S. Department of Education's recent crackdown on sexual harassment of students, stated that "[o]ur first goal is prevention through education. Information is always the best way to combat sexual violence."<sup>77</sup> There should be a similar emphasis on the dissemination of information about pregnancy discrimination. On April 4, 2011, OCR published a "Dear Colleague Letter" ("DCL") on sexual harassment<sup>78</sup> that can serve as a helpful model for responding to violations of pregnancy discrimination. The letter states that "[c]ompliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment."<sup>79</sup> The letter proved successful. Most universities and colleges revisited their policies regarding sexual assault under Title IX.<sup>80</sup> For example, the University of North Carolina at Chapel Hill developed new

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<sup>76</sup> *Id.* at 26 (citing 20 U.S. § 1681 *et. seq.*).

<sup>77</sup> *Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence*, The White House: Office of the Vice President (Apr. 4, 2011), <http://www.whitehouse.gov/the-press-office/2011/04/04/vice-president-biden-announces-new-administration-effort-help-nation-s-s>.

<sup>78</sup> Russlynn Ali, *Dear Colleague Letter: Sexual Violence*, U.S. Department of Education's Office for Civil Rights (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (discusses student-on-student sexual harassment, sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence); Karin Kapsidelis, *UVA plans to revise sexual misconduct policy*, THE DAILY PROGRESS (May 5, 2011), <http://www2.dailyprogress.com/news/2011/may/05/uva-plans-revise-sexual-misconduct-policy-ar-1020158/> (The letter prompted change at UVA, with the university broadening the scope of what constitutes sexual misconduct and lowering the standard of evidence necessary to find a study guilty.).

<sup>79</sup> Ali, *supra* note 78, at 5.

<sup>80</sup> See Allie Grasgreen, *Tide Shifts on Title IX*, INSIDE HIGHER ED (Apr. 24, 2012 3:00

procedures on how they will handle sexual assault allegations; Stanford University eased its criminal standard of proof below that of “beyond a reasonable doubt” in investigations of sexual assault complaints; the University of Oklahoma extended the window of time for reporting sexual assault and the University of Georgia found they were not complying with Title IX requirements.<sup>81</sup>

As the DCL suggests, a recipient’s general policy prohibiting sex discrimination violates Title IX if students are unaware what constitutes sexual harassment.<sup>82</sup> Students are also unaware of the protections granted by Title IX pregnancy discrimination regulations. Following the procedures outlined in the DCL on sexual harassment, students must be made aware of the specific practices that constitute pregnancy discrimination. If they bring a complaint the Title IX coordinator must lead the recipient’s response. “The [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.”<sup>83</sup> Even without actual complaints, “[s]chools also should assess student activities regularly to ensure that the practices and behavior of students [and recipient’s faculty and officials] do not violate the schools’ policies against sexual harassment and sexual violence.”<sup>84</sup> Schools should also implement a similar assessment to ensure they are not violating the pregnancy discrimination regulations under Title IX.

The Title IX regulations provide several routes for ensuring adequate dissemination. To comply with Title IX, the regulations stipulate that recipients must disseminate information to

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AM),<http://www.insidehighered.com/news/2012/04/24/ocr-dear-colleague-letter-prompts-big-change-sexual-assault-hearings-unc>.

<sup>81</sup> *Id.*

<sup>82</sup> Ali, *supra* note 78, at 7.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 15.

applicants that the university it does not discriminate on the basis of sex in its admissions or employment decisions.<sup>85</sup> This broad mandate from the Assistant Secretary of Education “to apprise such persons of the protections against discrimination assured them by [T]itle IX”<sup>86</sup> could be fulfilled by including “pregnancy discrimination” in the enumeration of its protections. The Assistant Secretary 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, fully describing its assurances, including pregnancy discrimination, and commitments “to take whatever remedial action is necessary . . . to eliminate . . . discrimination on the basis of sex.”<sup>87</sup>

The Obama administration has shown particular concern with the issue of pregnancy discrimination. In 2011, the White House and NSF implemented the “NSF Career-Life Balance Initiative” which supports scientists in the midst of family formation by providing extensions of grants for students’ child birth, parental supplements for laboratories while PIs are on family

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<sup>85</sup> See 34 C.F.R. § 106.9 (2000) (“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 [T]itle 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 [for the U.S. Department of Education’s OCR] finds necessary to apprise such persons of the protections against discrimination assured them by [T]itle IX . . .”).

<sup>86</sup> See *id.*

<sup>87</sup> *Id.* at § 106.4(a) (2000) (“Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.”).

leave, and other family friendly policies.<sup>88</sup> The initiative “includes a ‘stop the clock’ provision on its grants, allowing scientists to defer or suspend their grants for up to a year to accommodate childbirth or adoption.”<sup>89</sup> In the same year the U.S. Department of Justice (“DOJ”) coordinated a Title IX Interagency Working Group which focused on effective strategies for Title IX compliance reviews of STEM programs and brought together NASA, NSF, the Department of Energy, and the Department of Education.<sup>90</sup> On June 20, 2012, the Obama administration announced a commitment for federal agencies to consolidate agency expertise with regards to Title IX compliance and highlighted the fact that many federal agencies are actively engaged in investigations to ensure such compliance.<sup>91</sup> The efforts of the Obama administration crystallize the importance for further dissemination and compliance of Title IX regulations prohibiting pregnancy discrimination.<sup>92</sup>

## 1. Self-Evaluation

A recipient’s self-evaluation of its compliance with Title IX allows it to identify violations, especially in its admissions process and treatment of students.<sup>93</sup> With this information, colleges and universities can implement stronger outreach and recruitment efforts,

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

<sup>89</sup> Mason, *supra* note 55.

<sup>90</sup> Jessie DeAro, *Bringing Title IX to Classrooms and Labs*, The White House: Council on Women and Girls (June 24, 2010, 4:00 PM), <http://www.whitehouse.gov/blog/2010/06/24/bringing-title-ix-classrooms-and-labs>.

<sup>91</sup> *Obama Administration Commemorates 40 Years of Increasing Equality and Opportunity for Women in Education and Athletics*, *supra* note 7.

<sup>92</sup> President Barack Obama, *President Obama Reflects on the Impact of Title IX*, The White House: Office of the Press Secretary (June 23, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/23/op-ed-president-obama-president-obama-reflects-impact-title-ix>.

<sup>93</sup> *Title IX & STEM: A Guide for Conducting Title IX Self-Evaluations in Science, Technology, Engineering and Mathematics Programs*, *supra* note 8, at 24.

create greater transparency in program policies and practices, and modify policies and practices so that they adhere to Title IX.<sup>94</sup> Conducting periodic self-evaluations and utilizing the results of those evaluations in order to improve the participation of women in STEM programs will enhance their overall inclusiveness.<sup>95</sup>

According to the Title IX regulations, recipients must review their current policies and practices and their effects concerning admission and treatment of students.<sup>96</sup> If their policies and procedures do not comply with Title IX requirements, they must “1) modify the policies and procedures to bring them into compliance and 2) take appropriate steps to remedy any discrimination that resulted from these practices.”<sup>97</sup> In addition, recipients must record the results of the self-evaluation and document the modifications and remedial steps taken to resolve any violations.<sup>98</sup> These documents should be kept for three years and be available to the funding agency upon request.<sup>99</sup>

NASA guidelines, recommended by the Obama administration, suggest colleges and universities inquire about their “[a]pplications, admissions, retention, and degrees earned rates . . . [c]riteria for assignment of graduate students to researchers and advisors; [f]unding of students through 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.”<sup>100</sup> In their admissions and enrollments sector, recipients should review the total numbers of applications, acceptances and new enrollment rates by gender; the

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See 34 C.F.R. § 106.3(c)(1) (1980).

<sup>97</sup> *Title IX Legal Manual, supra* note 1, at 109; 34 C.F.R. §§ 106.3(c)(2); 106.3(c)(3) (1980).

<sup>98</sup> *Title IX Legal Manual, supra* note 1, at 109; 34 C.F.R. § 106.3(d) (1980).

<sup>99</sup> *Title IX Legal Manual, supra* note 1, at 109; 34 C.F.R. § 106.3(d) (1980).

<sup>100</sup> *Title IX & STEM: A Guide for Conducting Title IX Self-Evaluations in Science, Technology, Engineering and Mathematics Programs, supra* note 8, at 3.

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.”<sup>101</sup> They should also ask whether their admissions criterion has an adverse impact on gender.<sup>102</sup> NASA also offers advice as to what data to collect to ensure compliance with Title IX regulations. For example, in regards to pregnancy leave,<sup>103</sup> recipients should track the:

[n]umber 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.<sup>104</sup>

Colleges and universities should also pay attention to documents and statistics regarding their “non-discrimination and anti-harassment policies and grievance procedures for students.”<sup>105</sup>

NASA recommends recipients evaluate:

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)?<sup>106</sup>

Not only should they evaluate the policies to ensure they are accessible and informative,<sup>107</sup> recipients should also keep track of the number of grievances and complaints

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<sup>101</sup> *Id.* at 6.

<sup>102</sup> *Id.* at 8.

<sup>103</sup> 34 C.F.R. § 106.40(b)(5)(2000).

<sup>104</sup> *Title IX & STEM: A Guide for Conducting Title IX Self-Evaluations in Science, Technology, Engineering and Mathematics Programs*, *supra* note 8, at 14.

<sup>105</sup> *Id.* at 11.

<sup>106</sup> *Id.* at 13.

