TITLE IX AND SPECIAL EDUCATION IN ELEMENTARY AND SECONDARY SCHOOLS: CONFLICTING RIGHTS, CHALLENGING OPPORTUNITIES

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I. INTRODUCTION

In July of 2022, Title IX turned 50 years old.[1] The Education Amendments Act (to the Civil Rights Act) of 1972[2] was an omnibus spending bill that addressed a multitude of issues. It included direct federal student aid, desegregation and busing, funding for indigenous children, and prohibition of sex discrimination in Title IX of the Act. Title IX's purpose is to ensure that public funds (collected in the form of taxation from all citizens) are not utilized in ways that encourage, subsidize, permit, or result in prohibited discrimination against some people.[3] In short, Title IX states no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.[4] While commonly thought of as an "equity in sports" law due to its impact on equalizing athletic opportunities for women, Title IX carries particular weight in its regulatory requirement that public schools respond promptly to complaints of sex

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1. 20 U.S.C. §§ 1681-1688.
2. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat 235.
3. Cannon v. University of Chicago, 441 U.S. 677, 704 (1979).
4. 20 U.S.C. §§ 1681-1688.

discrimination and thereafter prevent it.[5] Since 1997, Title IX guidance has noted that treating people differently on the basis of sex includes sexual harassment, and thus protects students from sexual harassment in educational programs or activities.[6] It is this area of Title IX, and its interrelationship with special education laws in our elementary and secondary schools, that is the focus of this article.

The year after Title IX became law, the Rehabilitation Act of 1973[7] became the first civil rights law to provide equal access to elementary and secondary school districts for students with disabilities. It prohibits discrimination in a variety of contexts, including its well-known "Section 504" which, as currently amended,[8] provides that persons with disabilities, including public school students, may not by reason of their disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. Section 504 specifically requires school districts to provide a "free appropriate public education" ("FAPE") to each qualified student with a disability in the school district's jurisdiction. Section 504 defines FAPE as the provision of regular or special education and related aids and services designed to meet the student's individual educational needs "as adequately as the needs of nondisabled students are met."[9] Section 504 creates a responsibility to prevent and appropriately respond to disability harassment. It also requires that, before disciplining a student with a disability in a way that changes the student's educational placement, a manifestation determination hearing is required to ensure that the behavior being disciplined is not a manifestation of the child's disability.[10]

On the heels of Section 504, the Education for all Handicapped Children Act ("EHA")[11] was enacted in 1975. Today, as amended, it is known as the Individuals with Disabilities Education Act ("IDEA").[12] IDEA is an education law (as opposed to a civil rights law) requiring public school districts, in exchange for receipt of federal funding, to identify and educationally serve all children with disabilities, ages 0-21. IDEA also requires FAPE although the definition is different than FAPE in Section 504. Under IDEA, FAPE is an Individual Education Program ("IEP") that is reasonably calculated to enable a child to

5. 34 C.F.R. § 106.1 et seq.
6. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Mar. 13, 1997).
7. 29 U.S.C. § 701 et seq.
8. 29 U.S.C. § 794.
9. *29 U.S.C.* §794(a); 34 C.F.R. §104.4(a).
10. 34 C.F.R. 104.33(b)(1)(i).
11. Pub. L. No. 94-142, 89 Stat. 773 (1975).
12. 20 U.S.C. § 1400 (2004).

make progress appropriate in light of the child's circumstances, with the chance to meet challenging objectives.[13] IEPs must take place in the "least restrictive environment" ("LRE") and, if a school district creates any change in placement that exceeds ten non-consecutive days, it has an obligation to notify the student's parent or guardian of the change and their parental rights. Similar to Section 504, if the change in placement is due to a disciplinary action (e.g., suspension, expulsion, etc.), a manifestation determination hearing to ensure that the behavior being disciplined is not a manifestation of the child's disability is required.[14] If it is a manifestation, then instead of the punishment, the school district must amend the child's IEP to ensure there is a behavior intervention plan that meets both the child's and the school district's needs. Finally, if a school district removes a child from his or her then-current placement, parents who dispute the change in placement have a right to "stay put" throughout the pendency of the proceedings, which means that the child remains in the same educational programming and setting he was in prior to being moved.[15] IDEA contains an administrative remedies process for complaints by individuals that allege its provisions have been violated. Prior to filing a civil suit, individuals are required to exhaust those administrative remedies.[16]

Taken together, there are unique interactions and barriers to compliance with Title IX, Section 504, and IDEA when we consider sex-based discrimination against students with disabilities or perpetrated by students with disabilities. The laws can conflate and conflict. Consider the obligation of a school district for a child whose disability causes him to perseverate and fail to understand social cues – for example, a child with Autism Spectrum Disorder ("ASD"). Imagine this child is in seventh grade, and just entering puberty. The child develops an unrequited crush on a non-disabled peer such that he follows her around, constantly requesting to touch and kiss her. The non-disabled peer becomes more and more uncomfortable, and in fact, one day is inappropriately touched by the child with ASD. What is the obligation of the school district to the child with ASD under either Section 504 or IDEA? What is the obligation of the school district to the non-disabled peer under Title IX? The parental interests and ex-

13. Endrew F. v. Douglas County School District Re-1, 137 U.S. 988 (2017).

14. *See* 34 CFR 300.114(a)(2) (defining Least Restrictive Environment), 34 CFR 300.530(e) (explaining IDEA's manifestation determination).

15. *See* Honig v. Doe, 484 U.S. 305 (1988).

16. See Fry ex rel. E.F. v. Napolean Community Schools, 137 U.S. 743 (2017), addressing the circumstances in which parents must exhaust the administrative remedies found in IDEA when their lawsuit purports to assert claims only under other federal discrimination statutes such as the ADA and Section 504.

pectations of the child with ASD may be very different than the parental interests or the expectations of the child who is being sexually harassed. Each set of parents has a different set of remedies for harm arising out of a failure of a school district to follow both laws. How can a school district both (a) ensure that the harassing environment is eliminated for the victim, while (b) permitting the student with a disability whose inappropriate actions arise out of his disability to remain in the least restrictive environment with his general education peers?

This article introduces the reader to Title IX, with a specific focus on the requirements to protect elementary and secondary students from sexual harassment, and how these requirements have been interpreted by the courts and the Office of Civil Rights under various administrations; it examines the challenges Title IX poses for children with disabilities given children's special education rights under Section 504 and IDEA; and it argues for statutory changes to permit direct relief to victims and more robust regulatory clarity in both the Title IX and IDEA regulations.

II. DISCUSSION

A. Title IX Prior to 2020

As initially drafted in 1972, enforcement of Title IX seemed limited to administrative actions brought by the federal government.[17] However, in 1979, the United States Supreme Court held that Title IX contained an implied right of action by individuals for which monetary damages are available.[18] In 1997, the United States Department of Education (the "Department of Education") published guidance entitled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties."[19] The guidance was grounded in longstanding legal authority that sexual harassment can be a form of sex discrimination and laid out the steps a school should use to recognize and effectively respond to sexual harassment of students. In 1998 and 1999, the Supreme Court issued two decisions related to sexual harassment in schools, *Gebser v. Lago Vista Independent School District*[20] and *Davis v. Monroe County Board of Education*.[21]

17. 20 U.S.C. § 1682.

18. Cannon v. University of Chicago, 441 U.S. 677 (1979); *see also* Franklin v. Gwinnett County Pub.Sch., 503 U.S. 60, 72 (1992).

19. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 62 Fed. Reg. 12034 (March 13, 1997).

20. 524 U.S. 274 (1998).

21. 526 U.S. 629 (1999).

