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An Avalanche of Liability

The Tie Between Title IX and Comprehensive Sex Education

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For Solveig Laugerud:

Thank you for your guidance throughout this process and for seeing the potential in me, and in turn my thesis.

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We’ve grown side by side, learning each day a little more about ourselves and our dreams. Thank you for inspiring me to be my best self.

And for my family:

Even when I'm far away I'll always hold you in my heart. Thank you for giving me a loving home to come back to at my journeys end, and for teaching me the importance of having a courageous spirit and a gentle heart.

In Dedication:

To those who fight when they should run, love when they should hate, and choose every day to keep moving forward.

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1. Introduction

Humans, based off of their humanity, are entitled to life, liberty, and the pursuit of happiness. If an element of society hinders these rights, then it is understood that the government is obligated to handle it in the most productive way. One way in which states strive to protect the rights of its citizens is through its laws. The law is ever changing with the times, as it should. Laws that are stagnant risk enslaving future generations to the whims of the past. As such, the high courts interpret the law, and the lower courts operate using the precedent the high courts set. However, a state that only focuses on the law as a preventative method will always be playing "catch up". Instead, states that are successful in protecting the rights of its citizens must take a look at the "why" of that matter. Essentially, why the crime is being committed in the first place, and what preventative methods are in the states power to enforce to protect its citizens from future harm.

In this paper I use the law as a justification for the United States Federal Government to intervene and enforce comprehensive sex education in its states as a preventative method to sexual harassment and assault. I base this justification on the obligation's laid out in Title IX legal code. The U.S. Department of Education's Office of Civil Rights enforces Title IX, a statute in the Education Amendments of 1972.

Title IX stipulates that:

> "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".[1]

In the US there are approximately 17,600 local school districts and over 5,000 universities that receive funds from the US government.[2] If the funding recipients are found in the court of law to be liable for Title IX violations, they could be subject to heavy monetary compensation. The funding recipients are obligated to ensure their school programs and the overall education environment does not foster sex discrimination or incite instances of sexual harassment. I will discuss the legal aspects of Title IX in greater detail later in this paper.

The US operates using a system of federal and state laws; federal laws apply to all states in the union while individual states can have their own laws that only apply to said state. A state is allowed to have its own laws as long as they don't infringe on the laws or rights laid out by the federal government. For example, in the last 10 years same sex marriage was legalized in the US by the Supreme Court. This became a federal law, and states were obligated to enforce it. Conversely, the legalization of marijuana has been made legal in states such as Colorado and California, but the federal government has not enacted restrictions or regulation on it that apply to all states. Title IX exists in the federal legal code of the US and applies to all educational

[1] "Title IX and Sex Discrimination." *Office for Civil Rights*. US Department of Education, (20 August 2021). https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.
[2] Ibid.

institutions that receive federal funds. These funding recipients, regardless of which state they reside in, are obligated to abide by Title IX.

The same obligations outlined in Title IX can be found in international human rights law. Using the combined obligations set by Title IX and international humanitarian law, I argue that comprehensive sex education is not only a legal obligation held under Title IX, but a human right to ensure the right to life, free from discrimination on the basis of sex.

2. Methodology

The purpose of this thesis is to use Title IX legal code to determine the current and potential future obligations educational institutions hold to protect their students from discrimination on the basis of sex. Due to my background in legal studies, I anticipated the majority of my thesis would stem from my legal analysis of the cases I selected. From this selection of cases, I determined central themes and used this thesis to explore these themes in greater detail. I utilized international humanitarian law and sociological/psychological studies and articles to support my findings. The two main methodologies I employed in my thesis are systematic content analysis of judicial opinions and thematic analysis.

a. Systematic Content Analysis of Judicial Opinions

I began by examining the nuances of Title IX; how it was interpreted in the courts, and in turn what this interpretation would mean for the lives of those in the US educational institutions. Systematic content analysis "aims for a scientific understanding of the law itself as found in judicial opinions and other legal texts".[3] This methodology is typically used by legal researchers who wish to analyze the law not only from the scope of legality, but sociology, criminology, etc. The interdisciplinary nature of this methodology allows for a broader understanding and analysis of the law. Using this method, I systematically selected cases that I believe were representative of the larger sample of Title IX cases. Additionally, each case I selected highlighted a particular aspect of Title IX legal code that would be useful when examining the sociological impact of Title IX rulings on society as a whole. I chose this method because it allowed me to bring "the rigor of social science to [my] understanding of case law, creating a distinctively legal form of empiricism".[4] It allowed me to engage the cases from the scope of legality while being mindful of the sociological ramifications each case illustrated.

Additionally, I wanted my thesis to focus on legal cases spanning a time length of roughly 30 years, hence why I chose court cases ranging from 1992 to 2021. Some of the earlier cases I examine set the legal precedent while the later cases either enforced or challenged it. I wished to analyze cases throughout multiple decades to give the reader a better idea of the metamorphosis

[3] Hall, Mark A, and Ronald F Wright. "Systematic Content Analysis of Judicial Opinions." *California Law Review*, (February 2008). https://www.jstor.org/stable/20439171.
[4] Ibid.

Title IX has gone through since its inception and the liberties/interpretation the courts have granted it.

As previously mentioned, Title IX states that funding recipients cannot discriminate on the basis of sex. To further narrow my legal case analysis, I wanted to examine Title IX complaints where the plaintiff alleged crimes relating to sexual harms. In order to ensure that my analysis was not overly narrow, I selected cases of student-on-student sexual harassment as well as student-teacher sexual harassment. Additionally, to obtain the overall picture of education institutions in the US, I selected cases where the accused were in elementary schools, middle schools, and universities. I did this to ensure that when my sociological analysis came into play, I had thoroughly examined all sections of the US education system to identify any patterns. By using systematic content analysis of my Title IX cases, I was able to hypothesize what other instances could fall under Title IX legal code such as the right to comprehensive sex education. After all, "prophecies of what the courts will do…are what I mean by the law".[5] By dissecting how Title IX has been applied previously in the courts, I can determine how it might be interpreted in courts in the future.

b. Thematic Analysis

After I selected my cases, I read and re-read them to identify key themes. I found some commonalities between the cases and drew inferences based on the current legal precedent set by the US Supreme Court of other legal obligations that exist under Title IX. It was important to first analyze Title IX from a legal case analysis perspective, as "studies of judicial decisions yield useful, albeit narrow information, that moves us toward a greater understanding of the bigger policy questions" and help uncover themes that speak to a potentially larger sociological problem.[6]

In contrast to sole legal analysis, thematic analysis "provides a flexible and useful research tool, which can potentially provide a rich and detailed, yet complex, account of data".[7] Thematic analysis is often "misinterpreted to mean that themes 'reside' in the data…if themes 'reside' anywhere, they reside in our heads from our thinking about our data and creating links as we understand them".[8] Essentially, it is the obligation of the researcher to select an appropriate sample and analyze said sample to identify common themes, as I have done in this thesis.

The first theme I identified from my case data was that most of these Title IX cases were originally granted summary judgment or dismissed in their entirely. None of the cases selected where originally held before a jury. It was only after the plaintiffs filed again in the Court of

[5] Holmes, Oliver Wendell Jr., "The Path of the Law", *10 HARV. L. REV*. 457, 461, (1897).
[6] Jordan, Karen A., "Empirical Studies of Judicial Decisions Serve an Important Role in the Cumulative Process of Policy Making." 31 Ind. L. Rev. 81, 88, (1998).
[7] Braun, Virginia, and Victoria Clarke. "Using Thematic Analysis in Psychology." *Qualitative Research in Psychology* 3, no. 2 (2006): 77–101. https://doi.org/10.1191/1478088706qp063oa.
[8] Ely, M., Vinz, R., Downing, M. and Anzul, M. "On writing qualitative research: living by words." *Routledge/Falmer*, (1997).

Appeals that the courts found the case satisfied the elements necessary to prove that a Title IX violation took place, and the case was moved forward to trial. This illustrates a larger sociolegal issue at play, mainly speaking to how survivors of sexual abuse are viewed and portrayed in the US courts and community as a whole due to misinformation and the propagation of harmful gender norms. Stemming from this theme, two another intertwined themes were identified. I found during my thematic analysis that there was a significant lack of awareness by the teachers and staff as to the anti-harassment policies and procedures that must be followed in order to abide by Title IX legislation. This lapse in educating the teachers and staff played a part in the continued sexual harassment and/or assault that the plaintiffs faced in the cases I selected. Additionally, the plaintiffs themselves were sometimes unable to properly articulate the harms being done and report these instances to the Title IX Coordinator.[9] While all the plaintiffs in these cases did report the instances of sexual harassment and/or assault to an adult, this adult was never the Title IX Coordinator that was in charge of handling these types of complaints. This further points to a failing by the educational institutions to provide the contact information of said Title IX Coordinator as well as educate its students of the rights they hold and the appropriate process for reporting Title IX complaints. These three themes allowed me to conclude that sex education can be used to educate students about consent, Title IX policies and procedures, as well as deconstruct harmful gender roles that propagate sex-based violence. While examining the ways in which Title IX is used to protect students from sexual harassment in schools, it became apparent that the lack of Title IX policies and procedures being taught to educators and students alike was centrally to blame. I tie this legal obligation to international humanitarian law to strengthen its position.

Lastly, I discuss psychological studies and sociological articles to illustrate the psychological harm that survivors of sexual assault experience. I tie these psychological harms to a decrease in the survivor's academic ability, for which a funding recipient can be held liable under Title IX. I then end the thesis by examining a preventative method, comprehensive sex education. Using the legal case analysis and thematic analysis, I argue that not employing comprehensive sex education in kindergarten through the twelve grade (herein K-12) is in violation of Title IX legal code and therefore is within the US governments federal jurisdiction to intercede.

c. Ethical Considerations

A central ethical consideration when examining court cases is the processing of plaintiffs' and defendants' personal data. However, my thesis does not include the processing of personal data. When I submitted my thesis proposal to the Norwegian Centre for Research Data (herein NSD) I informed them that I would only use readily available information pertaining to each case. This would be information that the general public could freely access, including the defendants and plaintiffs' names (or in some cases the alias Doe), occupation, etc. My thesis was carefully

[9] All educational institutions that receive federal funding must also appoint a Title IX Coordinator. All Title IX related allegations and complaints should be reported to their office. Similarly, if a student brings a Title IX related complaint to a teacher or staff member, it is that adult's responsibility to inform the Title IX Coordinator.

designed with ethical considerations as a top priority. It has been approved by NSD due to the fact that the personal data gathered is public knowledge and does not include contact information or any other special categories of personal data collected from sources outside the official court documents themselves.

3. Legal Analysis of Title IX

The legal framework of Title IX is a complex series of evolutions. It is debated among legal scholars if the Title IX we know today is the same Title IX the courts envisioned when they first wrote Title IX into the Educational Amendments in 1972. Upon its inception, Title IX was believed to only allow public action suits. For example, a school's program could be found to discriminate on the basis of sex, but a specific individual who alleges sexual harassment in this sexist school program could not sue the funding recipient under Title IX because no private action suits were thought to be covered. This thinking changed with the court case Cannon v. University of Chicago. In this court case decided in 1980, the US Supreme Court set the legal precedent that although Title IX does not explicitly permit private action suits, there exists an implied private right of action for individuals to enforce Title IX.[10] Eleven years later in Franklin v. Gwinnett County Public Schools, the court found that private individuals could be given monetary compensation for the funding recipients Title IX violations.[11] These two cases set the groundwork for the court cases that follow, and the metamorphosis of Title IX.