<sup>107</sup> *See id.* at 11.

made by students against faculty, staff and other students.<sup>108</sup> Lastly, the institution should note any trends in this data and determine the appropriate steps needs to address the issues.<sup>109</sup> NASA also encourages colleges and universities to question whether subtler forms of bias other than sexual harassment, such as pregnancy discrimination, are present in educational programs.<sup>110</sup>

## 2. Best Practices

Federal agencies and educational institutions have implemented policies that have been beneficial to pregnant students. Through its comprehensive review of STEM programs' compliance with Title IX, NASA discovered promising practices implemented at colleges and universities.<sup>111</sup> Among them, recipients established "strong Title IX coordination efforts, including collaborative partnerships with institutional leadership and academic departments to provide, among other things, regular education and awareness opportunities regarding harassment and bias, and information on how to utilize mechanisms in place, e.g., internal complaint procedures for addressing such concerns"<sup>112</sup> and conducted "on-going Title IX self-evaluation efforts, including climate surveys and periodic reviews of data broken down by gender on critical program processes, e.g., admissions, recruitment, and qualifying examinations to ensure program policies and practices are not having a negative impact on program participation."<sup>113</sup> Regarding family friendly policies, promising practices include: on-campus child care facilities; full health care coverage; and, an institutional commitment to family friendly policies, such as family housing, a Work/Life Resource Center that provides services

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<sup>108</sup> *Id.* at 11.

<sup>109</sup> *Id.* at 13.

<sup>110</sup> *Id.* at 17.

<sup>111</sup> *Title IX & STEM: Promising Practices for Science, Technology, Engineering, & Mathematics*, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION 4 (June 2009), [http://odeo.hq.nasa.gov/documents/71900\\_HI-RES.8-4\\_09.pdf](http://odeo.hq.nasa.gov/documents/71900_HI-RES.8-4_09.pdf)

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

and resources to pregnant women and helps them obtain child care and flexible work schedules, and one year of absence for graduate students who have childbearing and caregiver responsibilities.<sup>114</sup> NASA ultimately concluded that “strong Title IX compliance efforts, especially broad dissemination of information and effective education and awareness efforts, can assist recipients in addressing issues of gender in the STEM fields.”<sup>115</sup>

Both the NIH and NSF provide the most financial assistance “and have gone further than other agencies in offering a variety of family accommodations.”<sup>116</sup> NIH offers a generous eight weeks of paid leave to postdocs who receive the National Research Service Award.<sup>117</sup> At the University of California, Berkeley, clock extensions were implemented for graduate students so they could apply for fellowships or grants beyond the usual deadlines to accommodate the time lost for childbirth.<sup>118</sup> Clock extensions account for any leave or loss of productivity by pushing back the student’s subsequent deadlines for course or degree completion.<sup>119</sup> This ensures that students, when taking and returning from pregnancy leave, are not subjected to undue pressure for taking time off.<sup>120</sup> For a six month maternity leave, for example, a PI would extend benchmarks or eventual target dates for completion of research or the position by six months.<sup>121</sup>

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<sup>114</sup> *Id.* at 24.

<sup>115</sup> *Id.* at 27.

<sup>116</sup> Mason, *supra* note 55.

<sup>117</sup> *Id.* (“However, recipients may take that paid leave only ‘when those in comparable training positions at the grantee organizations have access to this level of paid leave.’ In other words, every postdoc at that university must also be eligible for eight weeks of paid leave- an unlikely circumstance for postdocs who are supported by a wide variety of sources.”).

<sup>118</sup> *Graduate Council Student Parent Policies* (Revision of May 1998 Statement); UNIVERSITY OF CALIFORNIA, BERKELEY GRADUATE DIVISION (Aug. 4, 2011),

<https://grad.berkeley.edu/policies/guides/appendix-7-graduate-council-student-parent-policies-revision-of-may-1998-statement/>.

<sup>119</sup> McCue, *supra* note 24, at 127.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

To standardize these leave policies, federal funding agencies should communicate clear parental leave policies which universities can follow and use as guidelines.<sup>122</sup>

### 3. Recommendations

Most recommendations stress the importance of collaboration between research universities and the federal funding agencies. The Federal Demonstration Partnership and its 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.<sup>123</sup>

To do more, the Obama administration could convene a panel to “hammer out baseline policies that would become mandatory for all grant agencies and universities.”<sup>124</sup> The policies could mimic those offered by other federal agencies, such as NSF’s salary supplements to the grant for childbirth leave, and NIH support for re-entry training following an absence of more than a year in order to accommodate family needs.<sup>125</sup>

In the Center for American Progress’s 2009 report *Staying Competitive: Patching America’s Leaky Pipeline in the Sciences*, the researchers recommended recipients review whether their existing and future policy initiatives are effective and comply with Title IX.<sup>126</sup> By collecting systematic longitudinal data, colleges and universities will make informed decisions and respond effectively to complaints.<sup>127</sup> They should proactively build and maintain the

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<sup>122</sup> *Id.* at 128.

<sup>123</sup> Whittemore, *supra* note 54, at 3.

<sup>124</sup> Mason, *supra* note 55.

<sup>125</sup> *Id.*

<sup>126</sup> Goulden, *supra* note 10, at 42.

<sup>127</sup> *Id.*

necessary data to better assess whether they are producing positive results and meeting Title IX requirements.<sup>128</sup> For example, they should track “how much do family effects explain the drop off of women in federal funding rates at each successive training/career level?”<sup>129</sup> Because most gender equity and family responsive initiatives remain under-assessed, federal agencies should offer more grant programs to assist with recipients’ efforts.<sup>130</sup>

#### **D. Enforcement: Administrative Complaint Procedure Through the United States Department of Education’s Office of Civil Rights.**

Recipients must also inform students how they can exercise their legal protections under Title IX. Students can either file a complaint with the recipient’s Title IX coordinator,<sup>131</sup> the federal funding agency,<sup>132</sup> or the OCR. The OCR can enact an Early Complaint Resolution (“ECR”).<sup>133</sup> Under ECR, if both the complainant and recipient agree to participate, then the OCR will serve as facilitator for the parties to resolve the complaint.<sup>134</sup> The OCR will monitor the ECR to ensure that, if it is unsuccessful, the OCR’s investigation of the complaint will proceed in

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> 34 C.F.R. § 106.8(a) (1980) (“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); *Id.* at 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.”).

<sup>132</sup> *See Title IX Legal Manual, supra* note 1, at 129-32.

<sup>133</sup> *OCR Case Processing Manual*, U.S. DEPARTMENT OF EDUCATION, Section 201 (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.”).

<sup>134</sup> *Id.*

a timely fashion.<sup>135</sup> Upon completion of the investigation, the OCR will rule whether the recipient has complied with Title IX.<sup>136</sup> The 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.”<sup>137</sup> The complainant can also appeal OCR’s findings.<sup>138</sup> If the OCR makes a determination of non-compliance then it “will attempt to secure the recipient’s willingness to negotiate a resolution agreement.”<sup>139</sup> For the complaint to be considered resolved, the recipient must enter into an agreement, which if fully performed, will remedy the problem.<sup>140</sup>

If a recipient deemed to be in noncompliance is unwilling to voluntarily resolve the complaint, then the Enforcement Office will send a Letter of Impending Enforcement Action.<sup>141</sup> If OCR is unable to reach a settlement with the recipient, it will issue an enforcement action.<sup>142</sup> At this point, OCR may suspend, terminate, or refuse to grant or continue federal assistance to the recipient.<sup>143</sup> It may also refer the matter to the Department of Justice, which may seek injunctive relief, specific performance, or other remedies against the recipient.<sup>144</sup>

In June 2012, the OCR released a report highlighting its enforcement efforts.<sup>145</sup> In the span of three fiscal years, OCR received nearly 3,000 Title IX-related complaints and launched more than 35 investigations.<sup>146</sup> These investigations address a broad range of Title IX issues,

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<sup>135</sup> *Id.* at section 205.

<sup>136</sup> *Id.* at section 303.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at section 306.

<sup>139</sup> *Id.* at section 303(b).

<sup>140</sup> *Id.* at sections 304, 404.

<sup>141</sup> *Id.* at section 305.

<sup>142</sup> *Id.* at Article IV.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 402; *Title IX Legal Manual*, *supra* note 1, at 165.

<sup>145</sup> *Title IX Enforcement Highlights*, United States Department of Education, Office for Civil Rights (June 2012), <http://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf>

<sup>146</sup> *Id.* at 2.

including comparable educational opportunities, equal treatment, athletics, sexual violence, and sexual and gender-based harassment.<sup>147</sup> In the fiscal years of 2009-2010 and 2010-2011, the issue of pregnancy discrimination against pregnant and parenting students was raised 43 times in Title IX complaints.<sup>148</sup> The report did not reveal how the issues were resolved.<sup>149</sup>

There has been one recent success. In 2011, sixteen students filed a complaint with the OCR regarding the sexually hostile environment on Yale University's campus.<sup>150</sup> OCR conducted an extensive investigation at the campus, assessing whether Yale had designated a Title IX coordinator and effective grievance procedure that would promptly and equitably address complaints as well as whether Yale had allowed the sexually hostile environment on campus to develop by not sufficiently responding to notice of sexual harassment.<sup>151</sup> In response to the federal investigation, Yale created an external "Advisory Committee on Campus Climate" to review the campus's policies and procedures and advise the University president on how Yale can handle sexual misconduct complaints more effectively.<sup>152</sup> Working closely with the OCR throughout its investigation, Yale voluntarily made changes to its Title IX compliance

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<sup>147</sup> *Id.* at 3.

<sup>148</sup> *Id.* (The numbers of complaints and issues will not match. "A single complaint can raise multiple issues; therefore, the total number of issues raised will exceed the number of complaints received.").

<sup>149</sup> See *Title IX Enforcement Highlights*, *supra* note 147.