Gebser involved a sexual relationship between an employee and a student. Gebser, a high school student was sexually preyed upon by a teacher. The teacher often made sexually suggestive comments to students, many of which were directed at Gebser. She did not report this to school officials, although parents of other students complained to the school principal. The principal asked the teacher to apologize to Gebser and others, but did not report the incident to the school superintendent. The teacher ultimately engaged in sexual intercourse with Gebser. During all this time, the district had done nothing to create a procedure for lodging sexual harassment complaints and had no formal anti-harassment policies as required by Title IX. Gebser ultimately sued the district, raising, among other things, the district's obligations under Title IX. The Court confirmed the teachers's behavior fell within the ambit of sexual harassment prohibited by Title IX for which a district could be liable, but focused on "the contours of that liability" (e.g. what must be shown to render a district liable).[22] The Supreme Court's interpretation is that a district's liability to an individual for damages for such sexual harassment only arises if the district had "actual knowledge" of the harassment and responded with "deliberate indifference."[23] In addition, the harassment must be "so severe, persistent and objectively offensive that it effectively bars the victim's access to educational opportunity."[24] The Supreme Court held that damages could not be recovered under Title IX unless a school official with authority to institute corrective measures on the district's behalf had actual notice of, and was deliberately indifferent to, the teacher's misconduct. Gebser, they found, could not prevail under this "actual notice" standard (the Superintendent was the district's Title IX Coordinator) and the district's failure to comply with the federal regulations did not establish "deliberate indifference."[25]

In *Davis*, a fifth-grade girl was persistently pursued by another student's sexual advances, creating a hostile and offensive school environment. Her harasser regularly made vulgar comments like "I want to feel your boobs," and made physical advances trying to touch her breasts and genitals.[26] The victim reported the harassment to her teacher and mother, yet the harassment continued for months, and the student harasser was not disciplined. Other girls also tried to report being harassed by the same student, but the teacher would not let them go to the principal.[27] The student harrasser was eventually

22. Gebser v. Lago Vista Independent School District*,* 524 U.S. 274, 281 (1998).
23. *Gebser,* 524 U.S. 274 at 290.
24. Davis v. Monroe County Board of Educ., 526 U.S. 629, 631 (1999).
25. *Gebser,* 524 U.S. 274 at 290.
26. *Davis*, 526 U.S. at 633.
27. *Id*. at 635.

prosecuted for sexual misconduct, but by that time, the girl's schoolwork suffered and she developed suicidal ideations. After a six-year journey to the Supreme Court over whether a school could even be liable for student-on-student sexual harassment, the Supreme Court held that a private right of action could lie against a school district, but again, only when the district is deliberately indifferent to harassment of which the recipient has "actual knowledge" and the harassment is "so severe, pervasive and objectively offensive" that it deprives the victim of access to the educational opportunities provided by the school.[28] In a 5-4 decision, the case was returned to the district court for trial.

In 2001, in response to *Gebser* and *Davis*, the Department of Education issued "Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties (the "Guidance")."[29] The revised Guidance underscored that, despite the high bar set by the Supreme Court for recovery of monetary damages in a private right of action, preventing and remedying sexual harassment is an ongoing obligation of the schools that is enforced administratively by the Office of Civil Rights ("OCR"). The revised Guidance then distinguished *Gebser* and *Davis* from the federal government's own administrative enforcement rights. Noting the Supreme Court cases were about liability standards for private actions for monetary damages, the Guidance contrasted that with standards applicable to enforcement of Title IX by the OCR, including corrective action requirements to be met in order to avoid the loss of federal funding.[30] The revised Guidance made it clear that once a school had notice of possible sexual harassment of students, it was to take immediate and appropriate steps to investigate and then take prompt and effective steps to end any harassment, eliminate a hostile environment if one had been created, and prevent harassment from occurring again. In addition, the school was responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed.[31] If a responsible school employee directly observed sexual harassment of a student, the school was to contact the student who was harassed (or the parent of the student), explain that the school is responsible for taking steps to correct the harassment, and discuss informal or formal action. Even if a parent did not file a formal complaint, the school still had a duty to promptly investigate and

28. *Id.* at 630.

29. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001).

30. *Id*.

31. *Id.*

resolve the problem. Responsive measures had to be designed to minimize any burden on the student who was harassed.

This differentiation between (a) what a parent has to show to obtain monetary damages and (b) what would be considered a violation of Title IX for purposes of administrative enforcement, ensured ongoing student protections from harassment notwithstanding the high bar set by *Gebser* and *Davis.* Students with disabilities are at greater risk for being a target of sexual harassment or the perpetrator of sexual harassment.[32] They may have difficulty avoiding situations that lead to harassment, as well as difficulty knowing how to respond.[33] The high bar set by *Gebser* and *Davis* does not consider that young students, even those without disabilities, may not have any understanding of the difference in authority of a classroom teacher and a principal. They may not even know their principal and could reasonably assume that a teacher or school nurse is an appropriate person to whom they should bring their concerns. They may not speak English as a first language. People with developmental disabilities are four to ten times more likely to be abused than their peers without disabilities.[34] Children with intellectual and mental health disabilities are five times more likely to be sexually abused than their peers without disabilities.[35] Sex education is often not made available for students with disabilities.[36] Moreover, many children with more severe disabilities rarely leave the classroom in which their abuser is located and have little opportunity to interact with outside staff.[37]

For example, in *Rost v. Steamboat Springs Re School District*[38] K.C., a seventh-grade girl with an early-childhood brain injury was coerced into performing various sexual acts with several boys who continuously pestered her for oral sex, called her names, and threatened to distribute naked photos of her. Few, if any, of the actual incidents

32. Ellie Young, Melissa Allen Heath, Betty Ashbaker & Barbra Smith, *Sexual Harassment Among Students with Educational Disabilities*, 29 REMEDIAL AND SPEC. EDUC. 208, 208 (2008).

33. *Id*. at 210.

34. D. SOBSEY ET AL., VIOLENCE AND DISABILITY: AN ANNOTATED BIBLIOGRAPHY (Brookes Publishing, 1995).

35. Nancy Smith & Sandra Harrell, *Sexual Abuse of Children with Disabilities: A National Snapshot*, 32 CHILD LAW PRAC. NEWSL. (2023).

36. The National Center for Education Statistics notes that less than 1/3 of students with deaf blindness, intellectual disabilities or multiple disabilities spend 80% or more of their time in general education classes. *Inclusion of Students with Disabilities*, NAT'L CTR. FOR EDUC. STAT. (July 6, 2022), https://nces.ed.gov/fastfacts/display.asp?id=59.

37. *Fast Facts*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=59 (last visited Mar. 18, 2023) (noting that less than 1/3rd of students with deaf blindness, intellectual disabilities or multiple disabilities spend 80% or more of their time in general education classes).

38. 511 F.3d 1114 (10th Cir. 2008).

appeared to be consensual. Prior to the child reporting the events to school officials, her mother suspected something was wrong, pleaded with the school counselor to address it, and reported the school counselor for lack of responsiveness. K.C. did tell the counselor boys were bothering her but did not know the word "assault." In the two years after K.C. reported the behavior, K.C. repeatedly told the school that boys were bothering her, that she was afraid to go to school, and finally she described the forced oral sex based on the threats the boys had made. Shortly thereafter, K.C. suffered the first of several acute psychotic episodes.[39] Yet the school district successfully argued that, despite K.C.'s severe impediments in expression and understanding, that expressing those boys were bothering her was insufficient to give the district notice under Title IX that she was being sexually harassed.

Soper v. Hoben[40] further illustrates the challenge of meeting the reporting and notice requirements. R.S. was a student with special needs who was raped by one of her classmates. R.S. had Down syndrome and was placed with other children who had intellectual disabilities. One of these peers kissed her without consent. Her mother told the teacher about the incident and voiced concerns for R.S.'s safety. The teacher said she would keep an eye on it. However, shortly thereafter, the same boy who kissed R.S. told her to hide in the back room and raped her. Two other boys also molested her. The school launched an investigation, but the main perpetrator was not disciplined for months and the other two children were never disciplined. The United States Court of Appeals for the Sixth Circuit declined to incorporate the notice about the unwanted kissing into its analysis of "deliberate indifference," stating that the rape itself was the starting point of notice and because the school thereafter had prevented any future occurrences of rape, the school was not deliberately indifferent. As such, its actions thereafter were not "'clearly unreasonable in light of the known circumstances.'"[41]

A third example is seen in *Patterson v. Hudson Area Schools.*[42] In 2009, as a sixth-grader, D.P. began to be harassed by his peers–they called him "gay," "queer," and said he had "man boobs." They teased him about his lack of pubic hair.[43] D.P. stopped wanting to attend school and his parents met repeatedly with school staff, including ad-

39. Rost v. Steamboat Springs Re Sch. Dist., 511 F.3d 1114 (10th Cir. 2008).

40. 195 F.3d 845 (6th Cir. 1999).