I will begin by briefly summarizing the facts of the following cases: Gebser v. Lago Vista Independent School District, Davis v. Monroe County Bd. of Educ., Williams v. Bd. of Regents of Univ, Jennings v. University, Hill v. Cundiff, and Doe v. Fulton County School District. In order to see the evolution of the legal precedent I will examine each case according to the date it was decided, starting at the beginning in order to illustrate how Title IX has evolved. After each case has been summarized, I will put it into the context of the four elements necessary to justify a Title IX claim. These elements will be identified Davis v. Monroe County Bd. of Educ. and examined further after each case has been summarized. Next, I will discuss the dissenting opinions concerning the scope of Title IX and the fears these Supreme Court Justices held towards the evolution of Title IX. Lastly, I will examine the lack of justice found in the courts for survivors of sexual assault and propose other avenues through which survivors can access justice.

a. Factual Background of Title IX Cases

Gebser v. Lago Vista Independent School District

In Gebser v. Lago Vista Independent School District, the petitioner Gebser was in a sexual relationship with her English teacher, Frank Waldrop, who was at the time an employee of Lago

[10] *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir. 1981).
[11] *Franklin v. Gwinnett County Public Schools*, 200 Ga. App. 20, 407 S.E.2d 78 (Ga. Ct. App. 1991).

Vista Independent School District.[12] In the spring of 1991, Gebser met Waldrop in eighth grade when she joined a high school book discussion group. It is noted that during the book discussion group, Waldrop would make sexually suggestive comments to his students. It wasn't until the following year when Gebser was a freshman in high school and Waldrop her teacher that a sexual relationship began between the two. The two had sexual intercourse on numerous occasions during the remainder of Gebser's freshmen year, often during class time but never on school grounds. Eventually in January of 1993 the two were caught having intercourse by a police officer who arrested Waldrop; Waldrop was then fired.

It is important to note that in October of 1992, in the middle of the relationship between Gebser and Waldrop, two other students and their parents came forward with complaints concerning Waldrop's sexual comments made in class.[13] The principal dismissed the claims and warned Waldrop to exercise caution with his comments in the classroom. No further disciplinary action was taken. Additionally, the principal failed to report the parents' concerns to the superintendent who was the Title IX Coordinator.[14]

Later when Gebser was asked why she didn't report the relationship to school officials, she stated that "while she realized Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher".[15] This points to a failing on behalf of the school district to properly educate its students on sex education, and more importantly consent based sex education. It is also important to note that at the time the district had no policies or procedures in place for students to report sexual harassment claims, nor were there any sort of formal antiharassment policy in place.[16] This is a direct violation of federal regulations.[17]

Gebser filed a lawsuit against Waldrop and Lago Vista Independent School District raising claims against the school district under Title IX, Rev. Stat. § 1979, *279 42 U.S.C. § 1983, state negligence law, and claims against Waldrop primarily under state law.[18] This case went all the way to the Supreme Court which affirmed the judgment of the lower courts stating that:

> "Damages may not be recovered for teacher-student sexual harassment in an implied private action under Title IX unless a school district official who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct".[19]

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[12] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989 (1998).
[13] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 278 (1998).
[14] Ibid.
[15] Ibid.
[16] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, (1998).
[17] Title IX Federal Regulations stipulates that a funding recipient must establish procedures for handling allegations of sexual harassment and assault. Regardless of if the plaintiff's allegations of sexual harassment are found to be true or not, because the funding recipient lacks the proper reporting procedures, they could still be found liable for violating Title IX.
[18] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989 (1998).
[19] Ibid.

This would later be referred to as an "appropriate person", and it becomes a central element in determining if a funding recipient can be held liable for Title IX violations.

Davis v. Monroe County Bd. of Educ.

Moving on to a case decided only a year after Gebser v. Lago Vista Independent School District in 1999 is the landmark case Davis v. Monroe County Bd. of Educ. which governs how courts today interpret claims of sexual harassment. Similarly to the case discussed prior, this case went all the way up to the Supreme Court. Before we look at the decision, lets discuss the background of the case.

In 1992, the petitioner's daughter (herein LaShonda) was a fifth grader at a public elementary school in Monroe County.[20] Davis claims that LaShonda was a victim of ongoing sexual harassment by another fifth-grade student (herein G.F). The first instance of reported sexual harassment is in December of 1992 when G.F attempted to touch LaShonda's breast and genitals, saying vulgar comments such as "'I want to get in bed with you'" and "'I want to feel your boobs.'"[21] Similar incidents took place in January of 1993. Each time the harassment took place, LaShonda reported it to her mother as well as her homeroom teacher Diane Fort. Davis contacted Fort who assured her that the principal had been made aware of the incidents, but no disciplinary or other action was taken to ensure LaShonda's safety.

Over the next couple of months G.F's harassment of LaShonda did not cease. Every case of sexually suggestive comments and actions were reported to two more of LaShonda's teachers (for a total of three teachers who were explicitly aware of the sexual harassment). Davis continued to follow up after each incident with the teachers. G.F's harassment of LaShonda ceased in mid-May when he was charged and convinced of sexual battery.[22]

During this time, LaShonda was not G.F's only victim. A group of female students, including LaShonda, attempted to get an audience with the principal to discuss G.F's sexual harassment. The teachers denied the group's request to meet with the principal, and the meeting never occurred. During the months G.F was sexually harassing LaShonda he was never disciplined. It took three months of continuous harassment for the teachers to finally agree to move LaShonda's away from G.F so they would no longer sit right next to each other in class. Additionally, "petitioner alleges that, at the time of the events in question, the Monroe County Board of Education had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue".[23] As discussed in the case prior, this would be a violation of federal regulations.

[20] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999).
[21] *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 633 (1999).
[22] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 634 (1999).
[23] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 635 (1999).

The District Court dismissed the case, stating that student-on-student sexual harassment provides no grounds for a private cause of action under Title IX. The Court of Appeals for the Eleventh Circuit affirmed this decision.[24] However, in the final decision the Supreme Court reversed the ruling from the lower courts that dismissed the case, and instead remanded it for further proceedings. This decision was controversial amongst the Supreme Court judges, with many of them filing dissenting opinions.

In its new precedent, the Court decided that a private damages action can be found in student-on-student cases of sexual harassment if the following criteria are met. First, the defendant must be a Title IX funded recipient.[25] Second, an "appropriate person" must have knowledge of the alleged harassment or discrimination the plaintiff suffered.[26] Third, the funding recipient is liable for student-on-student sexual harassment claims only if "the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities".[27] Fourth, "the discrimination must be 'so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit'".[28]

We will discuss each of these elements in more detail later in the legal analysis section once all the cases have been effectively summarized.

Williams v. Bd. of Regents of Univ.

Next, I will be examining the elements of Williams v. Bd. of Regents of Univ. In this case, the plaintiff Tiffany Williams (herein Williams) was a student at University of Georgia (herein UGA) where she was ganged raped in the student dorms.[29] The perpetrator Tony Cole (herein Cole), invited Williams to his dorm room where the two engaged in consensual sex. Unknown to Williams, a friend of Cole's was hiding in the closet while Cole and Williams had intercourse. Cole and his friend, Brandon Williams (herein Brandon), had agreed beforehand that Brandon would hide in the closet while Cole had sex with Williams. Cole then left the room, closing the door behind him and Brandon emerged from the closet and sexually assaulted Williams, attempting to rape her. In the other room Cole was on the phone with another friend Steven Thomas (herein Thomas) and told him to come over. Cole stated that he and Brandon were "running a train" on Williams.[30] Running a train is a slang term for gang rape. Thomas came over to Cole's room, and with encouragement from Cole proceeded to rape Williams.

Shortly following the event the police were notified and Williams requested that they proceed with charges against Cole, Brandon, and Thomas. Almost a full year and a half after the incident, UGA decided to hold a disciplinary hearing for the three men. None of them faced any

[24] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).
[25] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999).
[26] Ibid.
[27] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).
[28] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, (1999).
[29] *Williams v. Bd. of Regents of Univ*, 477 F.3d 1282 (11th Cir. 2007).
[30] *Williams v. Bd. of Regents of Univ*, 477 F.3d 1282, 1287 (11th Cir. 2007).

ramifications for their actions. The criminal charges against all three were eventually dismissed by the prosecutor.

This is an interesting case because the claim for a private right of action and monetary compensation can be found due to the negligence of Cole's coaches. Cole, Thomas, and Brandon were all student athletes. Williams brought Title IX charges against James Harrick (herein Harrick) Cole's basketball coach, Vincent Dooley (herein Dooley) who was the Athletic Director of the University of Georgia Athletic Association (herein UGAA), and Michael Adams (herein Adams) who was the President of UGA and UGAA. All three of these men were personally involved in admitting Cole to UGA even though they were aware he had a history of sexually harassing women at his previous colleges.

The District Court originally dismissed William's case due to the fact they believed she failed the meet the deliberate indifference element in Title IX cases.[31] However, a Court of Appeals then proceeded to reverse the first court's ruling and found that Williams did satisfy all the elements to hold a claim to a violation of Title IX by UGA and UGAA.[32]

Jennings v. University

Jennings v. University is a case concerning the sexual harassment of a student by her coach. Melissa Jennings (herein Jennings) was a student at University of North Carolina (herein UNC) and a member of the women's soccer team. Jennings Title IX claims revolve around her soccer coach Anson Dorrance (herein Dorrance). Jennings claims that Dorrance "persistently and openly pried into and discussed the sex lives of his players and made sexually charged comments, thereby creating a hostile environment in the women's soccer program".[33] When the sexual harassment was taking place Jennings reported it to Susan Ehringhaus who was the assistant to the Chancellor and legal counsel to UNC. Ehringhaus dismissed these claims and told Jennings to try and "work it out" with Dorrance.

Some of the sexual comments Dorrance made include but are not limited to the following:

- Dorrance asked one of the players repeatedly "who [her] fuck of the minute is, fuck of the hour is, fuck of the week [is]," whether there was a "guy [she] ha[dn't] fucked yet," or whether she "got the guys' names as they came to the door or . . . just took a number".[34]
- He asked another girl on the team if she was "going to have sex with the entire lacrosse team," and advised a third, "[Y]ou just have to keep your knees together . . . you can't make it so easy for them".[35]

[31] *Williams v. Bd. of Regents of Univ*, 477 F.3d 1282 (11th Cir. 2007).
[32] Ibid.
[33] *Jennings v. University,* 482 F.3d 686, 690 (4th Cir. 2007).
[34] Ibid.
[35] Ibid.

- Dorrance told one of the other players, Keller, that he would "die to be a fly on the wall" the first time Kellers roommate and fellow teammate had sex.[36]
- Jennings overheard Dorrance telling a soccer trainer that Dorrance would like to have a threesome with the Asian girls on his soccer team.
- Dorrance showed overt affection for Keller, "frequently brushing her forehead, hugging her, rubbing her back, whispering in her ear, dangling a hand in front of her chest, or touching her stomach".[37]
- During an away soccer tournament, Dorrance brought Jennings to his hotel room to review her performance. Jennings describes the scene; "I was 17 when he asked me that in a dark hotel room, knee-to-knee, bed not made, sitting at one of those tiny tables."[38]

These are just some of the few instances of the sexual harassment that took place reportedly anytime the team was together, whether that was at practices, in warmup, on buses to games, etc. This behavior was brought to the attention of what would be considered an "appropriate person" at UNC, and it was expressly ignored. The court first granted summary judgement on Jennings Title IX claims against UNC. A Court of Appeals later vacated the first court's decision and remanded the case for further processing arguing that the elements exist for Jennings to have a Title IX claim.