<sup>150</sup> See Lisa W. Foderaro, *At Yale, Sharper Look at Treatment of Women*, N.Y. TIMES (Apr. 7, 2011), [http://www.nytimes.com/2011/04/08/nyregion/08yale.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/04/08/nyregion/08yale.html?pagewanted=all&_r=0) (In the complaint, the students recounted over seven years of acts against women, including the fall 2010 chants of "No means yes" by a Yale fraternity parading through the university's residential quadrangle. The students also detailed the university's "inadequate response to a long trend of public sexual harassment" and "failure to appropriately address several instance of private sexual harassment and assault.").

<sup>151</sup> *U.S. Department of Education Announces Resolution of Yale University Civil Rights Investigation*, U.S. Department of Education (June 15, 2012), <http://www.ed.gov/news/press-releases/us-department-education-announces-resolution-yale-university-civil-rights-invest>.

<sup>152</sup> Jordi Gassó, *New Committee Advises on "Campus Climate"*, YALE DAILY NEWS (Apr. 18, 2011), <http://www.yaledailynews.com/news/2011/apr/18/new-committee-advises-on-campus-climate/>.

procedures.<sup>153</sup> The university also entered into a voluntary resolution agreement which stated that the university, among other tasks, “will continue to improve and publicize university resources and programming aimed at responding to and preventing sexual harassment and violence.”<sup>154</sup>

Dissemination and compliance is just one piece of the puzzle. Despite the positive changes at Yale via OCR enforcement, the OCR route does not always result in a beneficial outcome for students. A private right of action has the potential to provide students with an incentive to advocate for themselves against pregnancy discrimination.

## **II. Title IX Private Right of Action**

Title IX is enforced in two ways: administrative enforcement by the OCR, as discussed *a*, above and private right of action,<sup>155</sup> which the Supreme Court recognized in its 1979 Supreme Court decision, *Cannon v. University of Chicago*.<sup>156</sup> The Court reasoned that because Title VI,<sup>157</sup> the model for Title IX,<sup>158</sup> granted an implied private right of action, Congress had

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<sup>153</sup> *U.S. Department of Education Announces Resolution of Yale University Civil Rights Investigation*, *supra* note 151.

<sup>154</sup> *Id.* (The agreement also stipulated that Yale will “conduct periodic assessments of the campus climate to evaluate the success of its efforts, coordinate its compliance efforts via its Title IX coordinator, implement a new grievance process designed to promptly and equitably address complaints of sexual misconduct under Title IX and where appropriate, notify the Yale community of the outcome of complaints, and continue its efforts to educate and train all sectors of the Yale community on Title IX.”).

<sup>155</sup> *See Cantalupo*, *supra* note 70, at 225 (“Both enforcement jurisdictions derive from the fact that schools agree to comply with Title IX in order to receive federal funds.”); *but see Title IX Legal Manual*, *supra* note 1, at 112 (However, a student cannot bring a private right of action claim if her school failed to implement a Title IX grievance procedure. The Supreme Court in *Gebser v. Lago Vista Sch. Dist.*, 524 U.S. 274 (1998), ruled “that failure to meet this requirement, by itself, does not amount to discrimination on the basis of sex.” Here, the student can only complain to the funding agency to receive enforcement.).

<sup>156</sup> 441 U.S. 677, 717 (1979) (Plaintiff alleged the University of Chicago Medical School discrimination against her on the basis of her sex after she was denied admission to its program.).

<sup>157</sup> 42 U.S.C. § 2000(d) (1964) (The Title VI statute reads “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the

intended Title IX to have an implied private right of action as well.<sup>159</sup> An individual can pursue a private action under Title IX before exhausting her administrative remedies.<sup>160</sup>

Thirteen years after *Cannon*, the Court “awarded compensatory damages to a plaintiff who sued for intentional sex discrimination” in *Franklin v. Gwinnett County Public Schools*.<sup>161</sup> This was the first time the Court allowed monetary damages in a private Title IX action.<sup>162</sup> Here, the Court relied on the “long-standing rule” that, without an express limitation by Congress, the existence of a cause of action (either expressly or impliedly) gave courts the power to grant all appropriate remedies.<sup>163</sup> The Court also found Congress was aware of the judiciary’s common-law tradition that the denial of a remedy was the exception rather than the rule.<sup>164</sup> Therefore, the Court concluded Congress did not intend to limit a court’s power to award monetary damages for a violation of Title IX.<sup>165</sup> In addition, it found Title IX does not limit the amount of damages the court may award.<sup>166</sup>

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benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

<sup>158</sup> See *Title IX Legal Manual*, *supra* note 1, at 8-10.

<sup>159</sup> *Cannon*, 441 U.S. at 695-98; Sean Campbell, *Civil Rights-Title IX- Compensatory Damages Are Not Available For A Title IX Violation Without A Showing Of Intentional Discrimination*, 11 SETON HALL J. SPORTS L. 177, 182 (2001).

<sup>160</sup> *Cannon*, 441 U.S. at 687 n.8, 706 n.41; *Title IX Legal Manual*, *supra* note 1, at 156.

<sup>161</sup> 503 U.S. 60, 75, 76 (1992).

<sup>162</sup> Campbell, *supra* note 159, at 183.

<sup>163</sup> *Title IX Legal Manual*, *supra* note 1, at 157 (citing *Franklin*, 503 U.S. at 66).

<sup>164</sup> Campbell, *supra* note 161, at 184.

<sup>165</sup> *Id.* (citing *Franklin*, 503 U.S. at 71-72); see also *Franklin*, 503 U.S. at 75-76 (rejecting limiting monetary awards to equitable relief, such as backpay).

<sup>166</sup> Ellen J. Vargyas, *Franklin v. Gwinnett County Public Schools and its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373, 383 (1993) (This concept of unlimited damages for Title IX is in contrast to Title VII’s limited damages remedy.) (citing 42 U.S.C. § 1981(a) (1988 & Supp. III 1991)).

## **A. The History of Title IX Judicial Action- Athletics and Sexual Harassment**

Since the advent of Title IX in 1972, universities have increasingly faced discrimination lawsuits brought by female athletes and female victims of sexual harassment. Immediately after its passage, questions arose concerning exactly what types of behavior Congress intended to forbid and what type of protection it hoped to provide to victims.<sup>167</sup> As demonstrated by the following cases, Title IX helped reveal the unequal treatment of male and female athletes on school campuses and has since shaped sexual harassment litigation. Its simple language has often rendered the statute challenging to implement, however.

### **1. Athletics**

The most recognizable effect of Title IX is its guarantee of equal access to sports for all students. In 1972, the number of girls participating in high school sports was 294,015 and in 2012, there are 3,173,549 girls involved in their schools' sports programs.<sup>168</sup> At the college level, the number of female athletes has increased 545 percent since 1972.<sup>169</sup>

A review of athletic gender equity case law reveals that, most often, the cases involve a university defendant that attempted to either eliminate or demote an existing women's sports team. In two of these cases, plaintiffs received both monetary and equitable relief because the

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<sup>167</sup> 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, 286 (2010) (citing The Federal Civil Rights Enforcement Effort, Vol. 3: To Ensure Equal Educational Opportunity, U.S. Comm'n on Civil Rights 39-41 (1975), available at <http://www.eric.ed.gov/PDFS/ED102071.pdf>).

<sup>168</sup> Robert B. Gardner & Rick Wulkow, *Celebrating Title IX 40 Years Later*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, <http://www.nfhs.org/content.aspx?id=6910> (last visited Mar. 8, 2013).

<sup>169</sup> *Title IX Myths and Facts*, WOMEN'S SPORTS FOUNDATION, <http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/what-is-title-ix/title-ix-myths-and-facts> (last visited Mar. 8, 2013).

university's actions were considered intentional discrimination.<sup>170</sup> In *Roberts v. Colorado State University*,<sup>171</sup> the university arranged to eliminate its women's varsity softball team.<sup>172</sup> The 10th Circuit Court looked to the 1979 Policy Interpretation's Three-Prong Test to assess whether the University had fully accommodated the abilities and interests of the female athletes in its current sports programs.<sup>173</sup> OCR determines compliance by one of the three prongs: (1) Are interscholastic opportunities for males and females substantially proportionate to the respective enrollment of each gender? (2) Is the institution's current and historical practice of program expansion responsive to the athletic interest of the underrepresented gender? (3) Does the institution fully accommodate the abilities and the interest of the underrepresented gender in the current program?<sup>174</sup> The court ruled that the 10.5 percent disparity between the number of enrolled women and women athletes, after the elimination of the varsity softball program, was a direct violation of the first prong.<sup>175</sup> Because the university failed the Three-Prong Test for Title IX compliance, the women's softball team was reinstated.<sup>176</sup>

Around the same time, a circuit court in Pennsylvania heard a similar case. *Favia v. Indiana University of Pennsylvania* ("IUP")<sup>177</sup> was about the lack of substantial proportionality between the number of female undergraduates and the number of female athletes.<sup>178</sup> Citing funding concerns, IUP decided to eliminate the women's varsity gymnastics and women's

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<sup>170</sup> See discussion *supra* Part II.

<sup>171</sup> 998 F.2d 824 (10th Cir. 1993).

<sup>172</sup> *Id.* at 826.

<sup>173</sup> *Id.* at 828- 29 (citing *Policy Interpretation*, 44 *Fed. Reg.* 71413, 71,418 (1979), <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>).

<sup>174</sup> *Id.*

<sup>175</sup> *Roberts*, 998 F.2d at 829.

<sup>176</sup> *Id.* at 826.

<sup>177</sup> 7 F.3d 332 (3d Cir. 1993).