41. Soper v. Hoben, 195 F.3d 845, 855 (6th Cir. 1999) (quoting *Davis*, 526 U.S. at 648).

42. 551 F.3d 438 (6th Cir. 2009).

43. Patterson v. Hudson Area Schs., 551 F.3d 438, 440 (6th Cir. 2009).

ministrators, counselors, and teachers.[44] In seventh grade, D.P. was verified under IDEA as emotionally impaired, and he received services under IDEA for two years, in a small class environment, which helped him with his peers.[45] However, in ninth grade the services stopped and the harassment picked back up: he was shoved, called names, the word "fag" was printed on his school work, his planner was defaced with crude sexual drawings and statements, his shoes were thrown in the toilet, his locker was vandalized, etc.[46] The district did very little to investigate and the harassment continued until he was a victim of sexual assault.[47] His parents removed him to a private school and filed suit under Title IX. Despite all of these incidents, the district court granted summary judgement in favor of the school district, claiming that there was no showing that they were deliberately indifferent.[48] While the Sixth Circuit remanded on the finding that this was a genuine issue of material fact, this case illustrates the "uphill climb" of an individual's ability to hold a district accountable for a harassing environment.

Finally, in *Murrell v. School District No. 1*,[49] the United States Court of Appeals for the Tenth Circuit found a school district was liable under a Title IX claim but only because the school principal and teachers were well aware that P.J., a developmentally and physically disabled student, suffered sustained sexual harassment, assault, and battery by one of her fellow students.[50] The staff, upon her enrollment, had been advised that in her previous placement she had been sexually assaulted. Yet they placed her in a class with a student, John Doe, who was known to have significant behavioral problems including sexually inappropriate conduct.[51] At some point, Doe took her to a secluded area and sexually assaulted her while she was menstru-

44. *Patterson*, 551 F.3d at 440.
45. *Id*. at 441.
46. *Id*. at 442.
47. *Id*.
48. Patterson v. Hudson Area Schs., No. 05-74439, 2007 WL 4201137 (E.D. Mich. Nov. 28, 2007). The lower court laid out in specific detail a pattern of severe and pervasive sexual harassment that adversely impacted the child's access to education. *Id.* In addition, it found that the family had repeatedly informed the district about the harassment such that the district had actual knowledge of it. *Id.* However, the lower court stated that the law at the time did not require the district to remedy the problem, just respond in a manner that was not clearly unreasonable. *Id.* The lower court stated that "deliberate indifference" to the harassment only existed if it could be shown that the district response was so inadequate that the student was made more vulnerable but the response. *Id.* Since the district suspended some of the perpetrators in some instances and had policies meant to prohibit harassment, the court said it could not find that Defendants acted unreasonably. *Id.*
49. 186 F.3d. 1238 (10th Cir. 1999).
50. Murrell v. Sch. Dist. No. 1, Denver, Co., 186 F.3d. 1238 (10th Cir. 1999).
51. *Murrell*, 186 F.3d at 1243.

ating. P.J. bled and vomited.[52] Upon discovering this, staff had the janitor clean the area, returned both students to class, and did not tell her mother what happened.[53] P.J., who was functioning at approximately a first-grade level, told her teachers what had happened to her and was told not to tell her mother.[54] Only when P.J.'s suffering resulted in suicidal behavior, such that she was taken to a psychiatric hospital, did her mother learn about what happened. The school's reaction was to suggest that the sexual contact might have been consensual and refused to investigate the incident, report it to law enforcement, or discipline Doe in any way.[55] Only in this extreme situation was a parent able to meet the high bar set by *Gebser* and *Davis*.

All these cases illustrate the importance of administrative oversight to ensure student safety in schools, whether or not specific circumstances will actually yield monetary damages in a private right of action.

In 2011, during the Obama Administration, the Office for Civil Rights ("OCR") issued a Dear Colleague Letter (the "2011 DCL") supplementing the 2001 Revised Sexual Harassment Guidance. The 2011 DCL asserted that sexual harassment includes sexual violence (physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to an intellectual or other disability). The 2011 DCL made clear that all acts of sexual violence were considered forms of sexual harassment covered under Title IX and that these are concerns that apply in all contexts, not just post-secondary.[56] The 2011 DCL stated that the more severe the conduct, the less need there was to show a pattern or practice to establish a hostile environment exists, and that a single instance could create a hostile environment.[57] It also set forth numerous positions including: (a) the school's duties arose if a school knew or "reasonably should know" about student-on-student harassment; (b) schools may have an obligation to respond to student-on-student sexual harassment that initially occurs off school grounds because the continuing effect could be experienced in the educational setting; and (c) a law enforcement investigation did not alleviate the school from its duty to conduct an independent investigation.

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52. *Id*.
53. *Id*. at 1244.
54. *Id.*
55. *Id*.
56. Letter from Russlynn Ali, Asst. Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Sexual Violence (Apr. 4, 2011), https://obamawhitehouse.archives.gov/sites/default/files/dear_colleague_sexual_violence.pdf.
57. *Id.* at 3 (citing Jennings v. Univ. of N.C., 444 F.3d 255 (4th Cir. 2006) (acknowledging that a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims)).

It fleshed out the duties of a required Title IX Coordinator and set forth that, for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (e.g., it is more likely than not that sexual harassment occurred) as opposed to the clear and convincing standard. It did not require schools to permit parties to have lawyers, and it discouraged allowing parties to personally question or cross-examine each other during any hearing because the trauma of an alleged perpetrator questioning an alleged victim could escalate or perpetuate a hostile environment. This latter aspect, while praised by survivors of sexual assault, was faulted by law professors, civil libertarians, and the American Bar Association.[58]

In 2014, still during the Obama Administration, the OCR issued a Questions and Answers on Title IX and Sexual Violence[59] in support of the 2011 DCL (the "2014 Q&A") further clarifying the 2011 DCL. For students with disabilities, these expansions provided a way to address bullying, same-sex harassment, and the verbal and physical abuse suffered by children with special needs who often look or act differently than their general education peers.[60] The 2011 DCL and the 2014 Q&A gave comfort to parents that sending their vulnerable child with special needs to school was safer than in the past, because a school ostensibly would not be waiting to intervene in harassing situations until their student had been deprived of educational opportunity. This reliance was appropriate, as seen in the Fiscal Year 2015 Annual Report (the "Report") to the President and Secretary of Education.[61] The Report states that in 2015 it processed a record high number of complaints (nearly 10,400), nearly 3,000 of which were Title IX-related,[62] opened more than 3,000 investigations, and reached more

58. Shep R. Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct,* BROOKINGS (2020) https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/.

59. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

60. Mark C. Weber*, Disability Harassment in the Public Schools,* 43 WM. & MARY L. REV. 1079, 1090 (2002).

61. Catherine E. Lhamon, *Securing Equal Educational Opportunity, Report to the President and Secretary of Education*, U.S. DEP'T OF EDUC., OFFICE FOR CIV. RTS. (Dec. 2016), submitted under Section 203(b)(1) of the Department of Education Organization Act of 1979, requiring the Assistant Secretary for Civil Rights to make an annual report summarizing the compliance and enforcement activities of the agency. *Id.* The report encompasses all areas overseen by OCR, including complaints related to admissions, desegration, disparate discipline, disproportionate enrollment of minorities in special education, racial harassment, retaliation and other issues. *Id.*

62. *Id*. at 3, 38.

than 1,000 resolutions.[63] Sixty-five complaints involved sexual violence in elementary and secondary schools.[64] The Report describes its resolution of a complaint with a school district where a male student was subjected to gender-based harassment, called "gay," was taunted as not having male body parts, and had his pants pulled down at school. The district agreed to revise its Title IX policies, committed to checking with the student regularly to ensure no additional instances of sexual harassment had occurred, and to provide training to staff and students.[65]

B. TITLE IX 2020

As the political divide in the United States broadened, the actions taken to protect students during the Obama Administration became political fodder. The 2016 Republican platform devoted an entire section to Title IX.[66] After the election of then-President Trump, in 2017 the then-Acting Assistant Secretary issued a letter formally withdrawing the 2011 Dear Colleague letter (the "2017 Withdrawal"), advising that the OCR would not rely on the withdrawn documents in its enforcement of Title IX, and instead would revert back to the 2001 Revised Sexual Harassment Guidance.[67] The 2017 Withdrawal asserted there was no duty to investigate harassment where the underlying incident(s) occurred off school grounds; removed the recommended timelines for investigation; and required schools, prior to investigation, to provide alleged perpetrators the identity of their accuser, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident. It also permitted schools to limit the right of appeal to just the "responding party" (e.g., the alleged perpetrator). Then, on May 19, 2020, the Trump Administration enacted new Title IX regulations.[68] These regulations are still in effect at the time of this writing. The sea-change in the Title IX 2020 regulations is that they adopt nearly "whole-cloth" the monetary damages standard created by the Supreme Court in *Gebser* and *Davis* as the framework for the Office of Civil Rights investiga-

63. *Id*. at 3.
64. *Id*. at 13.
65. *Id*. at 43, 44.
66. The Republican Party, *Republican Platform 2016*, REPUBLICAN NATIONAL CONVENTION (July, 2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5b1%5d-ben_1468872234.pdf.
67. Letter from Candice Jackson, Acting Asst. Sec'y for Civ. Rts.,U.S. Dep't. of Educ., Off. for Civ. Rts., Dear Colleague: Withdrawal of Prior Statements of Policy and Guidance (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.
68. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2020).

tions. In other words, the narrow approach to what a parent had to prove to obtain monetary damages in a private right of action against a school district became the universal standard for holding a school district accountable. The Title IX 2020 regulations do recognize sexual harassment and sexual assault as unlawful sex discrimination, but they narrow the definition of a "hostile environment." The essential rules applicable to elementary and secondary schools under Title IX 2020 are:

1. School districts with "actual knowledge" of sexual harassment "in an education program or activity" of the district must respond promptly in a manner that is not "deliberately indifferent," which is defined as "clearly unreasonable in light of the known circumstances."[69]
2. An education program of the district includes locations, events, or circumstances over which the district exercises substantial control.[70]
3. School districts must respond "promptly" to reports or formal complaints of sexual harassment.[71] There is a three-part sexual harassment definition. Note that only one of the three definitions has a "pervasiveness" requirement.
    a. Sexual harassment means "conduct on the basis of sex that satisfies one or more of the following: An employee of the district conditioning the provision of an aid, benefit or service of the district on an individual's participation in unwelcome sexual conduct; unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault, dating violence, domestic violence or stalking.
4. If a district receives a "formal" complaint, it must follow an appropriate grievance process to investigate the harassment[72] and must offer supportive measures to the alleged victim and the alleged perpetrator.[73]
5. Districts must provide each party, and their parents, a description of the allegation and a copy of the investigative report on the incident.
6. They must afford each party the opportunity to submit written, relevant questions that a party wants asked of

69. 34 C.F.R. § 106.44 (2020).
70. *Id.*
71. *See, e.g.,* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).
72. 34 C.F.R. § 106.45 (2020).
73. 34 C.F.R. § 106.44 (2020).

any party or witness, provide each party with the answers, and allow for additional limited follow-up questions from each party.

7. Districts may remove an alleged perpetrator from an education program on an emergency basis, provided that a safety and risk analysis is completed and an immediate threat justifies the removal, and there is an opportunity to challenge the decision immediately following the removal. This provision does not alter any rights under IDEA or Section 504.[74]
8. Districts may choose between a "preponderance of evidence standard" or a "clear and convincing evidence" standard, but whatever they choose must be applied to all formal complaints (against students or employees).
9. There must be an appeals process.
10. Sexual harassment means "conduct on the basis of sex that satisfies one or more of the following: An employee of the district conditioning the provision of an aid, benefit or service of the district on an individual's participation in unwelcome sexual conduct; unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault, dating violence, domestic violence or stalking.

Immediately after the issuance of these Title IX 2020 regulations, Attorneys General from seventeen states and the District of Columbia sued to have them vacated, or to at least postpone their effective date.[75] They alleged that Title IX 2020 was unlawfully promulgated and strips away longstanding protections against sexual harassment for students. These Attorneys General stated:

> If the Rule is permitted to take effect . . .[it] will reverse decades of effort to end the corrosive effects of sexual harassment on equal access to education – a commitment that, until now, has been shared by Congress and the Executive Branch across multiple elections and administrations, as well as by state and local officials and school administrators . . . .[76]

The complaint put specific emphasis on how the definition of a "hostile environment" disregards the needs of students with disabili-

74. *Id.; see also* Discrimination on the Basis of Sex in Education Programs or Activities, 85 Fed. Reg. 30,574 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

75. Complaint for Declaratory and Injunctive Relief, Pennsylvania v. DeVos, No. 1:20-cv-01468 (D.D.C. June 6, 2020). In addition, the ACLU, the National Women's Law Center, and several higher education associations brought separate suits on additional or separate grounds.

76. *Id*.

ties who may not be able to verbalize social-emotional or other safety concerns.[77] One of the challenges the complainants also point out is that, since the Title IX 2020 regulations permit all parties to discuss the allegations, gather evidence, and obtain all evidence gathered from a school district (without regard to relevancy, confidentiality, the need to protect young minor witnesses, or the implications of sharing sensitive information about young children) the risk of retaliation rises[78] and Title IX collides directly with other district obligations such as the privacy protections found in the Family Education Rights and Privacy Act ("FERPA").[79]

The United States District Court for the District of Columbia issued an opinion on August 12, 2020, holding that the plaintiffs neither established the likelihood of success nor that they were likely to suffer irreparable harm and denied their motion, even though they "raised serious arguments about certain aspects of the Rule."[80]

Student discipline practices raise another concern. Title IX 2020 requires all "disciplinary sanctions or other actions that are not supportive measures"[81] to be subject to specific Title IX 2020 grievance procedures. The Title IX 2020 due process requirements involve procedures that take a minimum of twenty days and a formal appeal process. This applies in the elementary and secondary school environment, and therefore conflicts directly with a school district's ability to give a detention or a short-term suspension, and creates disparities between discipline for all other misconduct and sexual harassment. Given that students with educational disabilities are at greater risk for sexual harassment, whether as victim or perpetrator,[82] the disparate impact Title IX 2020 has on children with disabilities cannot be overstated. Title IX 2020, in its creation of grievance procedures, fails to address the disciplinary protections under IDEA and Section 504 of the Rehabilitation Act discussed above.

Under Title IX 2020, the OCR essentially reversed course on the meaning of "on the basis of sex," threatening, for example, to withhold federal funds from multiple Connecticut school districts because the districts allowed transgender students to participate in athletics

77. *Id.* at 28.

78. *Id.* at 37-38.

79. 20 U.S.C. § 1232g; 34 CFR § 99 (1988).

80. Pennsylvania v. Devos, No. 1:20-cv-01468-CJN, at *1 (D.D.C. Aug. 12, 2020) (order denying plaintiff's motion for preliminary injunction).

81. *See* 34 C.F.R. § 106.30(a); 34 C.F.R. § 106.44(a).

82. Young, *supra* note 32, at 208

based on their gender identity. OCR claimed this was discrimination against cis-gender children in violation of Title IX.[83]

These shifts caused enormous alarms in the disability community. Anti-disability animus is often expressed through sex discrimination. As touched upon earlier, harassment on the basis of physical differences or mental characteristics is commonplace, and teachers as well as children have been the aggressors.[84] There are a myriad of cases of "failure to supervise" students who have been sexually assaulted by other students.[85] School employees may perceive students with disabilities as unreliable without regard to the abilities of the child.