Hill v. Cundiff

In Hill v. Cundiff we have a case in which the teachers at Sparkman Middle School used a female student (herein Jane Doe, or Doe) in a "rape-bait" scheme to catch another student (herein CJC) in the act of sexual harassment.

Sparkman was negligent in its duties to properly educate its faculty on the sexual harassment policy of the school. The school employed, by a decision made by the school's Principal Ronnie J. Blair (herein Blair), a "catch in the act" policy concerning sexual harassment. Essentially, the only way for the school to investigate claims of sexual harassment is if a faculty member physically saw the sexual harassment taking place, if the perpetrator confessed to the harassment, or if there was sufficient physical evidence. This policy made it so that even though Doe was being repeatedly harassed by CJC, the school failed to intervene in an appropriate fashion. Prior to his assault of Doe on January 22, 2010, "CJC had accumulated a disciplinary history of violence and sexual misconduct".[39] During the 18 months before the rape of Doe took place, CJC had five infractions for sexual misconduct and four for violent/threatening behavior. Despite this dangerous behavior, the most extreme punishment CJC received was a 20 day in school suspension. Additionally, at the end of each school year Sparkman Middle School would shred

[36] *Jennings v. University*, 482 F.3d 686, 692 (4th Cir. 2007).
[37] *Ibid.*
[38] *Jennings v. University*, 482 F.3d 686, 693 (4th Cir. 2007).
[39] *Hill v. Cundiff*, 797 F.3d 948, 959 (11th Cir. 2015).

all administrative information, including information, interviews, etc. that spoke to any disciplinary actions taken by the school as well as any infractions by students.

Doe had repeatedly gone to her teacher and assistant principals to report CJC's behavior but was told nothing could be done because they couldn't prove the harassment was taking place. In order to obtain said proof, Teacher's Aide Simpson set up a scheme to catch CJC in the act by using Doe as bait. When CJC asked Doe to come to the bathroom with him, presumably to have sex, Simpson told Doe to accept. Simpson took Doe and the two of them went to the assistant principal's office to tell her of the plan. Doe then went with CJC into the bathroom. Simpson thought that the assistant principal Dunaway was going to handle the proposed "sting" operation and Dunaway later claimed that she had no knowledge of the event Simpson had orchestrated. Due to the actions, and inactions, of Simpson and Dunaway, Doe was raped by CJC in the school bathroom. She told him "I don't want to do this" and tried to get him away from her but was unable to do so.[40] The later medical reports indicate signs of anal rape.

James Hill, a guardian, and friend of the plaintiff later filed Title IX claims against the school district. The first court originally granted summary judgement on these claims, but a Court of Appeals reversed this decision and remanded the case for further processing.

Doe v. Fulton County School District

The last case we will examine is Doe v. Fulton County School District in which student-on-student sexual assault took place on a special needs school bus escorting the students to and from school on a daily basis. The plaintiff Jane Doe (herein Doe) is a fourteen-year-old girl with neurodevelopmental disabilities. Due to these disabilities, Doe functions at a "cognitive and communicative level far below her actual" age.[41] To counter these obstacles in communication, Doe normally would have a person to monitor her and help with communication. In addition, it was required by Fulton County School District (herein FCSD) in Doe's Individualized Education Plan to provide Doe with an electronic tablet to communicate with the individual assigned to monitor her as well as her fellow classmates and teachers. Every day to and from school Doe would ride the special needs school bus. The school bus is equipped with electronic safety monitors, audio and video recordings, and wide view safety mirrors so that the whole bus was visible at all times to the bus driver. The bus driver was an employee of FCSD, as was the individual put on the school bus to assist in monitoring the students and communicating with Doe. For financial reasons, FCSD decided to remove this individual from the bus.

Between April 4, and April 20, 2019, Doe was repeatedly sexually assaulted by two of her classmates. The assaults took place on the school bus and slowly escalated as the two perpetrators discovered that they could get away with more and more without getting caught. During the course of the coming weeks, the boys grabbed Doe's breasts, masturbated next to her,

[40] *Hill v. Cundiff*, 797 F.3d 948, 962-63 (11th Cir. 2015).
[41] *Doe v. Fulton Cnty. Sch. Dist.,* CIVIL ACTION NO. 1:20-cv-00975-AT, 2 (N.D. Ga. Mar. 23, 2021).

performed oral sex on her, and raped her. These were all separate instances that slowly escalated into the rape on April 20th. After the events of April 20th, the bus driver "vaguely mentioned to another FCSD employee that he had 'noticed something' on his last route".[42] He said that that "something" might have involved physical contact.[43] He gave no indication that he was aware of the separate instances of sexual assault that Doe had undergone in the past couple of weeks, all taking place under his watch. Doe's parents were informed that an incident may have occurred on the bus, and they took her to see a doctor. The doctor found signs of vaginal penetration consistent with rape.

The defendants FCSD move to dismiss the Title IX claims holding them liable for the negligence of the bus driver by arguing that the bus driver does not fit the criteria for an "appropriate person" which is necessary in order for the plaintiff to be eligible for a Title IX claim. We will discuss the breakdown of Title IX elements in the next section and examine this case more thoroughly.

b. Analyzing the Elements of a Title IX Claim

We already briefly discussed the Title IX elements in the Davis v. Monroe County Bd. of Educ. case summary. Before legal precedent was set by the Supreme Court, it was heavily debated how Title IX should be interpreted. This case set the legal standard for how Title IX claims can be addressed by courts all over the US. If it is possible for a jury to find all these elements present in the plaintiffs' allegations, then the case can move forward.

The first element that must be able to be proven is that the defendant is a Title IX funding recipient.[44] This is necessary because Title IX is a federal law that can be enforced on federally funded schools and universities. So, if the plaintiff is alleging sexual harassment from say a Catholic primary school that receives no federal funding, then the plaintiff cannot utilize Title IX. In the cases discussed above we see no issue in establishing the first element. All institutions received federal funds.

The second element is proving that an "appropriate person" had knowledge of the sexual harassment, abuse, etc. that the plaintiff experienced. In Gebser v. Lago Vista Independent School District, the Supreme Court ruled that an "appropriate person" can be defined as an official employee of the funding recipient who "at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf".[45] In other words, in order to satisfy this element a school official must have knowledge of the alleged sexual harassment, assault, etc. and be in a position to have intervened and stopped it. An example of this would be in the Hill v. Cundiff case. Doe had repeatedly reported CJC's conduct to her teachers as well as the school's Assistant Principle. Sparks County originally tried to have

[42] *Doe v. Fulton Cnty. Sch. Dist.*, CIVIL ACTION NO. 1:20-cv-00975-AT, 5 (N.D. Ga. Mar. 23, 2021).
[43] Ibid.
[44] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999).
[45] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 276 (1998).

the case dismissed on the grounds that only the Teacher's Aide Simpson was involved in the scheme to catch CJC in the act that resulted in the rape of Doe. A Teacher's Aide is an individual who is not a licensed teacher, but assists in the classroom performing mostly administrative duties, therefore not making them an official employee of the school. The person who would be an "appropriate person", Assistant Principal Dunaway, denied having knowledge of the plan Simpson concocted. However, because in the court of law the facts of the case must be shown in favor of the plaintiff until proven otherwise, the Court operated on the assumption that Assistant Principal Dunaway was aware of the "rape-bait" scheme. Because of her position of relative authority, Assistant Principal Dunaway would be seen as an "appropriate person". Another case where the definition of "appropriate person" is heavily debated is Doe v. Fulton County School District. I choose this case because unlike the others that were argued in the Court of Appeals or the US Supreme Court, this case is relatively new (filed in 2021) and is only in the Civil Action stage. The Civil Action proceedings ended with the court ordering the defendant to provide the plaintiff with further evidence they requested, such as the tapes of the assault from the bus. Because we know the definition of an "appropriate person" given to us by Gebser v. Lago Vista Independent School District, we can make a legal argument as to why the bus driver could be considered an "appropriate person". First and foremost, he was an employee of FCSD. Most school districts have what is referred to as an Employee Code of Conduct. It is a document that outlines the duties the employees hold to their students. If Doe's legal counsel can obtain this Employee Code of Conduct it will surely outline the obligation to report instances of sexual harassment and assault that is held by all FCSD employees, which would include the bus driver. The defendant's claim is that the bus driver may be an employee, but that he did not have high enough authority to have stopped the actions. Essentially, he was not a Principal, Title IX Coordinator, or other higher ranked official in the school board. However, I would argue that because the bus driver was the only employee of FCSD on the school bus, the obligations rests with him to prevent sexual harassment or at the least report it. There was no one else on the bus who could have had higher authority than him in this scenario. Additionally, in Gebser v. Lago Vista Independent School District the definition of an "appropriate person" does not stipulate that the employee must hold a high-level position in the school in order to be considered an "appropriate person". Said person only has to "address the alleged discrimination", which the bus driver clearly could have done as he mentioned observing strange behavior of physical contact on the bus and chose not to act.[46] Concerning the additional stipulation for defining an "appropriate person" being having the authority to "institute corrective measures on the recipient's behalf", I believe an argument can be made that while the bus driver himself could not initiate corrective measures, he could institute them by reporting the incident to an individual (such as a Title IX Coordinator) who has this power. The use of the word "institute" here is deliberate. Defined by Merrian Webster, to institute something is to "set going", or to set in

[46] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 276 (1998).

motion future events.[47] This would allow the plaintiff to interpret the second element to reason a bus driver could be an "appropriate person" as the power to enforce the corrective measure is not a necessary element to a Title IX claim. Rather, the bus driver, or any other school employee, must only have been able to set in motion the process of investigating the incident and/or punishing the accused.

Once it has been decided that an "appropriate person" had knowledge of the alleged sexual discrimination we move onto the third element. In Williams v. Bd. of Regents of Univ., it was decided that "whether gender-oriented conduct rises to the level of actionable [Title IX] harassment ... depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved".[48] These factors lead into deciding if the third element of a Title IX claim can be met. The third element was proposed in the groundbreaking case Davis v. Monroe County Bd. of Educ. in which the US Supreme Court outlined these additional two elements. The third element of a Title IX claim stipulates that a funding recipient can only be found liable for a violation under Title IX if they "act[s] with deliberate indifference to known acts of harassment in its programs or activities".[49] To define what constitutes "deliberate indifference" is difficult and can vary from case to case.