<sup>178</sup> *Id.* at 335.

varsity field hockey teams.<sup>179</sup> This would further increase the disparity between the number of female students (55.6 percent of the student body) and female athletics.<sup>180</sup> The *Favia* court affirmed the lower court's opinion and ordered that both teams be reinstated.<sup>181</sup>

Note that in both *Roberts* and *Favia*, the defendant university sought to cut back on equal numbers of male and female sports. However, the courts decided that to comply with Title IX, the university must provide its female students an opportunity to participate if they have any interest or ability in a particular sport. In contrast, *Cohen v. Brown University*,<sup>182</sup> involved the women's gymnastics and volleyball teams suing Brown University because the university planned to demote them from university-funded varsity status to donor-funded varsity status.<sup>183</sup> This demotion violated Title IX because, for purposes of the three-prong test, the donor-funded teams were excluded from the total number of "intercollegiate teams" and therefore, the university failed the test for compliance.<sup>184</sup>

There has only been one case that has addressed pregnancy discrimination in the athletics context. In 2003's *Brady v. Sacred Heart University*,<sup>185</sup> a female athlete filed a Title IX lawsuit against her school alleging pregnancy discrimination.<sup>186</sup> After her pregnancy was revealed, plaintiff Tara Brady was asked to leave the basketball team by her coach who called her a "distraction" and had her request for "medical redshirt" status denied by the university.<sup>187</sup> Since

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (Before the cut of the two women's sports, 38 percent of female students played sports.).

<sup>181</sup> *Id.* at 344.

<sup>182</sup> 101 F.3d 155 (1st Cir. 1996).

<sup>183</sup> *Id.* at 161.

<sup>184</sup> *Id.* at 173- 174

<sup>185</sup> *Cohen*, *supra* note 38, at 217; *see also Brady v. Sacred Heart University*, No. 3:03 CV 514 (D. Ct. Conn. filed Mar. 24, 2003).

<sup>186</sup> *Cohen*, *supra* note 38, at 217.

<sup>187</sup> Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, HARV. J.L. & GENDER 326-27 (2005).

the case settled out of court on undisclosed terms, no legal precedents or enforcement addressing the needs of pregnant athletes have been generated since Title IX's enactment.<sup>188</sup>

## 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.”<sup>189</sup> No longer is sexual harassment addressed with a slap on the wrist. The United States Supreme Court has issued several decisions confirming that under Title IX, schools are obligated to prevent and address harassment against students committed by their peers or teachers.<sup>190</sup>

In 1992, the United States Supreme Court addressed sexual harassment under Title IX for the first time, holding that sexual harassment was an intentional violation of Title IX.<sup>191</sup> The case, *Franklin v. Gwinnett County Public Schools*, involved the sexual harassment of a female high school student by her teacher.<sup>192</sup> Plaintiff Christine Franklin filed an action for monetary damages after the school and school district took no action, even after they were notified of the

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<sup>188</sup> *Id.* at 329, 362.

<sup>189</sup> *Sexual Harassment*, TITLEIX.INFO, <http://www.titleix.info/10-Key-Areas-of-Title-IX/Sexual-Harassment.aspx> (last visited Mar. 2, 2013).

<sup>190</sup> *See also Sexual Harassment Guidance*, U.S. DEPARTMENT OF EDUCATION <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html> (last visited Mar. 2, 2013) (While sexual harassment is not explicitly prohibited in the language of Title IX or its regulations, OCR has long recognized that the prohibition against sexual harassment of students committed by school employees, other students or third parties is consistent with Congress's purpose of eliminating sex-based discrimination in federally funded educational institutions.).

<sup>191</sup> *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74 (1992).

<sup>192</sup> *Id.* at 63.

ongoing harassment.<sup>193</sup> The district court decided that Title IX did not authorize a monetary remedy for intentional violations of sex discrimination.<sup>194</sup> While the Court of Appeals for the Eleventh Circuit affirmed the district court's decision, the Supreme Court reversed, establishing that sexual harassment in education is prohibited sex discrimination and monetary damages are allowed under Title IX.<sup>195</sup>

Consistent with *Franklin*, courts have ordered defendants to pay monetary damages to victims in subsequent cases. Six years later, the Supreme Court was confronted with a similar case in *Gebser v. Lago Vista Independent School District*.<sup>196</sup> A high school student sued the district under Title IX for sexual harassment, seeking a monetary remedy.<sup>197</sup> The plaintiff, Alida Gebser, alleged that teacher Frank Waldrup instigated sexual relations with her.<sup>198</sup> Because the plaintiff's alleged Title IX claim was based on the principles of *respondeat superior* and constructive notice, the Court held the school district could not be held liable unless it had actual notice of the harassment.<sup>199</sup> Furthermore, the Court held that the school district could be liable for damages only if it was deliberately indifferent to known acts of teacher-student sexual harassment.<sup>200</sup>

Closely related but separate from teacher-student sexual harassment cases, on-campus student-on-student sexual harassment cases have also been addressed by the U.S. Supreme Court under Title IX. In *Davis Next Friend LaShonda D. v. Monroe County Board of Education*<sup>201</sup>

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<sup>193</sup> *Id.* at 63-64.

<sup>194</sup> *Id.* at 64.

<sup>195</sup> *Id.* at 65; Vargyas, *supra* note 168, at 377.

<sup>196</sup> 524 U.S. 274 (1998).

<sup>197</sup> *Id.* at 278-79.

<sup>198</sup> *Id.* at 277-79.

<sup>199</sup> *Id.* at 285, 291

<sup>200</sup> *Id.* at 277.

<sup>201</sup> 526 U.S. 629 (1999)

fifth-grader Lashonda Davis endured prolonged sexual harassment from a male peer.<sup>202</sup> Davis's parents reported the boy's behavior to the school and pursued a private action under Title IX after the school failed to react to their complaints.<sup>203</sup> The Supreme Court ruled that a school is liable for student-on-student sexual harassment if the harassment is so severe and pervasive that it interferes with the victim's educational environment.<sup>204</sup>

Finally, in 2009, the Supreme Court issued a unanimous decision in the student-on-student sexual harassment case *Fitzgerald v. Barnstable School Committee*,<sup>205</sup> holding that Title IX does not preclude a §1983 action<sup>206</sup> alleging unconstitutional gender discrimination in schools.<sup>207</sup> Here, kindergartener Jacqueline Fitzgerald showed signs of serious emotional and physical distress after being sexually coerced by a third-grader on the public school bus.<sup>208</sup> After the school principal took no action upon their complaint, the Fitzgeralds alleged violations of both Title IX and § 1983.<sup>209</sup> The Supreme Court reversed the decisions of the district and circuit courts that Title IX precludes § 1983 claims based on equal protection.<sup>210</sup>

The American judicial system has 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. Despite the successes and the positive decisions in *Cannon* and *Franklin*, there have not been many pregnancy discrimination cases<sup>211</sup> under Title IX; possibly because

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<sup>202</sup> *Id.* at 633.

<sup>203</sup> *Id.* at 633-34.

<sup>204</sup> *See id.* at 633.

<sup>205</sup> 555 U.S. 246 (2009).

<sup>206</sup> 42 U.S.C. § 1983 (1996) (Prohibits deprivation of any U.S. citizen's "rights, privileges, or immunities secured by the Constitution and laws.").

<sup>207</sup> *Fitzgerald*, 555 U.S. at 251, 260.

<sup>208</sup> *Id.* at 249-51.

<sup>209</sup> *Id.* at 250.

<sup>210</sup> *Id.* at 251.

<sup>211</sup> Michelle Gough, *Parenting and Pregnant Students: An Evaluation of the Implementation of*

many people do not know their rights under the statute. As discussed in the previous section, information concerning students' legal rights is not available to them. Therefore, because of the lack of case law and information, questions remain about how female students can use Title IX to protect themselves against pregnancy discrimination.

## **B. Title IX, Pregnancy Discrimination and Judicial Action**

Title IX can and should be an important tool for combating pregnancy discrimination in academia. The statute covers the full scope of educational programs and activities, including admissions, hiring, coursework accommodations, leave policies, health insurance and job protection coverage.<sup>212</sup> Victims of pregnancy discrimination can pursue a private action under Title IX for equitable relief and, ideally, monetary damages against their colleges and universities.

### **1. Private Action for Monetary Damages**

In *Cannon*, the Court held Title IX had an implied private right of action for those interested in pursuing litigation against their colleges and universities.<sup>213</sup> For pregnant graduate students and postdocs in the STEM fields, private action provides them with an opportunity to protect their legal rights, and in turn to reach the highest levels in their career without discriminatory policies or practices, finish their classes and research projects, and receive accommodations during their workday, without fear of retaliation.<sup>214</sup> As discussed *supra*, the

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*the "Other" Title IX*, 17 MICH. J. GENDER & L., 220- 248 (2011) (As of January 2010, eighteen cases have been brought related to Title IX and pregnant and parenting students; thirteen of those cases alleged Title IX violations. Of the eighteen, ten cases were decided in favor of students. Three were accommodation cases and seven were equal treatment cases.).

<sup>212</sup> *See supra*, discussion, Pt.I, A.

<sup>213</sup> *Cannon*, 441 U.S. at 717.

<sup>214</sup> *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 178 (2005) (finding Title IX's implied private action includes suits for retaliation because retaliation falls within Title IX's prohibition of intentional sex)(citing 34 C.F.R. § 106.71(1980)).

decision in *Franklin*<sup>215</sup> allows plaintiffs to pursue private action for monetary damages under Title IX.<sup>216</sup> While *Franklin* should apply to all cases alleging intentional violations of Title IX, it has not yet been applied in pregnancy discrimination cases.<sup>217</sup> However, there are many reasons why private litigants in pregnancy discrimination cases should be able to receive monetary damages, including (a) aligns with the congressional purpose of Title IX; (b) the Department of Education’s OCR complaint process is not adequate;<sup>218</sup> (c) the availability of monetary incentivizes victims to seek private action; (d) other remedies are insufficient; and, (e) encourages recipients to review and curb discriminatory behavior.