Berg v. Bethel School District,[86] illustrates this challenge. In *Berg,* C.K.M., a female ninth-grade student with profound intellectual deficits was harassed and assaulted by a male student whose school record was replete with warnings detailing past patterns of sexual misconduct as part of how his disability manifested itself. He had been caught masturbating another developmentally disabled male student, had raped another girl with special needs, and was caught sexually molesting a three-year-old at a playground near his home.[87] The male student had previously been provided a 1:1 supervisor as part of his IEP. However, this 1:1 was removed unilaterally by the district and was not documented in his IEP when the student moved to junior high, in violation of IDEA. Subsequently, the male student began a constant pattern of harassment of C.K.M., which was tracked and recorded by his teacher and paraeducators in a logbook.

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83. Letter from Timothy C.J. Blanchard, Director, New York Office, U.S. Dep't of Educ. Office for Civil Rights, to Lori Mizerak, Assistant Corporation Counsel, City of Hartford, et al., (Aug. 31, 2020).

84. *See* Kubistal v. Hirsh, No. 98 C 3838, 1999 WL 90625 (N.D. Ill. Feb. 9, 1999) (discussing how a teacher cruelly mocked a student with a visual impairment); Charlie F. v. Board of Educ., 98 F.3d. 989 (7th Cir. 1996) (discussing how a child with ADHD and panic attacks was subjected to a teacher having all the other children talk about him and his behavior); Witte v. Clark County Sch. Dist., 197 F.3d 1272 (9th Cir. 1999) (discussing how a 10-year-old with Tourette Syndrome, ADHD, an emotional disability and deformities in her legs and feet was tackled and sat upon, and forced onto a treadmill with weights, and forced to write "I will not tic" repeatedly).

85. A sadly typical case is that of Sutton v. Utah School for the Deaf and Blind, 173 F.3d 1226 (10th Cir. 1999), where a child with diminished mental capacity told his mother, using ASL, that a large boy not in his class had touched his genitals while he was in the bathroom. The mother notified the Superintendent who denied that this could have happened because all children had adult supervision in the bathroom. A week later, the child was again in the bathroom and the teacher's aide left to take a call. When she returned, the same student who was originally accused was sexually attacking the child. Following this, the child suffered from rage, compulsive behaviors, and other signs of great stress.

86. No. C18-5345 BHS, 2020 WL 7075209 (W.D. Wash. Dec. 3, 2020).

87. L.K.M. v. Bethel Sch. Dist., No. C18-5345, 2020 WL 7075209, at *3 (W.D. Wash. Dec. 2, 2020).

Ultimately, the male student sexually assualted C.K.M. in a porta-potty by the school's football field during a physical education class. When located and discovered by staff, C.K.M did not "really [give]. . .any information about what happened. She didn't seem concerned or, you know, that she thought that there was anything wrong with it."[88] The school's response was to discipline both students, accusing them of lewd and vulgar conduct.[89] The school claimed that the male student's conduct was not sexual harassment because the female student did not object, even though her profoundly limited cognitive abilities did not permit her to do so. The district relied on its definition in its harassment policy which defined sexual harassment as "unwanted" sexual behavior and when someone does not object it means the behavior is "wanted."[90] The school district moved for summary judgement on the Title IX complaints, arguing that the plaintiffs could not show the district possessed "actual knowledge" of the harassment and assault.[91] While the district court denied this motion, the case has taken several years to wind its way through the courts. On June 28, 2021, the Supreme Court denied the school district's petition for certiorari. In October of 2021 a jury trial verdict in the plaintiff's favor was found on her Due Process (Section 1983) and negligence claims, but not her Title IX claims.[92]

Cases also conflated the individual right to bring suit under Title IX with the administrative due processes required under IDEA. In *Jane Doe v. Dallas Independent School District*,[93] Jane, a student with special needs, was repeatedly assaulted by a classmate. She and her case manager, notified the school, which moved Jane and her assailant to different parts of the same room. The classmate's desk was placed about one foot from the class bathroom, and when Jane went to use the facility, he raped her. Jane's mother withdrew her from school and sued under Title IX.[94] The district court dismissed her claim, for failure to exhaust IDEA remedies. The IDEA states,

> nothing in this chapter shall be construed to restrict or limit the rights, procedures or remedies available under . . . other federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the

88. *L.K.M*, 2020 WL 7075209, at *10–11 (citing to a deposition of the staff member who found the children).

89. *Id*. at *10-11.

90. *Id.*

91. *Id*. at 26

92. Berg *ex rel.* C.K.M. v. Bethel Sch. Dist., No. C18-5345 BHS, 2022 WL 4182642 (W.D. Wash. Sept. 13, 2022).

93. 941 F.3d 224 (5th Cir. 2019).

94. *See generally* Jane Doe v. Dallas Indep. Sch. Dist., 941 F.3d 224 (5th Cir. 2019).

> [administrative due process] procedures [of IDEA] shall be exhausted to the same extent as would be required had the action been brought under [IDEA].[95]

Noting that the Supreme Court decision in *Fry v. Napoleon Community Schools*[96] held that the exhaustion requirement applies only if a plaintiff seeks relief available under the IDEA, which is limited to a free appropriate public education ("FAPE"), the United States Court of Appeals for the Fifth Circuit held that if a person with disabilities seeks Title IX relief that a non-disabled person could also seek *and* request relief that is different from or in addition to a FAPE, the IDEA's exhaustion requirement does not apply.[97]

Foundering case law, as well as the actions of the Trump Administration (withdrawing the guidance on gender identity issued by the Obama Administration in 2017[98] without offering any replacement guidance and releasing the Title IX 2020 regulations) caused revision of Title IX to again become a campaign focus, this time of then-Democratic candidate Joe Biden.

C. The Impact of *Bostock v. Clayton County* and the 2020 Election

Less than a month after the publication of the Title IX 2020 regulations, on June 15, 2020, the United States Supreme Court decided *Bostock v. Clayton County*.[99] Justice Gorsuch issued a majority opinion that the word "sex" as used in Title VII of the Civil Rights Act of 1964 includes sexual orientation and gender identity. Title VII case law has often informed Title IX case law with respect to the meaning of discrimination "on the basis of sex."[100] Following this decision, in August of 2020, the United States Court of Appeals for the Fourth Circuit affirmed a U.S. District Court holding that a school district that refused to permit a transgender boy to use the same common

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95. 20 U.S.C. § 1415(l) (emphasis added).
96. 137 S. Ct. 743 (2017).
97. *Dallas Indep. Sch. Dist.*, 941 F.3d at 229.
98. U.S. Dep't of Justice and U.S. Dep't of Educ., Dear Colleague Letter: Office for Civil Rights Withdraws Title IX Guidance on Transgender Students (Feb. 22, 2017).
99. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).
100. *See* Jennings v. Univ. of N. Carolina, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (holding that Title VII is the "most appropriate analogue when defining Title IX's substantive standards") (quoting Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n. 6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987)); Montgomery v. Indep. Sch. Dist., 109 F. Supp. 2d 1081, 1091 (D. Minn. 2000) (applying "Title VII precedents in analyzing plaintiff's Title IX claim" as "no logical rationale appears to exist for distinguishing Title VII and Title IX in connection with the issue raised").

restrooms that other children use constituted sex discrimination in violation of both the Equal Protection Clause and Title IX.[101]

While *Bostock* did not change the 1998 and 1999 *Gebser* and *Davis* cases, which remain good law in terms of recovery of monetary damages, recent lower court decisions seem to evidence less of an appetite for dismissing claims against school districts.