The US Supreme Court proposed the following solution concerning how to define and interpret acts of deliberate indifference:

> "Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action… These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it 'under' the recipient's programs".[50]

Essentially, the third element protects the funding recipient from being held liable for cases of student-on-student sexual harassment. However, the US Supreme Court found that a funding recipient can indeed still be liable if an "appropriate person" had knowledge of the harassment and failed to respond accordingly. An "appropriate person" can be said to of acted non-accordingly if the "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances".[51] This allows for the courts to determine on a case-by-case basis if the "appropriate person" responded appropriately to allegations of sexual discrimination,

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[47] "Institute Definition & Meaning." *Merriam-Webster*. Accessed 30 April 2022. https://www.merriam-webster.com/dictionary/institute.
[48] *Williams v. Bd. of Regents of Univ*, 477 F.3d 1282, 1297 (11th Cir. 2007).
[49] *Hill v. Cundiff*, 797 F.3d 948, 970 (11th Cir. 2015).
[50] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 644-45 (1999).
[51] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 630 (1999).

harassment, misconduct, etc. We see an example of this in Hill v. Cundiff. In this case, the principal did indeed subject CJC to disciplinary action. CJC suffered an in-school suspension for the alleged acts of sexual harassment. However, the court found that it was possible that this did not go far enough, and because CJC was not properly punished for his behavior it left the door open for him to further harass Doe. It could also be argued that the school districts policy of shredding the disciplinary records of the students at the end of the year impeded the school's ability to respond correctly to CJC's known history of sexual harassment. Another example of deliberate indifference is found in Jennys v. University when Jennings reported Dorrance's harassment to Susan Ehringhaus who is the assistant to the Chancellor and legal counsel to UNC. Ehringhaus had the proper authority to interfere, investigate, and/or report Dorrance for his abuse. Instead, she ignored Jennings claims, which were also backed up by testimony of other players, and her decision to do so allowed Dorrance to continue with his harassment undisturbed all due to his position of power.

It is also important to note that one instance of sexual harassment would not satisfy this element. In Davis v. Monroe County Bd. Of Edc. the court stated that a "'single instance of sufficiently severe one-on-one peer harassment' cannot have such a systemic effect in light of 'the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment'".[52] Therefore, in order for the harassment to be liable for a Title IX claim it must be "severe, pervasive, and objectively offensive".[53] The language chosen assigns a longitudinal element necessary for a Title IX claim to be present. As we can see, the deliberate indifference standard is hard to meet. Even though the US Supreme Court laid out the foundation for what would constitute "deliberate indifference" it is ultimately in each courts discretion to interpret the individual facts of each case presented.

This leads us into examining our fourth and final element of a Title IX claim. The final element necessary for a Title IX claim states that "the discrimination must be 'so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit'".[54] In all the cases we have analyzed there was a repercussion on survivors' education in response to the sexual harassment. The educational impact varied; some survivors dropped out or switched schools while others suffered from psychological aliments following their harassment that resulted in a negative effect on the individuals' academics. In Gebser v. Lago Vista Independent School District, Gebser later stated that she was terrified to go to the authorities about the sexual relationship that developed between her and Waldrop. The unequal power dynamic between the two (between a student and her teacher) added another element to the relationship that fostered feelings of fear and anxiety in Gebser. The type of behavior that Waldrop engaged in can be referred to as grooming. The Rape, Abuse & Incest National Network (herein RAINN) describes grooming behavior as "manipulative behaviors that the

[52] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652-53 (1999).
[53] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999).
[54] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

abuser uses to gain access to a potential victim, coerce them to agree to the abuse, and reduce the risk of being caught".[55] Due to lack of vigilance by Lago Vista Independent School District, they could be held liable for the actions of Waldrop. Moreover, this grooming behavior leaves its effects on the victims. The stress of keeping her relationship with Waldrop a secret added to the thoughts she was already having that something seemed wrong about said relationship could greatly influence her ability to receive an education.

In Williams v. Bd. of Regents of Univ., Williams withdrew from UGA after filing her Title IX. She stated that she no longer felt safe on the campus due to the lack of appropriate response by UGA to punish the perpetrators. In Jennings v. University, Dorrance's constant questions concerning the girl's sexual history and exploits put Jennings in a state of constant fear that she would be his target for the day. The toxic environment Dorrance's created was so pervasive that some of the girls would even go home crying after practices due to the sexual remarks Dorrance made about them. Jennings further testified that "the hostile atmosphere created by Dorrance made her feel humiliated, anxious, and uncomfortable; these effects, in turn, had a negative impact on her participation and performance in soccer and on her academic performance".[56] The nightmare did not end for Jennings, for when she filed the charges against Dorrance she began to be harassed by her fellow peers. It got so bad that "UNC officials warned her that they could not guarantee her safety on campus".[57] As a result, UNC recommended that Jennings finish her school year at a different University, resulting in a direct effect on her ability to receive an education. The case Hill v. Cundiff also illustrates the effect sexual assault can have on a student psychologically and in turn academically. After the rape, Doe eventually withdrew from Sparkman Middle School. She did not receive any assistance from the school board to provide her with counseling for the trauma she suffered. Doe did end up seeking out counseling on her own and was diagnosed with depression. In the aftermath of the rape, Doe stated that she "just didn't feel like [she] could do it anymore" and that she did not "trust being at school anymore".[58] Due to these facts, her grades suffered considerably.

In summation, sexual harassment, assault, discrimination, etc. can lead to a number of adverse effects on a person psychologically and academically. In both Williams v. Bd. of Regents of Univ. and Hill v. Cundiff, the courts also remarked that the plaintiff's withdrawal from the schools was "reasonable and expected" in light of the events that took place and the lack of appropriate response made by the funding recipient to avoid and/or seek to remedy the action.[59] This would strengthen the claim both plaintiffs have to a Title IX violation.

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[55] "Grooming: Know the Warning Signs." *RAINN*, (10 July 2020). https://www.rainn.org/news/grooming-know-warning-signs.
[56] *Jennings v. University*, 482 F.3d 686, 699 (4th Cir. 2007).
[57] *Jennings v. University*, 482 F.3d 686, 694 (4th Cir. 2007).
[58] *Hill v. Cundiff*, 797 F.3d 948, 965 (11th Cir. 2015).
[59] *Williams v. Bd. of Regents of Univ*, 477 F.3d 1282, 1297 (11th Cir. 2007).

c. Dissenting Opinions of Title IX's Scope: The Unintended Consequences

Some believe the scope of Title IX has been broadened too far. If a law exceeds the reach and effect it was meant to have, the law becomes something different than it was at its inception. It is the responsibility of the courts to interpret the law and ensure that laws meant to protect and hold people accountable do not do more harm than good. For if this becomes the case, then the law itself loses its purpose.

This is the fear that Justices Kennedy, Scalia, and Thomas speak of when they wrote their dissenting opinions concerning the Davis v. Monroe County Bd. of Educ. case. As discussed prior, this case set a new precedent to how cases of Title IX were interpreted in courts across the United States. By establishing the four elements needed to justify a Title IX claim in cases of student-on-student harassment, this opened the gates to holding schools liable for far more damages than they had been in the past. In the case Cannon v. University of Chicago, the courts found a private right to action existing in Title IX claims.[60] However, Justices Kennedy, Scalia, and Thomas (herein Justices) argue that Title IX does not create any such right to private action. If courts try and establish a right to private action this "inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken".[61] Another issue arises directly relating to the right of private action lawsuits, and that is that in the United States the recipients must be made aware of the conditions attached should they agree to receive federal funds. This is called the Spending Clause legislation.[62] Essentially, "the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability".[63] The Justices claim that for the courts to rule in such a way violates the States rights and exceeds the federal governments jurisdiction. If the majority opinion in Davis v. Monroe County Bd. of Educ. wanted to apply the cause for private action lawsuits, they would have to prove that the funding recipients were given clear notice that they could be in violation of Title IX and subject to monetary damages should cases of student-on-student sexual harassment be brought up against them. The dissenting opinion Justices argue that the majority cannot prove such. The Justices write heatedly that "the fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion".[64]

All of the Justices, the dissenting and the majority, agree that Title IX prohibits sexual misconduct by funding recipients.[65] However, the majority speculates that the funding recipient can be liable for the actions of a third party if an "appropriate person" has knowledge of the

[60] *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir. 1981).
[61] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 284 (1998).
[62] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999).
[63] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57 (1999).
[64] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 657 (1999).
[65] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999).

sexual misconduct and does not intercede accordingly to stop said conduct. In Gebser v. Lago Vista Independent School District the court stated that Title IX "contains no comparable reference to an educational institution's `agents,' and so does not expressly call for application of agency principles".[66] This thinking changed a year later with the Davis v. Monroe County Bd. of Educ. court opinion, but if we were to operate based on the court opinions of Gebser then nowhere in Title IX does it even mention individual "agents". Therefore, there is no legal recourse in holding funding recipients liable for the actions of third parties.

The Justices write that:

> "Discrimination by one student against another therefore cannot be 'under' the school's program or activity as required by Title IX. The majority's imposition of liability for peer sexual harassment thus conflicts with the most natural interpretation of Title IX's 'under a program or activity' limitation on school liability".[67]

The dissenting opinion written by the Justices goes on to discuss how a school is supposed to determine what is an appropriate degree of control to have over its students. The majority does not specify what actions a school must take when a claim of harassment is brought to their attention. Rather, the majority broadly states that the response just must be appropriate. This leaves the courts without clear guidelines on how to apply this element. However, The Department of Education (herein DOE) has written a clause and it is widely accepted that this clause serves as a guideline for funding recipients.[68] The majority claims that the statement in DOE lays the framework for holding funding recipients liable for the actions of third parties and in extension student-on-student sexual misconduct.

It reads:

> "'A [grant] recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient'".[69]

Given this passage, it is reasonable to assume that funding recipients were aware they could be liable for violating Title IX if they employed or worked closely with third party organizations that discriminated on the basis of sex. For example, "it might be reasonable to find that a school was on notice that it could not circumvent Title IX's core prohibitions by, for example, delegating its admissions decisions to an outside screening committee it knew would discriminate on the basis of gender".[70] However, "there is no basis to think that Congress

[66] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 283 (1998).
[67] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 661-62 (1999).
[68] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999).
[69] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 663 (1999).
[70] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 663 (1999).

contemplated liability for a school's failure to remedy discriminatory acts by students or that the States would believe the statute imposed on them a clear obligation to do so".[71]

d. Absence of Justice: The Failing of the Courts

Lastly, I wish to briefly address one final theme found in the court cases analyzed above. Every single case, with the exception of Doe v. Fulton County School District, went into the US Court of Appeals. It was there that the court's found that the Title IX claims had legal standing and moved the cases forward for further processing. The district courts in these cases originally awarded summary judgement to the defendants or dismissed the case entirely. Summary judgment is defined by Cornell Law School Dictionary as a "judgment entered by a court for one party and against another party without a full trial".[72] Furthermore, a summary judgment is only appropriate "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law".[73] In order for a plaintiff's Title IX claim to survive summary judgment, they must be able to provide the court with evidence that a Title IX offense may have taken place. It is unnecessary at this state in the litigation process to prove beyond a reasonable doubt that the offense did take place. As mentioned prior, all facts must be construed in favor of the plaintiff until proven otherwise. Essentially, if there exists even a minor chance that a Title IX offense occurred, then the case should be dismissed from summary judgement and remanded for further processing. If a case is granted summary judgement, it does not mean that it can never be reopened (as we can see by all these cases moving into the US Court of Appeals). However, this lengthy process can take years, and many survivors do not have the time, energy, or resources to go through a courtroom battle.[74]