**a. Monetary Damages Accomplishes Congress’s Two-Fold Purpose for Title IX.**

Title IX, like its model Title VI,<sup>219</sup> sought to accomplish two objectives.<sup>220</sup> First, Congress wanted to avoid the use of federal resources to support discriminatory practices and second, it wanted to provide individual citizens effective protection against those practices.<sup>221</sup> While the termination of funding generally serves the first purpose, it does not satisfy the second purpose, especially if “only an isolated violation has occurred.”<sup>222</sup> Monetary damages meet this second purpose because the threat and award of damages help eliminate recipients’

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discrimination.).

<sup>215</sup> 503 U.S. 60 (1992).

<sup>216</sup> *Id.* at 76.

<sup>217</sup> 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, 288, 295 (2010).

<sup>218</sup> See discussion *supra* Part I D.

<sup>219</sup> *Title IX Legal Manual*, *supra* note 1, at 8-15.

<sup>220</sup> *Cannon*, 441 U.S. at 704.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 704-05.

discriminatory practices and compensates the students harmed by those practices.<sup>223</sup> Individual relief to a private litigant who has prosecuted her own suit is sensible, consistent and necessary with the enforcement of the statute.<sup>224</sup>

After *Cannon*, Congress passed two amendments to Title IX that demonstrated Congress's intent to not limit the remedies available in a suit brought under Title IX.<sup>225</sup> The Rehabilitation Act of 1986<sup>226</sup> provides that remedies both at law and in equity are available in a suit brought under Title IX against any public or private entity.<sup>227</sup> In the second amendment, the Civil Rights Restoration Act of 1987,<sup>228</sup> Congress made no effort to restrict the right of action recognized in *Cannon* and ratified in the 1986 Act.<sup>229</sup>

**b. OCR's Complaint and Investigation Process<sup>230</sup> Is Not Adequate for Victims of Pregnancy Discrimination.**

In a study spanning from 1993 to 1997, the American Association of University Women ("AAUW") gave the OCR a fairly negative evaluation.<sup>231</sup> The study was particularly critical of the way OCR handles complaints, such as its policy, that sex discrimination complaints are

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<sup>223</sup> 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).

<sup>224</sup> See *Cannon*, 441 U.S. at 705-06.

<sup>225</sup> *Franklin*, 503 U.S. at 72.

<sup>226</sup> 100 Stat. 1845, 42 U.S.C. § 2000d-7 (1986); *Franklin*, 503 U.S. at 72. (The law abrogated the States' Eleventh Amendment Immunity under Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.).

<sup>227</sup> *Franklin*, 503 U.S. at 72-73 (citing 42 U.S.C. § 2000d-7(a)(2) (1978)).

<sup>228</sup> Pub. L. 100-259, 102 Stat. 28 (1987); *Franklin*, 503 U.S. at 73 (The Act was designed to correct the decision in *Grove City College v. Bell*, 465 U.S. 555, 573-74 (1984) (holding that the receipt of federal grants to some Grove City students does not mean institution-wide coverage under Title IX; rather it is the school's financial aid program that must be regulated under Title IX)).

<sup>229</sup> *Franklin*, 503 U.S. at 73.

<sup>230</sup> See discussion *supra* Part I.D.

<sup>231</sup> Julie A. Davis & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 51-52 (2007) (citing *A License for Bias: Sex Discrimination, Schools, and Title IX*, AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, 14-15 (2000)).

viable only if filed within 180 days of the alleged wrongdoing.<sup>232</sup> With poor Title IX compliance and dissemination among educational institutions,<sup>233</sup> some students will be adversely affected by this policy because they have little “sophistication in their understanding of the law and how it pertains to them.”<sup>234</sup> Furthermore, OCR’s self-imposed statute of limitations allows the agency to refuse to investigate a large number of complaints.<sup>235</sup> The study also criticized the time OCR takes to investigate and resolve complaints.<sup>236</sup> Even though OCR’s latest reports indicate that it is resolving cases within six months, students, concerned with staying in their academic program want and need a speedier resolution.<sup>237</sup> Another procedural flaw noted was OCR’s failure to detect recipients’ non-compliance with Title IX regulations because the agency focuses on complaint processes rather than compliance reviews.<sup>238</sup> Additionally, the study found OCR

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<sup>232</sup> Davis, *supra* note 231, at 52 (citing 34 C.F.R. § 100.7(b)).

<sup>233</sup> See discussion *supra* Part I.

<sup>234</sup> Davis, *supra* note 231, at 52.

<sup>235</sup> *Id.* at 52 (citing *A License for Bias: Sex Discrimination, Schools, and Title IX*, *supra* note 234, 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.”)).

<sup>236</sup> Davis, *supra* note 231, at 52 (citing *A License for Bias: Sex Discrimination, Schools, and Title IX*, *supra* note 234, 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 Annual Report to Congress: Fiscal Year 2004*, U.S. DEPARTMENT OF EDUCATION’S OFFICE FOR CIVIL RIGHTS 4 (2005), available at <http://www2.ed.gov/about/reports/annual/ocr/annrpt2004/report.html> (OCR's fiscal year 2004 report states that it resolved 91 percent of the complaints it received within 180 days, which exceeded its goal of 80 percent.)).

<sup>237</sup> Davis, *supra* note 231, at 52; *see also Annual Report to Congress: Fiscal Year 2004*, *supra* note 239).

<sup>238</sup> Davis, *supra* note 231, at 52; *see also id.* at 52 n.140 (citing *A License for Bias: Sex Discrimination, Schools, and Title IX*, *supra* note 234, at 13 (“During the the AAUW survey, “OCR initiated less than 20 compliance reviews dealing with sex discrimination. They found that numerous regional offices conducted no compliance review”); *Annual Report to Congress: Fiscal Year 2004*, *supra* note 239, at 5 (“In fiscal year 2004, OCR closed initiated 53 compliance reviews and closed 29. Fifteen of those resolved ‘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 . . . .”)).

spends a disproportionately small amount of resources on sex discrimination matters, relative to the number of complaints it receives.<sup>239</sup>

OCR is not likely to strongly enforce Title IX regulations, including the regulations prohibiting pregnancy discrimination.<sup>240</sup> Although OCR can terminate an institution's federal funding if it fails to comply with Title IX or its regulations, OCR has never used this remedy.<sup>241</sup> OCR's lack of initiative demonstrates the need for individuals to enforce Title IX themselves by pursuing a private action for monetary damages.<sup>242</sup>

**c. Monetary Damages Provide Benefits for Victims of Pregnancy Discrimination.**

Private suits under Title IX meet the law's purpose of protecting individuals from discrimination.<sup>243</sup> The availability of monetary damages under a Title IX suit is a better alternative than equitable relief because victims will receive a tangible award regardless of where they stand in the academic pipeline at the end of the trial. For example, while engaged in trial, some student-plaintiffs will have dropped out, or switched programs because of discriminatory behavior and no longer benefit from equitable relief. Therefore, the availability of monetary

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<sup>239</sup> Davis, *supra* note 231, at 53 (citing Am. Ass'n of Univ. Women Legal Advocacy Fund, *supra* note , 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 Title IX Enforcement Highlights*, *supra* note 125, at 2- 3 (report discusses positive steps taken by OCR to end sex discrimination in schools and although the agency claims to focus on the topic of pregnant and parenting students, it does not specifically mention the steps it is taking to help these individuals.).

<sup>240</sup> 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>).

<sup>241</sup> Short, *supra* note 240, at 123.

<sup>242</sup> *Id.*

<sup>243</sup> 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, 163 (1992).

damages increases the likelihood that students affected by pregnancy discrimination will bring private actions against their institutions.<sup>244</sup>

The legal benefits of a Title IX private action for monetary damages do not just apply to individual victims. The threat of monetary damages may encourage recipients to implement structural changes to their policies, benefitting all students. Indeed, this is precisely what happened when courts began awarding damages to plaintiffs alleging sexual harassment under Title IX; employers were prompted to disseminate information about legal rights regarding sexual harassment, implement trainings instructing employers and employees on what behaviors are prohibited, and develop policies and procedures for handling complaints.<sup>245</sup>

**d. Other Remedies Under Title IX Are Not Sufficient for Victims of Pregnancy Discrimination.**

While the administrative fund-termination remedy may prevent the use of federal funds to support sex discrimination, OCR has never used this as a remedy.<sup>246</sup> Moreover, the termination of federal funding is less effective in protecting individuals who want to continue their program or desire other protections against discriminatory practices.<sup>247</sup>

On the other hand, equitable relief, such as injunctive relief, is relatively easy for institutions to implement without the consequences of losing funding or paying compensatory damages to plaintiffs. But injunctive relief may have no practical value to students who decide to apply to a different educational institution, need additional pregnancy leave, or do not want to

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<sup>244</sup> See Wright, *supra* note , at 1380 (citing *Compensatory Relief Under Title IX of the Education Amendments of 1972*, 68 EDUC. L. REV. 557, 571 (1991)).

<sup>245</sup> See, e.g., Dave Bowman, *The Problem of Sexual Harassment*, TTG CONSULTANTS, <http://www.ttgconsultants.com/articles/sexHarass.html> (last visited Mar. 9, 2013).

<sup>246</sup> Short, *supra* note 240, at 123.

<sup>247</sup> See Kernie, *supra* note 243, at 165; *Title IX Legal Manual*, *supra* note 1, at 156 (citing *Cannon*, 441 U.S. at 705).

complete their research or education.<sup>248</sup> And because of prolonged litigation, students typically will leave or graduate by the time their case is resolved.<sup>249</sup> In a similar vein, mootness is a concern for students if they bring a suit *after* they have left the offending institution.<sup>250</sup> Furthermore, equitable relief only addresses the needs of the individual victim and, unlike the threat of monetary damages, does not encourage recipients to start reviewing and eliminating their discriminatory practices.