For example, in 2021, a Texas school district lost its motion to dismiss a Title IX claim brought by the mother of a sixteen-year-old boy with severe intellectual disability (he functioned at a kindergarten or first-grade level, with low social skills) who had been repeatedly assaulted in a school bathroom. He had been assigned an escort to supervise him between classes and when going to the bathroom. Each time he was assaulted he said he told his teacher, but she did nothing and did not inform his parents of the allegations until another school district employee found the student and his assaulter in a stall with their genitals exposed. The district argued that it did not have actual knowledge because the student did not tell the high school principal or vice principal about it. However, the court determined that the teacher could have taken corrective action and the fact that she was a teacher, not an administrator, did not preclude finding that she was an appropriate employee with the authority to make the district liable.[102]

Also in 2021, a mother of a fourteen-year-old student with intellectual disabilities was allowed to move forward on her Title IX claims against a Georgia district after her daughter was sexually assaulted on a school bus.[103] Prior to the assault, the district had a monitor on her school bus due to her inability to verbally communicate. The district removed the monitor for financial reasons (raising issues under IDEA concerning FAPE). After the removal, the girl was sexually assaulted every day over the course of two weeks. The court held that the mother had provided "a constellation of factors" that showed deliberate indifference by the district in violation of Title IX.

This more expansive take on what constitutes actual knowledge and deliberate indifference also can be seen in a recent United States Court of Appeals for the Sixth Circuit opinion related to a female freshman student who was subjected to unwelcome sexual acts in the stairwell at her school and another freshman student at a different school in the same district who was led to the bathroom by a male

101. Grimm v. Gloucester County School Board, 972 F.3d 586 (4th Cir. 2020).

102. I.M. v. Houston Indep. Sch. Dist., No. H-20-3453, 2021 WL 2270271, at *3–4 (S.D. Tex. 2021).

103. Doe v. Fulton Cnty. Sch. Dist., No. 1:20-cv-00975-AT, 2021 WL 1105617, at *4 (N.D. Ga. 2021).

student who pressured her into performing a sex act.[104] The plaintiffs alleged liability for the district's action and inaction both before and after the incidents, asserting that the district had a widespread problem of sexual harassment in its schools. The court found over 950 instances of sexual harassment in the district preceding the harassment of Doe 1 and 2.

The Court adopted the United States Court of Appeals for the Ninth Circuit's test as it pertains to pervasive misconduct, stating that a student must show that: 1) the school maintained a policy of deliberate indifference to reports of sexual misconduct, 2) which created a heightened risk of sexual harassment that was known or obvious, 3) in a context subject to the school's control, and 4) as a result the plaintiff suffered harassment that was "so severe, pervasive and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by [the] school."[105] Then the court found that a deliberate indifference to a pattern of student-on-student sexual misconduct which leads to sexual misconduct against the plaintiff satisfies the test. In the instant case, the facts also showed that no one informed the superintendent of schools about the Doe 1 and 2 incidents, and were not referred to a Title IX coordinator or provided any information about any steps that the school would take to address the consequences of the incidents. Importantly, the court noted that any "same victim" requirements that apply at the University level did not apply at the elementary and secondary level because these schools have more authority and control over their students.

Just as these court cases started to make litigation appear more feasible for families seeking individual monetary relief for the harms to their children, on the eve of Title IX's 50th anniversary the Supreme Court made monetary recovery even more difficult. In a little-discussed recent decision, *Cummings v. Keller Premier Rehab*,[106] the Supreme Court eliminated damages under Title IX for emotional distress.[107] The Supreme Court found that plaintiffs suing for discrimination under various civil rights laws cannot win any monetary awards for emotional suffering.[108] The primary harm victims of sexual assault and harassment most often suffer is not economic. Instead, they suffer from depression, anxiety, stress-related nervous system problems (e.g., headaches and digestive problems) and a long-

104. Doe *ex rel.* Doe #2, 35 F.4th 459, 462 (6th Cir. 2022).
105. *Id.* (citing Karasek v. Regents of the University of California, 956 F. 3d 1093 (9th Cir. 2020)).
106. 142 S. Ct. 1562 (2022).
107. Cummings v. Premier Rehab Keller. P.L.L.C., 142 S. Ct. 1562 (2022).
108. *Cummings*, 142 S. Ct. at 1570.

lasting feeling of betrayal by institutions, like schools, that were supposed to protect and help them.[109]

Jane Cummings, who is deaf and legally blind, sought physical therapy services from Premier Rehab Keller ("Premier") and asked them to provide an American Sign Language ("ASL") interpreter at her sessions.[110] They refused, and she sued alleging this failure constituted discrimination on the basis of disability in violation of Section 504 and the Affordable Care Act ("ACA"), which Premier was subject to as a recipient of federal financial assistance. The injuries Ms. Cummings was able to show were emotional in nature. The district court and the Fifth Circuit held that damages for emotional harm are not recoverable in private actions under either of these statutes. The Supreme Court affirmed, extending its holding to all Spending Clause actions. The Supreme Court held that a particular remedy is available in a private Spending Clause action only if the funding recipient is on notice that by accepting federal funding, it exposes itself to liability of that nature.[111] The Court expressly noted that neither Title VI, Title IX, Section 504, nor the ACA expressly provides victims of discrimination a private action to sue.[112] While acknowledging that in the case of Title VI and Title IX complaints, they have found an implied right of action and have confirmed that monetary damages were available, the Court said that those decisions did not describe the scope of appropriate relief. Turning to the nature of Spending Clause statutes (those that condition federal funding on a promise not to discriminate), the Court stated these are essentially contractual relationships.[113] Traditionally, compensatory damages are available and punitive damages are not.[114] "It is hornbook law that 'emotional distress is generally not compensable in contract.'"[115] Ms. Cummings unsuccessfully argued that the special rule for recovery of emotional disturbance is allowed when the breach is of such a kind that a serious

109. Kate Fogarty, *Teens and Sexual Harassment*: *Making a Difference*, UNIV. OF FLA. IFAS EXTENSION (2014), https://smartcouples.ifas.ufl.edu/media/smartcouplesifasufledu/docs/pdfs/Teens-and-Sexual-Harassment---Making-a-Difference.pdf; *see also* Jamie Ducharme, *Any Type of Sexual Harassment Can Cause Psychological Harm, Study Says*, TIME (Nov. 9, 2017), https://time.com/5017072/sexual-harassment-psychological-damage/; Rachel Rettner, *6 Ways Sexual Harassment Damages Women's Health*, LIVE SCIENCE (Nov. 9, 2011), https://www.livescience.com/16949-sexual-harassment-health-effects.html.

110. *Cummings*, 142 S. Ct. at 1566.

111. *Id.* at 1572 (citing Barnes v. Gorman, 536 U.S. 181, 187 (2002)).

112. *Id.* at 1569.

113. *Id.* at 1570.

114. *Id*. at 1571 (citing *Barnes* 536 U.S. at 187).

115. *Id*. at 1571 (citing R. LAYCOCK & R. HASEN, MODERN AMERICAN REMEDIES 216 (5th ed. 2019)).

emotional disturbance was a particularly likely result.[116] *Cummings* illustrates yet again the importance of Title IX regulations and enforcement provisions of the Office of Civil Rights in securing any relief under Title IX.

D. TITLE IX 2022

President Biden took office in January of 2021, and in early March of that year he issued Executive Order 14021 stating that U.S. policy is that all students should be free from discrimination on the basis of sex, including sexual orientation or gender identity. He ordered a review of all existing regulations that may be inconsistent with the policy and specifically ordered a review of Title IX.[117] In June of 2021, the Office of Civil Rights ("OCR") published notice in the Federal Register that, on the basis of the *Bostock* decision, it would be interpreting "discrimination on the basis of sex" to include discrimination on the basis of sexual orientation and gender identity.[118] A rewrite of Title IX regulations ("Proposed Title IX 2022")[119] was released for public comment by the Biden Administration on June 23, 2022, Title IX's 50th anniversary.[120]

Under Proposed Title IX 2022,[121] there is a balancing of the pendulum–the proposed regulations do not fully re-embrace the various guidance letters issued during the Obama Administration and repealed by the Trump Administration, but they do make very specific changes that broaden protections.[122] The most prominently discussed is the definition of sexual harassment. Proposed Title IX 2022 changes the term "sexual harassment" to "sex-based harassment" which is defined as harassment on the basis of stereotypes, sex char-

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116. *Id.* at 1572.