I was not surprised to discover this theme; rape cases in the US Courts are notorious for wearing down the survivors and providing limited access to any sort of justice. Feminists, sociologists, policy makers, etc. continue to debate the lack of justice served in the courts and devise other avenues by which survivors can obtain justice. A term coined kaleidoscope justice analyzes the different methods in which survivors can obtain justice when the courts cannot provide it.[75] Kaleidoscope justice deals with the aftermath of sexual assault by "provid[ing] a new way of thinking about victim-survivors and justice…it offers a contextual and relational understanding of justice, based upon a set of different factors that can take different forms, and it is not contingent upon specific justice methods, mechanisms or system".[76] If we think of justice as only residing in the courts, then many survivors do not obtain it. instead, kaleidoscope justice allows

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[71] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 663-64 (1999).
[72] "Summary Judgment." *Legal Information Institute*. Accessed 30 April 2022. https://www.law.cornell.edu/wex/summary_judgment.
[73] *Hallmark Developers, Inc. v. Fulton Cty., Ga.*, 466 F.3d 1276, 1283 (11th Cir.2006); seeFed.R.Civ.P. 56(a).
[74] Ransom, Jan. "'Nobody Believed Me': How Rape Cases Get Dropped." *The New York Times*, (18 July 2021). https://www.nytimes.com/2021/07/18/nyregion/manhattan-da-rape-cases-dropped.html.
[75] Antonsdóttir, Hildur Fjóla. "Injustice Disrupted: Experiences of Just Spaces by Victim-Survivors of Sexual Violence." *Social & Legal Studies* 29, no. 5 (2019): 718–44. https://doi.org/10.1177/0964663919896065.
[76] Ibid.

for a holistic view of what justice can look like and assists survivors of sexual assault in defining what justice means to them. For the purposes of this thesis, I wished to look instead at preventive methods. My research has led me to conclude that comprehensive sex education not only falls under the legal obligations held in Title IX but is a fundamental human right and is key to discouraging the types of discriminatory thoughts and behaviors that perpetuate the cycle of sex-based violence.

Another theme I identified through legal case analysis was that the students themselves were unsure of the proper reporting procedures. Now certainly this is not said to cast blame on those who were victimized, but rather at the institution that failed to properly educate students on anti-harassment policies and procedures. In addition, even the staff and teachers themselves were unaware of the proper policies and procedures, such as the obligation to report claims of sexual harassment and assault to the districts Title IX Coordinator. Due to the lapse of Title IX policy implementation, students were left at risk of acts of sexual harassment and assault. Schools should properly educate their students on important topics such as consent and the proper policies and procedures for reporting. This would be an intrinsic part of comprehensive sex education.

Next, I will examine the topics of comprehensive sex education as well as staff/teacher education under international humanitarian laws and treaties to which the US is partied to, as well as incorporate further Title IX analysis.

4. A Human Rights Based Approach to Comprehensive Sex Education and Title IX

Title IX stipulates that no federally funded program can discriminate on the basis of sex. It is difficult to say if at the inception of Title IX, the policymakers who enacted such an act could have foreseen the growth that Title IX would go through. There exists, through legal precedents set by the courts, a duty to protect against school programs that discriminate on the basis of sex. That would imply that program's that preach incorrect and potentially harmful information concerning sex education would violate Title IX. I believe that Title IX can be taken a step further, and that the accessibility to comprehensive sex education can be interpreted as a protection under Title IX legal code. This right to comprehensive sex education is "grounded in human dignity and human rights law".[77] Comprehensive sex education is a central component to the realization of a democratic society composed of educated citizens.

The UNESCO International Guidelines on Sex Education define comprehensive sex education as:

> "'An age-appropriate, culturally sensitive, and comprehensive approach to sexuality education that include programs providing scientifically accurate, realistic, non-

[77] UN General Assembly, *Report of the United Nations Special Rapporteur on the right to education*, A/65/162, (23 July 2010).

judgmental information. Comprehensive sexuality education provides opportunities to explore one's own values and attitudes and to build decision-making, communication, and risk reduction skills about all aspects of sexuality'".[78]

Furthermore, while the US still allows abstinence-only sex education programs that have inherent ties to religious organizations, the Secretary General himself states that a democratic state "must ensure that all its citizens receive a good education and must not allow religious institutions to set patterns of education or conduct that are claimed to apply not only to their followers but to all citizens, whether or not they belong to the religion in question".[79]

The right to comprehensive sex education can be found in the right to education, right to non-discrimination based on gender, and the right of the child. I will examine each human right and articulate the ties between it and the right to comprehensive sex education in an effort to illustrate that the US must view the obligations set in Title IX to extend to the fulfillment of bias-free and informed sex education for its citizens.

a. The International Covenant on Economic, Social and Cultural Rights: Right to Education

The International Covenant on Economic, Social and Cultural Rights was adopted by General Assembly resolution 2200A (XXI) on December 16th, 1966.[80] It entered into force on January 3rd, 1976, in accordance with Article 27.[81] The Committee on Economic, Social and Cultural Rights (herein CESCR) was established to monitor and enforce the ideals outlined in the International Covenant on Economic, Social and Cultural Rights by its State parties. The right to education is a founding principle of the Covenant. Article 12 stipulates that the right extends "not only to timely and appropriate health care but also to the underlying determinants of health, such as . . . access to health-related education and information, including on sexual and reproductive health".[82] In its General Comments, the CESCR elaborates on the different obligation's states hold under Article 12. In General Comment 13, even though sex education is not specifically mentioned, it can be reaffirmed that discrimination in education is not to be tolerated.[83] All states party to the Covenant must provide equal access to education (and in extent sex education) that is free from discrimination. The Committee also addresses the necessity for education to be mindful of the changing shifts in culture and society in order to keep up with the times. This

[78] United Nations Educational, Scientific and Cultural Organization (UNESCO), *International Guidelines on Sexuality Education: An evidence informed approach to effective sex, relationships and HIV/STI education*, (2009).
[79] UN General Assembly, *Report of the United Nations Special Rapporteur on the right to education*, A/65/162, (23 July 2010).
[80] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol. 993, p. 3, (16 December 1966).
[81] Ibid.
[82] Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12),* U.N. Doc. E/C.12/2000/4, (2000).
[83] Committee on Economic, Social and Cultural Rights, *General Comment 13: The Right to Education (Art. 13),* U.N. Doc. E/C.12/1999/10, (1999).

would ensure that medically accurate information is taught in schools so that students can enter their community as fully educated independent beings.

In his report, the United Nations Special Rapporteur stated the following concerning the right to education:

> "States are required to provide comprehensive sexual education to their people, especially children and adolescents, in compliance with the standards of availability, accessibility, acceptability and adaptability established by the Committee on Economic, Social and Cultural Rights as regards the right to education. This is a State obligation of due diligence since, under international law, States must show that they have taken all the measures of a preventive nature that are necessary to fulfil their obligations to guarantee the right to health, life, non-discrimination, education and information by eliminating barriers preventing access to sexual and reproductive health and by providing in schools and other educational facilities comprehensive education for sexuality giving precise, objective and unbiased information".[84]

The right to education, and in extent comprehensive sex education, can clearly be found in the International Covenant on Economic, Social and Cultural Rights. If the US wishes to comply with this Convention, then it should view comprehensive sex education not as an option, but as a human right.

In Title IX we also see a right to education in the legal precedent set by Davis v. Monroe County Bd. of Educ. when we examine the fourth element necessary to prove a Title IX claim. To reiterate, the fourth element states that the sexual harassment the plaintiff faced must have an effect on their ability to receive an education. From our previous case analysis, we saw this element being satisfied by a plaintiff's psychological state after the assault as well as a plaintiff changing schools to get away from her abuser. The obligation the funding recipient carries is to provide a safe learning environment for its students. When this environment is not proven to be a safe place and acts of discrimination on the basis of sex take place, this directly effects the student's ability to learn.

The right to education is further stipulated in Article 13 of the International Covenant on Economic, Social and Cultural Rights stating that:

> "The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship

[84] UN General Assembly, *Report of the United Nations Special Rapporteur on the right to education*, A/65/162, (23 July 2010).

among all nations and all racial, ethnic, or religious groups, and further the activities of the United Nations for the maintenance of peace".[85]

To deny this right to education is a violation of human rights law as well as federal law. As previously discussed, this right to education can be taken further by illustrating the right to comprehensive sex education as found in international human rights law, as well as in Title IX legal code.

b. Women's Human Rights Law: Discrimination on the Basis of Sex

The Convention on the Elimination of All Forms of Discrimination against Women (herein CEDAW) was adopted by the United Nations General Assembly on December 18th, 1979.[86] It entered into force as an international treaty on September 3rd, 1981.[87] Since then, almost 100 nations have signed said treaty, agreeing to abide by the provisions stipulated in the protection and promotion of women's rights across the world.[88] Article 10 of the CEDAW specifically mentions the importance of education in creating equality between the sexes. It calls for the revision of textbooks and teaching materials that propagate discrimination on the basis of sex, assigning gender stereotypes to both men and women that potentially feed into the cycle of misinformation and violence.[89] Article 5 requires the States to take action to eliminate discrimination women face in education, "'with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'".[90] Comprehensive sex education would be a way to facilitate at a young age the fostering of healthy interpersonal relationships between men and women. By starting sex education in kindergarten, the gender stereotypes that children are subjected to can be mitigated, and more inclusive and less discriminatory ways of thinking and observing their worlds can be instructed. After all, "protection of the human right to comprehensive sexual education is especially important in ensuring the enjoyment of women's right to live free of violence and gender discrimination, given the historically unequal power relations between men and women".[91]

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[85] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol. 993, p. 3, (16 December 1966).
[86] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations, Treaty Series, vol. 1249, p. 13, (18 December 1979).
[87] Ibid.
[88] United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women New York,* (18 December 1979). Accessed 24 April 2022. https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women
[89] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations, Treaty Series, vol. 1249, p. 13, (18 December 1979).
[90] Ibid.
[91] UN General Assembly, *Report of the United Nations Special Rapporteur on the right to education*, A/65/162, (23 July 2010).

The right to education that is free from discrimination on the basis of sex is a universal human right. The right of women to be free from violence starts with the right "to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination".[92] Children learn about right and wrong by interacting with their environment. A large part of a child's life is spent in the schools under the care of teachers. If these teachers instruct on comprehensive sex education that is free from gender stereotypes and discrimination, then the students will take this knowledge and continue to grow from it.