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

Today, with the increase of litigation in athletics and sexual harassment,<sup>251</sup> universities have a strong economic incentive to review and eliminate discriminatory practices long before any complaint is filed.<sup>252</sup> If victims of pregnancy discrimination pursued private action for monetary damages, recipients ignorant of Title IX's coverage may be alerted to its protections through the media or litigation at other universities.<sup>253</sup> Because of the high costs and long duration of these private actions, the threat of such actions will be an "effective deterrent against sex discrimination" on campuses.<sup>254</sup>

While this may subject educational institutions to massive financial liability, the Supreme Court in *Cannon*, did not intend to protect institutions from the costs of litigation.<sup>255</sup> This notion is supported by the fact that the remedy of fund-termination may be as severe as the amount of

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<sup>248</sup> Vargyas, *supra* note 168, at 380.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> See Vargyas, *supra* note 168, at 383; see also discussion *supra* Part II.A.

<sup>252</sup> Vargyas, *supra* note 168, at 384.

<sup>253</sup> See Fershee, *supra* note 217, at 321.

<sup>254</sup> Wright, *supra* note 223, at 1380.

<sup>255</sup> *Id.* at 1378 (citing *Cannon*, 441 U.S. at 709-10).

compensatory damages recipients are ordered to pay to victims.<sup>256</sup> At the same time, recipients should not be concerned with a sudden increase in litigation based on cases such as *Franklin*.<sup>257</sup> This is because, to bring a claim under Title IX for monetary damages, individuals must prove they 1) have suffered quantifiable damages and 2) were victims of intentional discrimination.<sup>258</sup>

## 2. Title IX Under Disparate Treatment and Disparate Impact Analyses

To establish disparate treatment, or intentional discrimination, a plaintiff must demonstrate that the recipient treated similarly situated individuals differently because of, or on the basis of, their sex.<sup>259</sup> This means the recipient was aware of the complainant's sex and took action at least in part based on sex.<sup>260</sup> But the recipient need not necessarily have evil motives when it treats the complainant differently – Title IX merely prohibits unjustified sex-based distinctions regardless of the recipient's motivations.<sup>261</sup> For example, many statutory or administrative policies intended or subsequently justified to address the special needs of a particular sex are, in fact, illegal discrimination.<sup>262</sup>

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.*

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<sup>256</sup> Wright, *supra* note 226, at 1378 (citing *Compensatory Relief Under Title IX of the Educational Amendments of 1972*, *supra* note 247, at 570).

<sup>257</sup> See Kernie, *supra* note 243, at 172 (1992); see also *Franklin*, 503 U.S. 60 (1992) (ruling plaintiffs can pursue private action for monetary damages under Title IX).

<sup>258</sup> Kernie, *supra* note 246, at 172 (internal citations omitted).

<sup>259</sup> See *Title IX Legal Manual*, *supra* note 1, at 58.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 58-59.

<sup>262</sup> *Id.* at 58 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726-730 (1982) (“maintenance of single sex nursing school as compensation for assumed prior discrimination rejected as perpetuating sex stereotypes”); *United States v. Virginia*, 518 U.S. 515, 534-46 (1996) (“benign justification in defense of a categorical exclusion does not block inquiries into actual purposes of and factual support for the exclusion”).

Green.<sup>263</sup> The plaintiff must first make a prima facie case for discrimination.<sup>264</sup> 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.<sup>265</sup>

If the plaintiff can prove these elements, then the recipient must demonstrate a legitimate, nondiscriminatory reason for the challenged action<sup>266</sup> or policy.<sup>267</sup> If she has evidence that the real reason for the recipient's actions was discrimination based on sex, then the plaintiff can argue that the recipient's reason is pretext for discrimination.<sup>268</sup>

Regarding students in higher education, instances of intentional pregnancy discrimination could include: (1) upon return from pregnancy leave, the recipient does not allow the student to continue in the position she held before her leave;<sup>269</sup> (2) a pregnant student is not allowed to finish a course<sup>270</sup> causing a delay in her education and/or the student to leave school; (3) a pregnant student is denied work or funding because she is taking too long to finish her research; (4) because of her pregnancy, a postdoctoral fellowship position is not renewed for an additional

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<sup>263</sup> 411 U.S. 792 (1973); *Title IX Legal Manual*, *supra* note 1, at 59 (Direct proof of intentional discrimination is often unavailable; in the absence of such proof, claims can be analyzed under the McDonnell-Douglas framework.); *Id.* at 61 (Similar principles under the McDonnell-Douglas framework can be used to analyze claims a recipient engaged in a pattern of discriminatory acts.).

<sup>264</sup> *See Title IX Legal Manual*, *supra* note 1, at 59-60.

<sup>265</sup> *Id.*; *see e.g.*, *Hogan v. Ogden*, 2008 U.S. Dist. LEXIS 58359, at \*25-26 (E.D. Wa. 2008) (plaintiff applied the framework to her coursework accommodation case.).

<sup>266</sup> *See Title IX Legal Manual*, *supra* note 1, at 61 (citing *McDonnell Douglas*, 411 U.S. at 802).

<sup>267</sup> *See id.* at 62.

<sup>268</sup> *See id.*

<sup>269</sup> *See* 34 C.F.R. § 106.40(b)(5) (2000); *see also* discussion *supra* Part I.A.4.

<sup>270</sup> *See* discussion *supra* Part I.A.3; *see also Hogan v. Ogden*, 2008 U.S. Dist. Lexis 58359 (E.D. Wa. 2008).

year, while a male postdoc in the laboratory (who began his postdoctoral fellowship at the same time) is invited to continue his fellowship;<sup>271</sup> and (5) not “stopping the clock”<sup>272</sup> which can be damaging to graduate students and postdocs.

In contrast to disparate treatment, the focus in disparate impact claims is whether a recipient’s facially neutral practice or policy “had a disproportionate impact on the basis of sex.”<sup>273</sup> In the Title IX context, a plaintiff must show the recipient’s facially neutral policy caused a disproportionate and adverse impact on women.<sup>274</sup> The plaintiff also does not have to prove the recipient had discriminatory intent.<sup>275</sup> If the plaintiff can prove a discriminatory impact, then the recipient must demonstrate a “substantial legitimate justification” for the challenged practice.<sup>276</sup> In the educational context, the practice must be an “educational necessity.”<sup>277</sup> 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.<sup>278</sup>

If the goal is to prohibit all forms of discrimination (and it certainly should be), then disparate impact analysis should be permitted in Title IX lawsuits, when appropriate.<sup>279</sup> In fact, each funding agency has implemented Title IX in a way that incorporates and applies the

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<sup>271</sup> McCue, *supra* note 24, at 132-33.

<sup>272</sup> See discussion *supra* Part I.C.2; see also McCue, *supra* note 24, at 126.

<sup>273</sup> See *Title IX Legal Manual*, *supra* note 1, at 65.

<sup>274</sup> *Title IX Legal Manual*, *supra* note 1, at 65 (citing *New York Urban League v. New York*, 71 F.3d at 1031, 1037-38 (2d Cir. 1995)).

<sup>275</sup> See *Title IX Legal Manual*, *supra* note 1, at 65.

<sup>276</sup> See *id.* at 65-66 (Title IX’s ‘substantial legitimate justification’ is similar to Title VII’s concept of ‘business necessity.’ Both involve the recipient showing the challenged practice or policy is related to the job.).

<sup>277</sup> See *id.* at 66.

<sup>278</sup> See *id.*

<sup>279</sup> James S. Wrona, *Eradicating Sex Discrimination in Education: Extending Disparate-Impact Analysis to Title IX Litigation*, 21 Pepp. L. Rev. 1, 15 (1994).

disparate impact theory even though disparate impact discrimination is not explicitly allowed by the language of the statute.<sup>280</sup>

A setback to disparate impact actions under Title IX occurred with the 2001 U.S. Supreme Court case, *Alexander v. Sandoval*.<sup>281</sup> The Court ruled a private cause of action under Title VI must be based on intentional discrimination and cannot be used to enforce disparate impact regulations.<sup>282</sup> Because Title VI was the model of Title IX,<sup>283</sup> the Sandoval decision is widely believed to apply to Title IX as well.<sup>284</sup>

Fortunately, the *Sandoval* dissent made the argument that *Cannon v. University of Chicago*<sup>285</sup> was a disparate impact case because the University of Chicago Medical School set age limits for applicants in its admission policies.<sup>286</sup> The plaintiff in that case argued the policies disproportionately affected women because the incidence of interrupted higher education is

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<sup>280</sup> *Title IX Legal Manual*, *supra* note 1, at 63-64.

<sup>281</sup> 532 U.S. 275, 278-79 (2001) (Plaintiff wanted to pursue a private right of action under a Title VI regulation authorized by the United States Department of Justice, against the Alabama Department of Public Safety after the Department decided to administer state driver's license examinations only in English; plaintiff claimed the policy was discriminatory against individuals based on their national origin.).

<sup>282</sup> *Id.* at 284-85; *see also* Lucy M. Stark, *Exposing Hostile Environments for Female Graduate Students in Academic Science Laboratories: The McDonnell Douglas Burden-Shifting Framework as a Paradigm for Analyzing the "Women in Science" Problem*, 31 Harv. J.L. & Gender 101, 124, *see also* n. 95 (2008) ("Although the Title IX regulations bar policies and practices that have discriminatory effects, a private action may only be based on intentional discrimination and cannot be brought to enforce Title IX disparate-impact regulations. The Supreme Court held as much in the Title VI case, *Alexander v. Sandoval*, which is widely believed to apply to Title IX as well.").

<sup>283</sup> *Title IX Legal Manual*, *supra* note 1, at 8.