117. *See* Establishment of the White House Gender Policy Council, 86 Fed. Reg. 13,797, 13,803, 13,804 (March 22, 2021).

118. Office for Civil Rights, Department of Education, 86 Fed. Reg. 32,637 (June 22, 2021) (to be codified at 34 C.F.R. ch. 1).

119. 87 Fed. Reg. 41390 (July 12, 2022).

120. Press Release, U.S. Dep't Educ., The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

121. *See* Jeremy Bauer-Wolf, *The Public Comment Period for Biden's Title IX Proposal is Over. What's Next?*, HIGHER ED. DIVE (Sept. 15, 2022), https://www.highereddive.com/news/the-public-comment-period-for-bidens-title-ix-proposal-is-over-whats-nex/631847/. The 60-day period for accepting public comments on the new draft regulations closed September 2022. *Id.* It garnered more than 200,000 comments. *Id.*

122. *See Summary of Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf.

acteristics, pregnancy or related conditions, sexual orientation, and gender identity that is:

> *quid pro quo* (explicitly or impliedly conditioning the provision of an aide, benefit, or service under the recipient's education program or activity on a person's participation in unwelcome sexual conduct);
>
> *Hostile environment harassment* (*i.e.*, unwelcome sex-based conduct that is sufficiently severe and pervasive to deny or limit a person's ability to participate in or benefit from the recipient's education program or activity); or
>
> A *specific offense*, such as sexual assault, dating violence, domestic violence, or stalking.[123]

The changes in Proposed Title IX 2022 are extensive, expanding the scope of sex-based discrimination, requiring changes based on constructive (as opposed to actual) knowledge, broadening reporting requirements, and creating two grievance processes, one covering all complaints under Title IX and another with added requirements that are applicable just to post-secondary students.

Note first the change in the language around "pervasiveness." Current Title IX 2020 requires something to be "so severe" that it "effectively denies equal access." Proposed Title IX 2022 adopts a more expansive approach and requires something to be "sufficiently severe" to "deny or limit" the ability to participate. Proposed Title IX 2022 also expands the "where"—e.g., Current Title IX 2020 does not require a school to address a hostile environment in its programs if the hostile environment results from harassment that happens outside of the activity. Proposed Title IX 2022 requires all hostile environment claims to be addressed, even if the actual "harassing" is occurring elsewhere. Proposed Title IX 2022 also requires investigation of all sex discrimination complaints, not just those that are considered "formal" complaints (as is the case under Current Title IX 2020). It also requires schools to offer supportive measures to restore access for any sex discrimination suffered not just sexual harassment, which is all that is covered under Current Title IX 2020. Proposed Title IX 2022 prohibits retaliation against complainants, but also requires schools to protect students from retaliation by other students. Importantly, Proposed Title IX 2022 requires certain employees to notify the Title IX coordinator of conduct that may constitute sex discrimination. Any employee of an elementary or secondary school district that is not a

123. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41569 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

"confidential" employee is so obligated. A school must take prompt and effective action to "end" any sex discrimination as more broadly defined, which requires the Title IX coordinator to take whatever prompt and effective steps are necessary to ensure that sex discrimination does not continue or recur.

Proposed Title IX 2022's prohibition against discrimination extends to pregnant students, who may not be discriminated against or excluded from school based on pregnancy-related conditions (pregnancy, childbirth, false pregnancy, and termination of pregnancy or recovery therefrom).[124] While pregnancy itself has not been traditionally defined as a disability, Proposed Title IX 2022 would give significant protections to pregnant students, and the proposed regulations note that specific pregnancy-related conditions may initiate a duty to provide Section 504 supports. The United States Department of Education gives the example of Student A telling her high-school teacher that a classmate, Student B, is home on bed-rest due to pregnancy-related high blood pressure as a situation that could obligate the school district to evaluate the student for Section 504 protections.[125]

For the first time since the enactment of Title IX in 1972, Proposed Title IX 2022 addresses requirements for responding to alleged sex discrimination involving a student with a disability, either as a complainant or as a respondent. It defines a student with a disability by referring to Section 504 and IDEA.[126] The Federal Register discussion states:

> [S]upportive measures that address the harassment's effects in relation to a student's disability may require tailoring in ways that may not be obvious to a Title IX Coordinator. In addition, in cases in which students with disabilities are respondents, care must be taken that any supportive measures are adopted with an awareness of how they might impact the students' equal access to the recipient's education program or activity. Similarly, the rights of students with disabilities . . . may preclude or require tailoring of otherwise appropriate supportive measures or emergency removals, or for students found responsible for sex-based harassment, disciplinary sanctions.[127]

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124. Title IX 2022 updates the definition of "pregnancy or related conditions" to include pregnancy, childbirth, termination of pregnancy or lactation; medical conditions related to same; and recovery from same or their related medical conditions.

125. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 n. 10 (July 12, 2022) (to be codified at 34 C.F.R. pt 106).

126. *Id.*

127. *Id*. at 41430.

Unfortunately, despite this recognition, the only actual requirement in Proposed Title IX 2022 is coordination between the school district Title IX coordinator and the student's IEP or Section 504 team to ensure compliance with each law throughout the Title IX grievance process.[128] While this is an important first step, it is merely that–so much more needs to be provided, and in some cases, earlier protections were stronger. For example, previous guidance, now rescinded and not replaced, noted that students with disabilities require additional support throughout a Title IX situation, Proposed Title IX 2022 just says that the Title IX coordinator should provide such individuals with information about available resources. Proposed Title IX 2022 does not discuss how a participant with disabilities is entitled to accommodations such as a sign language interpreter, putting investigation questions into writing, or a quiet room for an interview or extra time to review evidence.

Conflicts between Proposed Title IX and IDEA endure. Compare Proposed Title IX 2022 obligations with IDEA rights and student discipline protections. Proposed Title IX 2022 requires establishment by districts of "reasonably prompt timeframes" for grievances, whereas IDEA has a strict timeframes within it's due process protections. Proposed Title IX 2022 allows districts to implement supportive measures for victims that burden the accused during the pendency of a grievance, provided they are not "punitive" and that they are "no more restrictive than necessary to restore or preserve a complainant's access to the education program or activity." IDEA prohibits student change of placement (which includes different programming) if it alters schooling in the "least restrictive environment," and permits "stay put" in disputes over placement. IDEA also requires manifestation determinations when a student is excluded from educational programming for more than ten non-consecutive days (including moving the student to in-school detention). States are permitted to create specific complaint procedures for violations of IDEA. States also create and enforce student discipline laws. Proposed Title IX 2022 eliminates references to state or local law, clarifying that all Title IX regulations preempt state or local law, although permits state or local law that provides "greater protections against sex discrimination."[129] State student discipline laws may prohibit suspension or expulsion for sexual assault unless a complaint has been filed by a prosecutor in a court of competent jurisdiction and limiting the definition of sexual assault to terms in its criminal code to combat racism.[130] Under Pro-

128. *Id*. at 41439-40.
129. *Id*. at 41404.
130. *See, e.g*., NEB. REV. STAT. § 79-267(9) (Reissue 2014).

posed Title IX 2022 these protections for one purpose may be perceived as "lesser" protections for another purpose, and thus usurped by Title IX.