> "The absence of planned, democratic, and pluralist sexual education constitutes, in practice, a model of sexual education (by omission) which has particularly negative consequences for people's lives, and which uncritically reproduces patriarchal practices, ideas, values and attitudes that are a source of many forms of discrimination".[93]

A proactive sexual violence preventative strategy is comprehensive sex education. The Special Rapporteur himself states in his report on the right to education that the "empowerment of women, of which sexual education forms an essential part, is a powerful defense against violation of the human rights of girls and adolescent women".[94] He goes on the argue that comprehensive sex education is a benefit to boys as well, as it would instill "values of solidarity, justice and respect for the integrity of others", potentially resulting in a decrease of gender-based harms such as sexual harassment and sexual assault.[95] And while in the US it varies state by state what schools have to include in their sex education courses (if they have any at all), the CEDAW specifically outlines the topics that should be covered in sex education courses in order to ensure the protection and promotions of women's freedom and equality. The CEDAW recommends that sex education programs include "information on reproductive rights, responsible sexual behavior, sexual and reproductive health, prevention of STIs including HIV/AIDS, prevention of teenage pregnancies, and family planning" while also explicitly stating that states include "discussion of gender relations and violence against women".[96] Per the CEDAW, sex education is compulsory and should be provided "systematically" in schools.[97]

The founding purpose of Title IX is to protect students from discrimination on the basis of sex. In order to do this, strict legal obligations have been set that the funding recipients must abide by, or potentially be subject to monetary damages. While the CEDAW clearly outlines the right

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[92] Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, (9 June 1994).
[93] UN General Assembly, *Report of the United Nations Special Rapporteur on the right to education*, A/65/162, (23 July 2010).
[94] Ibid.
[95] Ibid.
[96] Center for Reproductive Rights: Briefing Paper, *The Human Right to Information on Sexual and Reproductive Health Government Duties to Ensure Comprehensive Sexuality Education,* (January 2008).
[97] Center for Reproductive Rights, *An International Human Right: Sexuality Education for Adolescents in Schools,* (September 2008).

to comprehensive sex education, the overarching purpose of the Convention is, like Title IX, to stop the systematic discrimination faced by women due to their sex. Title IX and the CEDAW's aims closely align, and the existence of both serve to strengthen one another in the fight for equality and protection against gender-based violence and discrimination.

c. Rights of the Child

The Convention on the Rights of the Child (herein CRC) was adopted by General Assembly resolution 44/25 on November 20th, 1989.[98] It was entered into force on September 2nd, 1990, in accordance with Article 49 as a Human Rights Treaty Body.[99] The monitoring Committee of the CRC stated in General Comment 1 that the purpose of a student's education is to "'develop a healthy lifestyle, good social relationships and responsibility, critical, creative talents, and other abilities which give children the tools needed to pursue their options in life'".[100] In order for a child to develop these tools, a comprehensive and unbiased sex education is of paramount importance. Furthermore, the Committee has explicitly stated the need for states to implement sex education into its curriculum that is uncensored and free from biases.[101] The Committee has also asked states to strengthen their existing sex education programs and takes notice of states that fail to provide comprehensive sex education to its children. The Committee has concluded that the right of health and information set a precedent for comprehensive sex education.[102] States also have a duty under the CRC to "ensure that children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality".[103]

Additionally, the CRC has stated that children have the right to "adequate information essential for their health and development".[104] In order to do that, states must ensure "that all adolescent girls and boys, both in and out of school, are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practice healthy behaviors".[105] The Committee also mentions that states sex education programs should strive to dismantle harmful gender stereotypes and discrimination, as this can negatively impact the child's ability to develop as a healthy member of society.

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[98] UN Commission on Human Rights, *Convention on the Rights of the Child,* E/CN.4/RES/1990/74, (7 March 1990).
[99] Ibid.
[100] Committee on the Rights of the Child, *General Comment 1: The Aims of Education*, 9, U.N. Doc. CRC/GC/2001/1, (2001).
[101] Center for Reproductive Rights: Briefing Paper, *The Human Right to Information on Sexual and Reproductive Health Government Duties to Ensure Comprehensive Sexuality Education,* (January 2008).
[102] Ibid.
[103] UN Commission on Human Rights, *Committee on the Rights of the Child,* General Comment 3, supra note 23, para. 16, (2013).
[104] UN Commission on Human Rights, *Committee on the Rights of the Child*, General Comment 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, para. 26, U.N. Doc. CRC/GC/2003/4, (2003).
[105] Ibid.

In regard to the unfortunate statistics of child sexual exploitation, the Committee envisions comprehensive sex education as being a preventative measure.[106] The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which was entered into force on July 1st, 2010 by the US, acknowledges that acts of sexual abuse are "destructive to children's health and psycho-social development".[107] Therefore, steps must be taken to ensure the safety of children all across the globe. The rights of the child are universally held in all states and should be a top priority in policy making and government agendas to promote and protect its children. Article 4 stipulates that "Each Party shall take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to protect children".[108]

In Article 6, the Convention states that:

> "Each Party shall take the necessary legislative or other measures to ensure that children, during primary and secondary education, receive information on the risks of sexual exploitation and sexual abuse, as well as on the means to protect themselves, adapted to their evolving capacity. This information…shall be given within a more general context of information on sexuality and shall pay special attention to situations of risk…".[109]

By successfully educating children on the dangers of sexual abuse, states can prevent and/or catch perpetrators all while protecting the child. Title IX protects the rights of the child by providing a safe place for students to learn and become informed citizens. Because Title IX applies to education institutions who receive federal assistance, most will be school districts where the children's age range is five to eighteen. While Title IX also applies to universities who receive federal funding and the adults who attend universities, the ability of Title IX to protect those under the age of eighteen (legally defined as a child) is intrinsic to its overarching purpose.

Article 19 of the CRC states that:

> "States Parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse…"[110]

Title IX was created to protect the nations children, and it holds an obligation to do so under international law as well.

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[106] Center for Reproductive Rights: Briefing Paper, *The Human Right to Information on Sexual and Reproductive Health Government Duties to Ensure Comprehensive Sexuality Education,* (January 2008).
[107] Council of Europe, *Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse*, CETS No.: 201, (2007).
[108] Ibid.
[109] Ibid.
[110] UN Commission on Human Rights, *Convention on the Rights of the Child,* E/CN.4/RES/1990/74, (7 March 1990).

d. Obligation to Educate Teachers and Staff

As mentioned previously, a commonality I found when examining US Court cases with Title IX claims is that there seems to be a lack of general knowledge possessed by the teachers and staff concerning Title IX and anti-harassment policies and reporting procedures. Even though the US does mandate teaching staff have access to such information, there seems to be a disconnect when it comes time to apply said information in a practical way. This could be for a number of reasons (out of date policies and procedures, lack of training, etc.). But the bottom line is that not only is it required by the US federal government, but educating teachers and staff is seen as a key element in fulfilling the right to education, life, and health.

The Committee on the Rights of the Child has expressly addressed their concerns for the lack of knowledge held by teachers and staff and have drawn a causal relationship between this lack of education and the limitations on the right of the child to be properly educated. Consequently, the Committee strongly urges states to provide training to teachers on sexual education instruction.[111] Proper sex education training for teachers additionally carries an obligation to educate teachers and staff to the signs of sexual abuse.

In the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 5 outlines preventative measures states shall enforce:

1) "Each Party shall take the necessary legislative or other measures to encourage awareness of the protection and rights of children among persons who have regular contacts with children in the education, health, social protection, judicial and law-enforcement sectors and in areas relating to sport, culture, and leisure activities.
2) Each Party shall take the necessary legislative or other measures to ensure that the persons referred to in paragraph 1 have an adequate knowledge of sexual exploitation and sexual abuse of children, of the means to identify them and of the possibility mentioned in Article 12, paragraph 1.
3) Each Party shall take the necessary legislative or other measures, in conformity with its internal law, to ensure that the conditions to accede to those professions whose exercise implies regular contacts with children ensure that the candidates to these professions have not been convicted of acts of sexual exploitation or sexual abuse of children".[112]

It is this Conventions strong belief that properly educating teachers and staff will prevent the future suffering of children. All states parties to this Convention have an obligation to protect the rights and freedoms of its children; enforcing proper comprehensive education to teachers and staff is a highly recommended method to do so from the opinion of the Convention.

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[111] Center for Reproductive Rights: Briefing Paper, *The Human Right to Information on Sexual and Reproductive Health Government Duties to Ensure Comprehensive Sexuality Education,* (January 2008).
[112] Council of Europe, *Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse*, CETS No.: 201, (2007).

In the Report of the United Nations Special Rapporteur on the right to education, the Secretary-General states in his concluding remarks that "One general problem arises from shortcomings in teacher training, which tends to perpetuate stereotypical and even discriminatory ideas. This gap undermines teachers' confidence in their ability to do their job properly".[113] This alludes to the CEDAW which prohibits any form of discrimination on the basis of sex. Sex education in particular, according to CEDAW and mentioned by the Secretary-General, must be free from these biases and teachers must be educated to refrain from teaching these biases and misinformation to children. Instead, the states should enforce "specialized teacher training in an institutional environment that supports teachers and increases their confidence".[114]

Concerning the topic of reporting, I noticed in the US court cases that oftentimes the principal or "appropriate person" would fail to report the incident of sexual harassment, assault, etc. to the proper authority (in these cases a Title IX Coordinator). Article 12 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse specifically stipulates those states should take the "necessary legislative [steps]…to encourage any person who knows about or suspects, in good faith, sexual exploitation or sexual abuse of children to report these facts to the competent services".[115] The US government outlines a similar obligation in its own federal education code. However, this strengthens the argument further by illustrating that the proper education of teachers and staff has a basis in human rights treaties, and that failing to do so is not just illegal but also immoral.

This obligation to educate staff and teachers in an effort to decrease sexual harassment can also be found in Title IX. The Department of Education (herein DOE) and The Office for Civil Rights (herein ORC) detail the obligations created by Title IX that funding recipients and their employees must follow in the *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, Or Third Parties Title IX* (herein Guidance).[116] As the legal precedents have been set by the Supreme Court concerning Title IX, the guidance has been ever changing in an attempt to adapt and stay up to date. The DOE and ORC always seem to be one step behind the times. But all the faults cannot be placed on their shoulders. Through their guidance policies and procedures, obligations and rules have been laid out in accordance with Title IX. It is the funding recipients themselves who have failed to provide proper training to its educators and staff concerning the proper policies and procures. If staff and teachers are not instructed on how to handle claims of sexual harassment and assault, then discrimination on the basis of sex will continue in schools nationwide.

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[113] UN General Assembly, *Report of the United Nations Special Rapporteur on the right to education*, A/65/162, (23 July 2010).
[114] Ibid.
[115] Council of Europe, *Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse*, CETS No.: 201, (2007).
[116] Department of Education, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, Or Third Parties Title IX,* The Office of Civil Rights, (19 January 2001).

For example, the Guidance states that:

> "Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex. Accordingly, regardless of whether harassment occurred, a school violates this requirement of the Title IX regulations if it does not have those procedures and policy in place".[117]

Additionally, the Guidance states that "A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities. The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated".[118] The DOE and ORC have outlined the obligations held by funding recipients to educate their staff, teachers, and students on the appropriate anti-harassment policies and procedures. But as I found in the legal case analysis, the funding recipients do not always do so. Or if the funding recipients do educate its staff and teachers, they teach incorrect information. An example can be found in Hill v. Cundiff, where the funding recipients do instill policies and procedures, but these policies pave the way for negligence as they do not follow the Guidance laid out by the DOE. In short, the Guidance must set out stricter anti-harassment guidelines and the funding recipient must do its due diligence in implementing them. Lastly, we can see in the Guidance an obligation for "further training for administrators, teachers, and staff and age-appropriate classroom information for students".[119] These policies and procedures will assist teachers and staff in "understand[ing] what types of conduct can cause sexual harassment" and how to best handle these claims.[120]

5. Comprehensive Sex Education as a Preventative Method

a. Sexual Assault in the United States: Psychological Ramifications and Prevalence

Being a survivor of sexual assault can have immediate and long-term psychological health consequences. A study done by the Centers for Disease Control and Prevention in 2017 found that the "immediate psychological consequences of sexual violence include shock, denial, fear, confusion, anxiety, withdrawal, guilt, shame, distrust of others, and post-traumatic stress disorder, and longer-term psychological consequences include depression, generalized anxiety, attempted or completed suicide, diminished interest or avoidance of sex, and low self-esteem".[121] Any one of these psychological conditions would make it difficult to readjust to life prior to the assault.