<sup>284</sup> Stark, *supra* note 65, at 124 (Although the Title IX regulations "bar certain policies and practices that have discriminatory effects, a private cause of action may only be based on intentional discrimination and cannot be brought to enforce" Title IX's disparate impact regulations. This was the ruling in the Title VI case, *Alexander v. Sandoval*, 532 U.S. 275 (2001), which is widely believed to apply to Title IX as well.).

<sup>285</sup> 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's medical school).

<sup>286</sup> *Sandoval*, 532 U.S. at 298 (Stevens, J., dissenting).

higher among women than among men.<sup>287</sup> *Cannon* found a private right of action exists to enforce Title IX and did not specify which types of discrimination, i.e. disparate treatment or disparate impact, were prohibited.<sup>288</sup> The dissent concluded disparate impact claims could be alleged under Title IX.<sup>289</sup>

In fact, disparate treatment and disparate impact regarding pregnancy discrimination claims have both been alleged under Title IX in lower court cases in earlier pre-Sandoval cases. In *Chipman v. Grant County School District*,<sup>290</sup> the court found that the plaintiffs, two pregnant high school students denied membership to their school’s National Honor Society (“NHS”) could succeed in their pregnancy discrimination claims by alleging either disparate impact or disparate treatment under Title IX.<sup>291</sup> The *Chipman* decision and the Sandoval dissent align with the spirit and purpose of Title IX. Because Title IX regulations prohibit pregnancy discrimination<sup>292</sup> and the congressional purposes of Title IX do not specify what type of discrimination Title IX supports,<sup>293</sup> one can argue that Title IX protects students from both the statutory and regulatory prohibitions of discrimination, regardless of whether the claim or regulation focuses on disparate treatment or disparate impact.<sup>294</sup>

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<sup>287</sup> *Id.*

<sup>288</sup> *See id.* at 297 (Stevens, J., dissenting)(citing *Cannon*, 441 U.S. at 703)(“A private right of action exists for ‘victims of *the* prohibited discrimination.’ Not some of the prohibited discrimination, but all of it.”).

<sup>289</sup> *Sandoval*, 532 U.S. at 295 (Stevens, J., dissenting); *see id.* at 296 (The *Sandoval* dissent also reinterpreted three prior U.S. Supreme Court Title VI cases used in the majority’s opinion – *Lau v. Nichols*, 414 U.S. 563 (1974) and *Guardians Associations v. Civil Serv. Comm’n of New York City*, 463 U.S. 582 (1983)).

<sup>290</sup> 30 F. Supp.2d 975 (E.D. Ky. 1998).

<sup>291</sup> *Id.* at 976-78.

<sup>292</sup> *See* discussion *supra* Part I.A.

<sup>293</sup> *See* discussion *supra* Part II B.1.a.

<sup>294</sup> *See also* Wrona, *supra* note 282, at 16-17 (explaining *Griggs v. Duke Power Company*, 401 U.S. 424, 429-32 (1971), which ruled Title VII prohibits facially neutral policies that have a discriminatory impact on the basis of a prohibited factor and cannot be justified by business

### 3. The Pregnancy Discrimination Act and Title IX

*General Electric Company v. Gilbert*,<sup>295</sup> which held that an employer’s disability plan that excluded pregnancy care was not “because of” sex,<sup>296</sup> was overruled by the Pregnancy Discrimination Act (“PDA”).<sup>297</sup> The Act, added to Title VII in 1978, protects pregnant women against employment discrimination in the workplace<sup>298</sup> and allows women to sue employers or potential employers for pregnancy discrimination.<sup>299</sup> By passing the PDA, Congress acknowledged and equated pregnancy discrimination with sex discrimination.<sup>300</sup>

#### a. Case Law under the Pregnancy Discrimination Act and Title IX

Discriminatory practices under the PDA may result in monetary damages, including both compensatory and punitive damages, and in some instances be analyzed under both disparate treatment and disparate impact theories.<sup>301</sup> For instance, the plaintiff in *Carballo v. Log Cabin Smokehouse*<sup>302</sup> was a waitress who filed a pregnancy discrimination claim after she was terminated by her employer.<sup>303</sup> She met the prima facie showing under the McDonnell-Douglas test<sup>304</sup> and the court denied the employer summary judgment.<sup>305</sup> In *Snow v. Earthworks*

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necessity, acknowledged the importance of removing discriminatory practices from society, regardless of intent).

<sup>295</sup> 429 U.S. 125 (1976).

<sup>296</sup> *Id.* at 145-46.

<sup>297</sup> Fershee, *supra* note 217, at 305 (citing Pregnancy Discrimination Act, Pub. L. No. 95-555 (1978)); *see also* 42 U.S.C. § 2000e(k) (1978).

<sup>298</sup> Fershee, *supra* note 169, at 305-06.

<sup>299</sup> *Id.* at 305.

<sup>300</sup> *See Newport Shipbuilding & Dry Dock Co v. EEOC*, 462 U.S. 669, 684 (1983).

<sup>301</sup> Abigail Levin, *Cause of Action under Title VII of Civil Rights Act of 1964*, 42 U.S.C.A. §§ 2000e *et. seq.*, for *Sex Discrimination Based on Pregnancy, Childbirth, or Related Medical Condition*, 40 CAUSES OF ACTION 2D 645, § 12 (2012).

<sup>302</sup> 399 F.Supp.2d 715 (M.D. LA. 2005).

<sup>303</sup> *Id.* at 720-21.

<sup>304</sup> *Id.* at 725; *see discussion supra* Part II.B.2.

<sup>305</sup> *Carballo*, 399 F.Supp.2d. at 726.

*Northwest, Inc.*,<sup>306</sup> the plaintiff sued her employer alleging pregnancy discrimination after she was terminated from her job.<sup>307</sup> The jury found for plaintiff on her Title VII (PDA) and FMLA claims, and awarded her compensatory and punitive damages.<sup>308</sup> In a subsequent motion, she requested and received attorney's fees of \$55,650 and costs of \$1,641.85 under Title VII.<sup>309</sup> Furthermore, in *Abraham v. Graphic Arts Intern. Union*,<sup>310</sup> the court found that a neutral leave-of-absence-policy too short to accommodate pregnant women may more harshly impact women.<sup>311</sup>

In the Seventh Circuit's, *Scherr v. Woodland School Community Consol. Dist. No. 50*,<sup>312</sup> the lower court's summary judgment in favor of defendants was reversed.<sup>313</sup> Here, two female teachers filed a lawsuit alleging their school district's leave policies discriminated against pregnant women because their schools denied their requests to combine paid sick leave with unpaid maternity leave.<sup>314</sup> Under a disparate treatment analysis, the court reversed and remanded the case to determine whether Woodland had a no-combination policy for all teachers.<sup>315</sup> The court also reversed and remanded the case on the issue of disparate impact.<sup>316</sup> It

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<sup>306</sup> 2009 WL 540100 (W.D. WA. 2009).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* (awarding- \$17,024 in economic damages, \$48,000 in emotional distress damages, and \$17,000 in punitive damages).

<sup>309</sup> *Snow v. Earthworks Northwest, Inc.*, No. C07-1729- JCC, 2009 WL 973166 at \*3-4 (W.D. Wash. 2009); *see* 42 U.S.C. § 2000e-5k.

<sup>310</sup> 660 F.2d 811 (D.C. 1981).

<sup>311</sup> *Id.* at 819.

<sup>312</sup> 867 F.2d 974 (7th Cir. 1988).

<sup>313</sup> *Id.* at 983.

<sup>314</sup> *Id.* at 975, 982.

<sup>315</sup> *Id.* at 982.

<sup>316</sup> *Id.* at 983.

decided that the lower court should determine the adverse impact of the policy by examining the needs of pregnant teachers and comparing the school's policy to those needs.<sup>317</sup>

There have been a handful of suits brought to court under the Title IX pregnancy discrimination regulations over the past thirty-five years.<sup>318</sup> Although the plaintiffs are not students in higher education, three cases are especially helpful for students who want to file pregnancy discrimination claims under Title IX against their educational institutions.

In *Wort v. Vierling*,<sup>319</sup> the plaintiff, a pregnant student, was dismissed from her high school's National Honor Society ("NHS") for deficiency of leadership and character.<sup>320</sup> She alleged she was dismissed because she had had a premarital pregnancy.<sup>321</sup> 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.<sup>322</sup> Plaintiff was also granted attorney's fees in the amount of \$19,567.50 and costs in the amount of \$1,553.32.<sup>323</sup>

In contrast to *Wort*, the court in *Pfeiffer v. Marion Center Area School District*<sup>324</sup> upheld the pregnant student-plaintiff's dismissal from NHS because she had engaged in premarital activity.<sup>325</sup> This decision is still good law in the Third Circuit.<sup>326</sup> On appeal, the plaintiff

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<sup>317</sup> *Id.* (citing *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272 (1987)(finding "equality in the disability context compares coverage to actual need, not coverage to hypothetical identical needs").)

<sup>318</sup> Gough, *supra* note 211, at 220- 48. (As of January 2010, eighteen cases have been brought related to Title IX and pregnant and parenting students; thirteen of those cases alleged Title IX violations. Of the eighteen cases, ten were decided in favor of students.).

<sup>319</sup> 778 F.2d 1233 (7th Cir. 1985).

<sup>320</sup> *Id.* at 1233.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 1234.

<sup>323</sup> *Id.*

<sup>324</sup> 917 F.2d 779 (3rd Cir. 1990).

<sup>325</sup> *Id.* at 780.

<sup>326</sup> Gough, *supra* note 211, at 248; *but see* Deborah Brake, *Legal Challenges to the Educational Barriers facing Pregnant and Parenting Adolescents*, 28 CLEARINGHOUSE REV. 141, 146 (1994)

challenged to admit evidence that was excluded at the trial level.<sup>327</sup> This evidence showed a male student was not dismissed from the school's NHS chapter after he had impregnated his girlfriend.<sup>328</sup> Fortunately, because of its decision to remand and the fact that the plaintiff established discriminatory intent, the Third Circuit also determined, if successful on remand, she could be awarded compensatory damages.<sup>329</sup>

Despite being academically qualified, the plaintiff in *Cazares v. Barber*<sup>330</sup> was rejected from the NHS because she was pregnant, unmarried, and not living with the father of her child.<sup>331</sup> The district court held the plaintiff's rejection violated Title IX and issued an injunction allowing her to attend the school's NHS induction ceremony.<sup>332</sup> The school responded to the court's decision by cancelling the NHS ceremony and terminating its participation in NHS.<sup>333</sup> The Court found this to be bad faith and accordingly affirmed the award of attorney's fees to plaintiff.<sup>334</sup>

*Chipman*,<sup>335</sup> 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."<sup>336</sup> In this case, two academically qualified pregnant students were not

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1995) (arguing the Pfeiffer court disregarded the facially discriminatory nature of NHS's policy.).

<sup>327</sup> *Pfeiffer*, 917 F.2d at 783.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 789.

<sup>330</sup> 959 F.2d 753 (9th Cir. 1992).

<sup>331</sup> *Id.* at 755.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 754.

<sup>335</sup> F. Supp.2d 975 (E.D. Ky. 1998).

<sup>336</sup> 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).

considered for admission to NHS.<sup>337</sup> The court referenced the Title IX regulations prohibiting discrimination based on parental status and pregnancy.<sup>338</sup> The two regulations specifically 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”<sup>339</sup> or 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.”<sup>340</sup> The court also imported PDA precedents that relied on disparate treatment and disparate impact analyses.<sup>341</sup> Moreover, the court noted that the use of disparate impact theory was well recognized in pregnancy discrimination cases.<sup>342</sup> The court also relied on the rulings of *Ilhardt v. Sara Lee Corp* and *Pfeiffer v. Marion Center Area School District*. The former case found that the PDA “amended Title VII of the Civil Rights Act to clarify that pregnancy discrimination is included in Title VII’s prohibition on sex discrimination.”<sup>343</sup> Pfeiffer also held that “regulations promulgated pursuant to Title IX specifically apply its prohibition against gender discrimination to discrimination on the basis of pregnancy, parental status, and marital status.”<sup>344</sup>

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<sup>337</sup> *Chipman*, 30 F.Supp.2d at 977.

<sup>338</sup> *Id.* at 977-78; See 34 C.F.R. §§ 106.40(a), 106.40(b)(1) (2000).

<sup>339</sup> *Chipman*, 30 F. Supp. 2d at 977 (citing 34 C.F.R. § 106.40(a)).

<sup>340</sup> *Chipman*, 30 F. Supp. 2d at 977 (citing 34 C.F.R. § 106.40(b)(1)).

<sup>341</sup> See *Chipman*, 30 F.Supp.2d at 978-80.

<sup>342</sup> *Id.* at 978 (citing *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1156-57 (7th Cir. 1997); *Garcia v. Woman’s Hosp. of Texas*, 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); *Scherr v. Woodland Sch. Community Consol. Dist. No. 50*, 867 F.2d 974 (7th Cir. 1988)).

<sup>343</sup> *Chipman*, 30 F. Supp. 2d at 978 (citing *Ilhardt*, 118 F.3d at 1154).

<sup>344</sup> *Chipman*, 30 F. Supp. 2d at 978 (quoting *Pfeifer v. Marion Ctr. Area School Dist.*, 917 F.2d 779 (3d Cir. 1990)).

By applying these regulations and PDA precedent, the court decided that NHS's exclusion of two pregnant students was based on pregnancy.<sup>345</sup> The Court followed *Wort* and *Cazares*, and ruled the chapter's exclusion of the students on the basis of pregnancy was illegal sex-based discrimination under Title IX.<sup>346</sup> The plaintiffs were awarded a preliminary injunction allowing them admission into their school's NHS.<sup>347</sup>

## **b. Statutory Interpretation**

In addition to the similar case law regarding disparate treatment and impact claims, the Title IX and PDA statutes and regulations have the same spirit and language, as will be seen in the following sections.

### **1. Statutory Language**

Six years after Title IX was passed, the PDA defined "on the basis of sex," a phrase which is also in the statutory text of Title IX. While the Title IX statute prohibits discrimination on the basis of sex,<sup>348</sup> the PDA states "[t]he 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 . . . ."<sup>349</sup> With both statutes' similar purpose of protecting women against

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<sup>345</sup> LeClair, *supra* note 340, at 318 (citing *Chipman*, 30 F. Supp. 2d at 978).

<sup>346</sup> *Chipman*, 30 F. Supp.2d at 978.

<sup>347</sup> *Id.* at 980.

<sup>348</sup> 20 U.S.C. § 1681a (1972) (The Title IX statute 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 . . .").

<sup>349</sup> 42 U.S.C. § 2000E(K) (1978) ("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; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected by similar in their ability or inability to work . . .").

pregnancy discrimination<sup>350</sup> and no relevant amendments to Title IX after the PDA,<sup>351</sup> one can argue that the PDA's definitions and case law can be used in Title IX pregnancy discrimination suits.<sup>352</sup>

## **2. Health and Insurance Benefits and Services regulations**

In both the PDA's and Title IX's regulations concerning health insurance, recipients and employers must treat pregnancy the same as they treat other disabilities. Specifically, Title IX requires pregnancy be "treated in the same manner and under the same policies as any other temporary disability"<sup>353</sup> while the PDA requires pregnancy to be "treated the same as disabilities caused or contributed to by other medical conditions."<sup>354</sup> The Title IX regulation is arguably less restrictive because it allows pregnancy to be compared to temporary disabilities, and therefore provides coverage for the illnesses and complications that may occur during pregnancy.

## **3. Leave Policy Regulations**

Similar language also is used in both the Title IX and PDA leave policy regulations. The Title IX regulation states that a leave of absence is justified if it is deemed medically

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<sup>350</sup> See discussion *supra* Part II.B.1.a

<sup>351</sup> See *supra* p. 37.

<sup>352</sup> See Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, CONGRESSIONAL RESEARCH SERVICE 16 (Aug. 31, 2008), <http://www.fas.org/sgp/crs/misc/97589.pdf> (In determining the significance of silence, "[T]he Court does sometimes assume that Congress will address major issues, at least in the context of amendment.").

<sup>353</sup> 34 C.F.R. § 106.40(b)(4) (2000) ("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.").

<sup>354</sup> 29 C.F.R. § 106.10(b) (1979) ("Disabilities caused or contributed to by pregnancy, childbirth or other related medical conditions, for all job-related purposes, shall 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.").

necessary.<sup>355</sup> The PDA requires that a fringe benefit program<sup>356</sup> must treat “women affected by pregnancy, childbirth or related medical conditions the same as other persons not so affected but similar in their ability or inability to work...”<sup>357</sup> Typically, under either regulation, a doctor determines whether a person can work.

After three decades of PDA litigation, Americans are more receptive to the notion that discrimination against pregnant women is sex discrimination and view it as a claim of fundamental and even constitutional magnitude.<sup>358</sup> Students can and should file pregnancy discrimination claims under Title IX just as employees currently allege PDA violations under Title VII. To help ensure their success in the academic pipeline, female students should use Title IX as a vehicle for protecting themselves against pregnancy discrimination. Specifically, taking note from *Chipman*, students may find success alleging the same regulations as the *Chipman* plaintiffs and including analyses from PDA precedent into their arguments. However, despite Title IX’s congressional purpose to end sex discrimination in schools, the PDA as a model and relevant case law as precedent, students still need to know how to effectively exercise their legal rights under the statute. To follow the athletic and sexual harassment case law, more information and case law precedent is needed that explains 1) the procedures for pregnancy discrimination

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<sup>355</sup> 34 C.F.R. § 106.40(b)(5) (2000) (“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.”).

<sup>356</sup> See 29 C.F.R. § 1604.9(a) (1972) (Fringe benefits includes medical, hospital benefits and leave.).

<sup>357</sup> 29 C.F.R. § 1604.10(d)(1) (1979) (“Any fringe benefit program, or fund or insurance program. . . which does not treat women affected by pregnancy, childbirth or related medical conditions the same as other persons not so affected but similar in their ability or inability to work must be in compliance with . . . 1604.10b by . . . 1979.”).

<sup>358</sup> 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).

lawsuits where the defendant is a professor or a student; 2) the notification requirements for educational institutions before they can be held liable under Title IX; 3) the availability of monetary damages and in what contexts. Hopefully, as compliance and dissemination becomes more transparent and accessible, Title IX will become a successful tool for students facing pregnancy discrimination in their academic institutions.

## **Conclusion**

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 regulation, should help keep women scientists in the STEM pipeline and it will help all other students in higher education as well. The first step is to disseminate information to students and other stakeholders who are mostly unaware of the pregnancy discrimination rights under Title IX. As universities are held accountable for widespread dissemination of the scope of Title IX to include pregnancy discrimination, the educational establishment will have to change its policies to accommodate pregnant scholars or suffer loss of federal funding.

Private lawsuits asserting Title IX pregnancy discrimination violations, which have had a limited and uncertain history are moving in the direction of providing both compensatory and monetary damages. The dissemination and enforcement of Title IX regulations with language and spirit akin to Title VII's Pregnancy Discrimination Amendment 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.

Enforcing Title IX pregnancy discrimination prohibitions will be a large step forward for all women in educational institutions. For young women scholars, it may be the difference between pursuing a productive career and giving up.