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[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Schneider, Madeline, and Jennifer S. Hirsch. "Comprehensive Sexuality Education as a Primary Prevention Strategy for Sexual Violence Perpetration." *Trauma, Violence, & Abuse* 21, no. 3 (2018): 439–55. https://doi.org/10.1177/1524838018772855.

Many studies have been done analyzing the psychological impact of rape on survivors. A longitudinal study done by Rothbaum, Foa, Riggs, and Walsh in 1992 found that at "one week post crime, 94% of the subjects met the symptom criteria for post-traumatic stress disorder (herein PTSD) and were clinically depressed. By three-month post crime, 47% still met full criteria for PTSD".[122] This study was conducted by interviewing 95 rape survivors in the emergency room of a hospital. Other studies can corroborate these findings. It has been found that two weeks post-assault, survivors "experience clinically significant fear, depression, other mood states, sexual dysfunctions, and problems with self-esteem and social adjustment".[123] One year after the assault, these same symptoms were still affecting survivors on a day-to-day basis. The study with the longest longitudinal sample was conducted by Kilpatrick in 1987 when he and his associates' examined survivors of rape over the course of a six-year period.[124] They found that over this period of time, survivors still had significant long-term problems with fear, social adjustment, and depression.[125] Another researcher named Burnam partnered with the National Institute of Mental Health in 1988 and conducted a probability survey with 3,132 households.[126] They found that 13.2% of the sample had an individual in the home who were survivors of sexual assault. It was discovered that "in comparison with those who did not report sexual assault, the victims reported significantly greater onset of phobias and panic disorder after the assault".[127] In this sample it was also found that those who had been sexually assaulted were more likely to experience a major depressive disorder than non-victims.

Additionally, the psychological effects multiple sexual assaults have on a survivor is another area of concern. This is called revictimization and was a factor in each of the legal cases I examined prior. A clinical follow-up of randomly surveyed crime victims conducted by Kilpatrick in 1987 found that "8.6% of victims of one rape and 20% of victims of two rapes currently met the diagnosis for major depressive disorder, whereas 45.7% of single-incident victims and 80% of two incident victims met the lifetime diagnosis of major depressive disorder".[128]

All of the studies mentioned were able to identify a link between when the sexual assaults took place and a decrease in a survivor's ability to function in day-to-day life. It has been found that work, and in turn school, adjustment was impaired for an average of eight months post-assault. Another study examined the impact of safe spaces on survivors of sexual assault. It found that those who were in a space they considered to be safe, for example school, when the sexual assault took place experienced greater fear and depressive episodes following the assault then those who perceived themselves to be in a dangerous situation prior to the assault.[129] The act of

[122] Resick, Patricia A. "The Psychological Impact of Rape." *Journal of Interpersonal Violence* 8, no. 2 (1993): 223–55. https://doi.org/10.1177/088626093008002005.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.

taking a place that is supposed to be a safe learning environment and turning it into a place of fear and anxiety can greatly affect the impact assault has on a person's academics.

One popular rape myth propagated by the media is the stranger danger rape myth that purports that those who are raped by strangers are more psychologically distressed in the aftermath than those who are raped at the hands of someone they know. This myth has been debunked as studies continue to find that this is not the case. If a rape survivor knew their attacker beforehand is inconsequential; they are just as likely to experience trauma reactions such as depression, PTSD, anxiety, etc. as those raped by strangers. This rape myth is dangerous as it sets up a hierarchy of harms approach when it comes to rape. For those who are raped by acquaintances, due to this unfounded myth, they feel their suffering is not as important or extreme as the trauma experienced by others. This is not the case, and the myth impedes survivors from reporting these instances of acquaintance rape as well as discourages them from seeking help from psychological sources in the aftermath.

Traumas can affect many aspects of a person's life; from work to social life, survivors often proport to have an altered mindset following an assault. Education is another area that can be affected, particularly if the trauma is linked to school in some way. For instance, if the sexual assault took place on school grounds like in Hill v. Cundiff. Doe no longer felt safe at the school and withdrew in the aftermath of the rape. She also reported feelings of worthlessness, depression, and decreased ability to focus on academics.

In the article *"'I've Never Told Anyone': A Qualitative Analysis of Interviews with College Women Who Experienced Sexual Assault and Remained Silent*, survivors of sexual assault describe changes in their academic behavior and personality following their assaults.

One survivor described the psychological ramifications of the assault, and in turn how it affected her academics:

> "I dropped the class that I was in with the guy. I became more fearful and closed. I did not socialize as much and stayed in my room a lot more on weekends. I changed my appearance and did not feel like the free spirit and open person I had been. I changed a lot after that night. I felt I was not a good judge of people".[130]

Sexual assault itself is not an uncommon phenomenon. In 2015, The National Intimate Partner and Sexual Violence Survey found that one in five women experience attempted or completed rape at some point in their lifespan.[131] To put this into perspective, if we consider the total US

[130] Caron, Sandra L., and Deborah Mitchell. "'I've Never Told Anyone': A Qualitative Analysis of Interviews with College Women Who Experienced Sexual Assault and Remained Silent." *Violence Against Women*, (2021), 107780122110227. https://doi.org/10.1177/10778012211022766.

[131] Smith, S.G., Zhang, X., Basile, K.C., Merrick, M.T., Wang, J., Kresnow, M., Chen, J. "The National Intimate Partner and Sexual Violence Survey (NISVS): 2015 Data Brief – Updated Release". (2018), Atlanta, GA: *National Center for Injury Prevention and Control*, Centers for Disease Control and Prevention.

female population in 2015 that comes out to about 25.5 million women.[132] Out of these one in five women, one in three young women experience completed or attempted rape for the first time between the ages of 11-17.[133] That would come out to around 7.8 million young women.[134] If we look at the statistics concerning men, we find that 2.8 million men experienced completed or attempted rape in their lifetimes.[135] Of this 2.8 million, 720,000 young men experienced completed or attempted rape for the first time between the ages of 11-17.[136]

These numbers tell us that sexual assault is a reality faced not only by adults, but also by children. Therefore, in order to prevent this cycle of violence, preventative measures must be put in place. A common preventative measure is to educate children in K-12 about consent and healthy relationships. The age range of these students would be approximately ages six to eighteen. Studies have been done analyzing if comprehensive sex education can be protective factor against sexual assault in college.[137] They have shown that "vulnerability to sexual assault could be mitigated by policy and programmatic approaches such as comprehensive sexuality education in middle and high school, which may include the teaching of sexual refusal skills as well as a broad range of other topics, and social and emotional learning interventions that explore gender".[138] This should be combined with continued refusal skills training in universities.[139] Additionally, educators must be educated themselves in distinguishing the signs of physical, sexual, and emotional abuse in their students and be able to respond accordingly.

In the legal cases I analyzed prior, two themes emerged. The first was that there was a significant lack of antiharassment protocols and procedures in place to guide the staff of these schools. This was certainly not the only factor that led to the sexual assault and harassments of the students mentioned, but I do believe it played a factor. Second, in some cases the survivors themselves were unable to properly describe the sexual harassment/assault that was happening to them. Research shows that the "ability of a child to prevent or report child abuse is dependent, in part, on their understanding of their bodies, including the correct names of body parts, the recognition that they have bodily autonomy, and the skills to communicate with a caring adult regarding perceived or real danger".[140] I believe I can make a compelling argument that lack of comprehensive sex education as well as antiharassment policies and procedures for educators

[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Santelli, John S., Stephanie A. Grilo, Tse-Hwei Choo, Gloria Diaz, Kate Walsh, Melanie Wall, Jennifer S. Hirsch, et al. "Does Sex Education before College Protect Students from Sexual Assault in College?" *PLOS ONE* 13, no. 11 (2018). https://doi.org/10.1371/journal.pone.0205951.
[138] Ibid.
[139] Ibid.
[140] Schneider, Madeline, and Jennifer S. Hirsch. "Comprehensive Sexuality Education as a Primary Prevention Strategy for Sexual Violence Perpetration." *Trauma, Violence, & Abuse* 21, no. 3 (2018): 439–55. https://doi.org/10.1177/1524838018772855.

contributes to the harassment faced by students. First, I will discuss and define consent-based sex education and argue that the legal code of Title IX implies a right to comprehensive sex education.

b. Instruction on Consent in K-12

We can define sexual consent as the "the voluntary, sober, and conscious willingness to engage in a particular sexual behavior with a particular person within a particular context".[141] Consent-based sex education would equip students with the communication skills to navigate the world of healthy relationships. Consent-based sex education is an integral element of comprehensive sex education. Leaning about the components of a healthy relationship would also entail teaching students about the signs of abusive relationships such as physical, emotional, and/or sexual abuse. For a brief background, the US education system is set up so that each state gets to decide on the education handbook it uses to teach sex education in its K-12 schools. States rights are heavily supported in the US, and the ties between sex education, religious affiliations, and the government is a long and complicated history. Essentially, the US preaches a doctrine of the separation of church and State. But this issue is hardly black and white which we will discuss more when we discuss the legal basis of comprehensive sex education found in Title IX.

Many states currently employ abstinence-only sex education. These sex education programs propagate incorrect information such as condoms being ineffective for sexually transmitted diseases (herein STD's), that the fetus has a personality and memory by ten weeks, and that women who have abortions are prone to suicide.[142] This is just a few of the fear based and blatantly inaccurate information that abstinence-only sex education teaches its students. They also propagate inequitable gender norms that assign the burden of pregnancy on the women and consider men to be "uncontrollable…sexual aggressors", putting the burden on women to be the gatekeepers of their virtue.[143] Abstinence-only sex education programs that teach incorrect information and harmful gender norms have been found unlawful in the US courts.[144] These schools have been forced to remove the inaccurate and potentially harmful information from their sex education handbooks. Also, some schools were found guilty in the court of law if they were federally funded and accepted donations from outside religious groups to propagate abstinence-only sex education.[145] The schools were found to have violated the separation of church and state by taking these donations to push the churches agenda in its schools through abstinence-only sex education.

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[141] Willis, Malachi, Kristen N. Jozkowski, and Julia Read. "Sexual Consent in K–12 Sex Education: An Analysis of Current Health Education Standards in the United States." *Sex Education* 19, no. 2 (2018): 226–36. https://doi.org/10.1080/14681811.2018.1510769.

[142] Kenny, Lorraine, and Julie Sterrnberg. Rep. "Abstinence-Only Education in The Courts." 31. 6th ed. Vol. 31. New York, NY: *ACLU Reproductive Freedom Project*, (2003).

[143] Ibid.

[144] Ibid.

[145] Ibid.

The Sex Education State Law and Policy Chart tells us that 35 states stress abstinence in their sex education.[146] In comparison, only 9 states require consent to be taught in sex education.[147] Comprehensive sex education, which includes consent-based sex education, would give the students the appropriate tools to prevent sexual harassment and assault.

> "If the goal of sex education is to prevent unsafe sexual behavior, then sexual consent (e.g., its nuances, its communication, and its respect) should be taught before students become sexually active – especially in the light of evidence that young people feel pressure to become sexually knowledgeable at a younger age than previous generations".[148]

Comprehensive sex education must be made a priority in schools across the US. If policymakers and safe sex advocates take a lifetime approach to decreasing the number of sexual harassments claims and assaults in the US, the way to start is to provide the teachings of respect and empathy starting in kindergarten and building upon it throughout the twelve grade.

c. Right to Comprehensive Sex Education Found in Title IX: Discrimination on the Basis of Sex

As mentioned prior, numerous victories have been won in the US court system to push for more informative and comprehensive sex education. These court cases were won because the plaintiff was able to prove that the sex education offered at the offending school was medically inaccurate or misleading. The plaintiff was then able to make a compelling argument that the state law prohibited the teaching of such ideas in sex education. In Coleman v. Caddo Parish School Board, a group of parents brought a lawsuit against the school for the inclusion of misleading and inaccurate facts in its abstinence-only sex education program.[149] This lawsuit was a success, and the school district removed the inaccurate information from its sex education course.[150] Through the US courts, plaintiffs have been able to argue that inaccurate and misleading information is in violation with the state's education code. However, no court has been able to find that abstinence-only education in itself is unlawful. As long as outside sources, such as religious organizations, are not blanketly involved and facts so apparently incorrect are not spouted to children as fact, then the US government has no grounds to interfere with the teachings the individual states themselves deem fit to employ in their schools. This would leave it in each state's power to choose whether or not to educate its students on topics of consent.

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[146] Rep. *Sex Ed State Law and Policy Chart*. Washington, DC: SIECUS, (2020).
[147] Ibid.
[148] Willis, Malachi, Kristen N. Jozkowski, and Julia Read. "Sexual Consent in K–12 Sex Education: An Analysis of Current Health Education Standards in the United States." *Sex Education* 19, no. 2 (2018): 226–36. https://doi.org/10.1080/14681811.2018.1510769.
[149] Kenny, Lorraine, and Julie Sterrnberg. Rep. "Abstinence-Only Education in The Courts." 31. 6th ed. Vol. 31. New York, NY: *ACLU Reproductive Freedom Project*, (2003).
[150] Ibid.

However, I believe that an argument can be made that inaccurate, misleading, and potentially harmful abstinence-only sex education could fall under a breach of Title IX legal code, making it a federal crime and therefore within the jurisdiction of the federal government to prosecute. Abstinence-only sex education "directly contradicts the legislative intent of Title IX because it denies women the benefits of evidence-based sex education and is premised on harmful social dynamics, such as the notion that women are responsible for controlling male sexuality".[151] These gender stereotypes can also be incredibly harmful to men. If what is considered masculine is to engage in risky sexual behavior while what is feminine is to be docile and pure, this could lead to harmful relationship dynamics between the sexes. The discriminatory intent that stigmatizes men in one role with women in another is harmful to both parties involved and can be found in abstinence-only sex education programs.

Some would argue that this interpretation extends beyond the reach of Title IX legal code. The Secretary of Education wrote previously about the issue of state's education rights and the scope of Title IX. The provision in 34 C.F.R. § 106.42 states that "[n]othing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials".[152] This could be interpreted as Title IX having no legal jurisdiction to influence the sexual education curriculum each state chosen to employ. But a conflict of interest arises. Title IX protects people from discrimination on the basis of sex in any education program. So, if an education program is inherently discriminatory, this would fall under Title IX's legal jurisdiction. Whether a sex education program violates Title IX would be decided on a case-by-case basis. However, I believe a legal precedent has already been set with the previous court cases, and that courts can continue to interpret Title IX as a mechanism to protect students and ensure that they obtain a bias-free sex education. If courts found that abstinence-only sex education violates Title IX, it would "hold[s] educational institutions accountable for providing well-researched information to their students".

d. Justifications for Comprehensive Sex Education in K-12

Some would argue that kindergarten is too early an age to start educating students on the importance of consent and comprehensive sex education. However, comprehensive sex education would not be teaching six-year-olds about sex, but rather taking a lifetime approach to educate children in order to prevent them from becoming perpetrators of sex-based harms in the future. Comprehensive sex education in kindergarten would talk about "what it means to give and receive permission to do something and how to share and play with others…[and] age-appropriate instruction about what it means to elicit or convey consent".[153] It will also help the

[151] Moreno, Danny. "Let's Talk about Sex Ed, Baby: Sexual Education Programs and Curricular Exclusions under Title IX." *The University of Chicago Law Review Online*, (23 August 2021). https://lawreviewblog.uchicago.edu/2021/08/12/moreno-sex-ed/.
[152] Ibid.
[153] Schneider, Madeline, and Jennifer S. Hirsch. "Comprehensive Sexuality Education as a Primary Prevention Strategy for Sexual Violence Perpetration." *Trauma, Violence, & Abuse* 21, no. 3 (2018): 439–55. https://doi.org/10.1177/1524838018772855.

students to "understand why consent is important and think about consent in a variety of contexts… [asking] questions about human morality, how we relate to one another, and what we owe to one another".[154] By teaching younger children about respect for others and themselves, sex education would steadily build upon itself in an effort to create more mindful and kind students, who might have a lower chance of engaging in perpetrating behavior and/or lower chances of victimization. It is also important to begin comprehensive sex education early in a student's academics due to the unfortunate reality that surrounds child sex abuse. As mentioned prior in this paper, some students cannot report sex related crimes because they are either unsure of the reporting process (who to report to, how to report, etc.) and/or they are unsure if a crime is being committed. Child often lack the ability to articulate the harm being done. An earlier statistic was that 7.8 million girls and 2.8 million boys report experiencing completed or attempted rape for the first time between ages 11-17.[155] Additionally, 3.2 million girls and 738,000 thousand boys reported their first competed or attempted rape took place before the age of 10.[156] It is important to note that these numbers are most likely lower than they actually are due to the fact that sex crimes often go unreported due to the social taboo's attached to them. These statistics alone create a compelling argument for implementing comprehensive sex education in kindergarten. Policymakers and advocates alike agree that by giving children the tools to articulate what is happening and by giving them a safe place to talk, we can greatly hinder the continuation of sexual violence. While a single sexual assault can lead to a number of psychological impairments that then effect a student's ability to be academically competitive, "revictimization poses an even greater risk, especially for post-traumatic stress disorder (herein PTSD) and depression".[157] Schools are supposed to be a safe place where children can obtain a quality education. If the aftermath of sexual assault prevents them from doing so, the school should do everything in their power to support and provide for their student. This would include implementing comprehensive sex education so that students can articulate their trauma and effectively decrease their chance of revictimization.

Another reason to begin comprehensive sex education in kindergarten is that this is when the children begin to learn about gender norms. Harmful gender stereotypes can propagate unhealthy views and expectations of how the genders are supposed to interact with one another and the roles that each gender is supposed to have in a relationship. In early childhood development, children learn from observation; they then imitate this behavior. From before a baby is even born the adults around them are already thinking about how to socialize the baby based on the gender.

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[154] Tatter, Grace. "Sex Education That Goes beyond Sex." *Harvard Graduate School of Education*, (2018). https://www.gse.harvard.edu/news/uk/18/11/sex-education-goes-beyond-sex.

[155] Smith, S.G., Zhang, X., Basile, K.C., Merrick, M.T., Wang, J., Kresnow, M., Chen, J. "The National Intimate Partner and Sexual Violence Survey (NISVS): 2015 Data Brief – Updated Release". Atlanta, GA: *National Center for Injury Prevention and Control*, Centers for Disease Control and Prevention, (2018).

[156] Ibid.

[157] Santelli, John S., Stephanie A. Grilo, Tse-Hwei Choo, Gloria Diaz, Kate Walsh, Melanie Wall, Jennifer S. Hirsch, et al. "Does Sex Education before College Protect Students from Sexual Assault in College?" *PLOS ONE* 13, no. 11 (2018). https://doi.org/10.1371/journal.pone.0205951.

For example, blue is for boy's while pink is for girl's, toy cars are for boys and barbies are for girls, etc. Girls are praised for being well-behaved and agreeable while boys are praised for athleticism and taking initiative. The seemingly harmless way children are socialized based on their gender can negatively impact their view of self and how they fit into the world. It can also propagate harmful gender stereotypes that feed into the cycle of violence. Children often learn these social behaviors and gender norms in school through interactions with teachers, staff, and their fellow students. It is important to begin comprehensive sex education when these gender norms are beginning to be introduced to the children.

> "Starting instruction as early as possible could help mitigate rigid and harsh gender stereotypes from forming, reducing potential perpetration behavior that stems from these risk factors later on in life. Intervening beginning in kindergarten, before children have engrained gender norms that guide their self-concepts, motivations, and expectations of others, could mitigate the potential harm that comes from rigid-hypermasculinity".[158]

Lastly, it is estimated that fifty to seventy-five percent of men who commit rape first do so as teenagers.[159] This would imply that starting sex education later on would decrease the general effectiveness of reducing perpetration. In my prior legal case analysis, I found that a number of the perpetrators were "caught" by educators and in some cases received some form of punishment, but the punishment was not equal to the crime. The perpetrators felt they could continue with their harassment. In many cases such as Hill v. Cundiff, Williams v. Bd. of Regents of Univ., and Doe v. Fulton County School District the behavior escalated the longer it went unpunished.

6. Conclusion

In conclusion, Title IX illustrates the legal obligation that funding recipients hold to not discriminate on the basis of sex. This in turn can apply to abstinence-only sex education courses which teach gender bias as well as medically inaccurate information. Under Title IX, I argue that the federal government has legal recourse to implement comprehensive sex education nationwide. I illustrate, through the use of international humanitarian law and US case law, the legal justifications for interpreting this obligation under Title IX. I go on to analyze the prevalence of sexual assault in the US and propose that a preventative measure to sexual assault is comprehensive sex education.

Essentially, Title IX establishes legal recourse for the federal government to enforce comprehensive sex education in its states. In turn, comprehensive sex education will operate as a preventative measure by educating students on consent, safe sex, etc. By implementing comprehensive sex education programs, the US can decrease the risk of potential perpetrator

[158] Schneider, Madeline, and Jennifer S. Hirsch. "Comprehensive Sexuality Education as a Primary Prevention Strategy for Sexual Violence Perpetration." *Trauma, Violence, & Abuse* 21, no. 3 (2018): 439–55. https://doi.org/10.1177/1524838018772855.
[159] Ibid.

behavior later in life as well as decrease the chances of victimization or revictimization for its citizens.

When writing the dissenting opinion for Davis v. Monroe County Bd. of Educ., the Justices remark that by broadening the scope of Title IX, this would set an avalanche of liability onto the courts. They employ this metaphor to illustrate the dangerous ramifications of allowing student-on-student claims of sexual assault to fall under Title IX legal code. The Justices utilize this emotionally charged metaphor as a means to strike fear into the hearts of US citizens; I will not argue that it doesn't fulfil this goal, but not for the reasons they intended. By comparing the number of sexual assault claims to an avalanche, they admit with no amount of shame, the horrendous prevalence of sexual assault in the US, and child sexual assault no less. This metaphor elicits emotions of fear not due to the potential liability, but rather that those at the highest positions in the judicial sector seem to have no humility when making this unsettling comparison. If the US wishes to live up to its high ideals of life, liberty, and the pursuit of happiness, then the way sexual assault is viewed by judges, policymakers, and citizens must change. I argue that, perhaps, what the US needs is an avalanche to force the public to address sexual assault. Because to admit that a problem of this proportion exists and to do nothing about it is inhumane, undemocratic, and a source of shame for the US and its citizens.

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