Proposed Title IX 2022 does nothing to resolve these competing interests, in fact exacerbating them needlessly in some instances. The result is a merry-go-round of litigation. For example, in 2019, a male high school student ("AB") in Palo Alto, California, with significant pragmatic speech impairments (diagnosed with Autism Spectrum Disorder), sexually harassed a female high school student ("CR").[131] A child on the spectrum often has social communication challenges and difficulty reading social cues and understanding interpersonal space. In 2021, the CDC reported that 1 in 27 boys are identified with ASD and 1 in 116 girls are so identified.[132] CR filed a Title IX complaint, and AB was removed from the school's robotics team that CR also participated in.[133] The mother of AB sued, claiming that his special education rights under IDEA were violated. IDEA requires that students with disabilities be permitted to engage in academics and extracurriculars if this is possible when supports are provided, and prohibits discipline for manifestations of disability. AB's mother argued in court that with additional support her son could successfully participate in robotics and argued that his texts and comments to CR were a manifestation of his disability. The school district settled with AB's family and reinstated him on the robotics team. CR's family then sued to order the school district to reinstate the ban.[134] Permitting AB to remain on the team can create an ongoing hostile environment for CR, colliding directly with CR's right to be free from harassment. This situation appears to have been privately resolved and the matters dismissed.

The complaints of a paraprofessional working with a child with disabilities further illustrates "the difficult balance that schools must find between ensuring all students have access to a public-school education while simultaneously maintaining a nonhostile work environment . . . ."[135] In *Webster v. Chesterfield County School Board*,[136] an eight-year old student with Down syndrome and Attention Deficit

131. Elena Kadvany, *District Flipped Sides in Gunn Sexual Harassment Case*, PALO ALTO WEEKLY (Feb. 11, 2019, 8:48 AM), https://www.paloaltoonline.com/news/2019/02/11/district-flipped-sides-in-gunn-sexual-harassment-case.

132. *Autism Statistics and Facts*, AUTISM SPEAKS, https://www.autismspeaks.org/autism-statistics-asd (last visited Feb. 4, 2023).

133. Kadvany, *supra* note 131.

134. Elena Kadvany, *Harassed Teen Seeks Court Order to Ban Ex from Robotics Team*, PALO ALTO WEEKLY, (Jan. 30, 2019, 3:22 PM), https://www.paloaltoonline.com/news/2019/01/30/harassed-teen-seeks-court-order-to-ban-ex-from-robotics-team.

135. Webster v. Chesterfield County School Board*, No. 21-1545* (4th Cir. 2022).

136. 38 F.4th 404 (4th Cir. 2022).

Hyper Activity Disorder put his hands up the dress of his paraprofessional and touched her private areas on a frequent basis.[137] After she repeatedly complained, she was temporarily assigned to a different classroom, but after a couple of weeks, was reassigned to work with the same student. When the touching occurred yet again, she was limited and ultimately completely removed from exposure to the student. Thereafter, she sued, alleging that she was subject to a sexually hostile work environment under Title VII of the Civil Rights Act of 1964.[138] The school district defended itself through expert testimony that the student "was incapable of distinguishing between sexes," could not form sexual intent, and that his behavior was driven by his disabilities.[139] In the context of Title VII, while the court was sympathetic to the paraprofessional's discomfort, it noted that the school board's balancing of a non-hostile environment while ensuring the child's access to education was reasonable. Would the Court have come to the same conclusion under Title IX, had the touching been suffered by another student?

III. PROPOSED REMEDIES

Sexual violence in K-12 schools is increasing. In 2017-18 (the latest reporting from the United States Department of Education) there were 14,938 reported incidents, representing a fifty-five percent increase from 2015-16.[140] The Chicago Public Schools reports a post-pandemic rise in sexual electronic communication, grooming, dating violence, sexual bullying, and sexual assault.[141] Sexual violence increases the possibility that an individual will acquire a disability, particularly trauma-induced mental illness.[142] More students are being diagnosed or verified with disabilities, many of them "invisible" (Attention Deficit Hypersensitivity Disorder, Oppositional Defiant Disorder Depression, Anxiety, Bi-Polar, etc.). Social media increases the capacity for creation of sexual harassment and hostile school environments. With the broader scope of protections and the requirement that Title IX grievance procedures be used for any information about

137. Webster v. Chesterfield Cnty. Sch. Bd., 38 F.4th 404 (4th Cir. 2022).

138. *Webster*, 38 F.4th 404.

139. *Id*.

140. *2017–18 Civil Rights Data Collection Sexual Violence in K-12 Schools Issue Brief*, U.S. DEP'T OF EDU. OFFICE FOR CIV. RTS.

141. Nader Issa, *CPS Sex Misconduct Allegations Return to Pre-pandemic Levels*, CHI. SUN TIMES (Aug. 24, 2022, 4:15 PM), https://chicago.suntimes.com/education/2022/8/24/23320645/cps-sexual-misconduct-reports-chicago-public-schools-covid.

142. Vilissa Thompson et. al., *Sexual Violence and the Disability Community*, THE CTR. FOR AM. PROGRESS (Feb. 12, 2021), https://www.americanprogress.org/article/sexual-violence-disability-community/.

sex discrimination, a much larger number of complaints concerning behavior of children with disabilities is likely.

More significant protections are necessary through statutes and regulation, and these protections must more thoroughly address the rights of students with disabilities whether they are a victim or a perpetrator of sexual harassment.

First, Congress should consider amending civil rights laws to allow damage awards for emotional distress. There is significant support for this in the "court of public opinion" as seen in the intense and ongoing #MeToo movement. Compensatory damages can only be made as part of a regulatory determination that a school district has intentionally violated Title IX[143] and the Office for Civil Rights can only enter resolutions that are consistent with the applicable statutes and regulations. Therefore, whether it is a private right of action or an investigation by administration, an avenue must be created to remedy the significant mental and emotional distress that accompanies a student being raped or otherwise sexually assaulted or harassed, especially in an elementary or secondary school setting. It is only when the penalty for failure is high that serious efforts to remedy pervasively hostile environments for children will be taken.

Second, Title IX regulations should contain requirements to accommodate the needs of students with disabilities who have been accused throughout the entirety of a Title IX investigation, including standards for "notice" when provided by students with disabilities, and accommodations in complaint procedures for both victims and perpetrators of sexual harassment who have disabilities, such as: ensuring the availability of translators and interpreters; scribes, text to speech and speech to text; written procedures that are leveled to a reader's capacity; more time to respond to allegations; and the right to have advocates speak on behalf of the student, among other things.

Third, greater care and deliberation must be outlined in Title IX regulations concerning the balancing of legal frameworks so that families and school districts are not left to a Title IX coordinator's understanding of "reasonable," or the public pressure of the coordinator's employer to take a stance that may not be appropriate, knowing that either the victim or the perpetrator does not have the capacity to navigate the complex, nuanced, and conflicting conflagration of laws. The regulations should require more than consultation, but rather that Title IX coordinators and Special Education Individualized Education Program teams should work in complete tandem anytime sexual harassment involves a child with a disability.

143. Alexander v. Sandoval, 532 U.S. 275 (2001).

Fourth, school districts tend to look at anything involving a child with a disability under the lens of IDEA or Section 504. Special education staff receive little or no training on Title IX, the two areas are siloed. Therefore, principals and teachers are likely to approach sexual assault or harassment of, or by, a child with a disability as solely subject to local special education and student discipline law. IDEA regulations should be modified to include the same "crosswalk" with Title IX that Title IX has for IDEA. Every teacher and administrator needs to be trained on the intersection of Title IX and IDEA, and every school district needs to provide staff and families with procedures for due process and/or grievances under each law.

Fifth, while there is an intersection between IDEA and Title IX, it must be made clear in regulation that the "exhaustion of remedies" requirements of IDEA are not applicable when the situation is one of sexual harassment, even though the child or children involved have disabilities.

Sixth, much greater clarity needs to be provided through federal guidance on the definition of consent, the definition of unwelcome conduct, and how a student's mental capacity, or lack thereof, factors into decisions made in the investigation of sexual harassment.

IV. CONCLUSION

Title IX and special education laws have been colliding for years. The United States Supreme Court has made appropriate recovery for sexual harms suffered by students with disabilities nearly impossible. Therefore, without statutory changes, administrative action pursuant to Title IX regulation remains the seawall protecting our most vulnerable children. The stripping of enforcement capacity by tying it to the high bar set by the Supreme Court in individual actions for recovery of monetary damages in 2020 has inoculated school districts against accountability while at the same time elementary and secondary schools have become more violent and dangerous for all children. Political rhetoric and the mainstreaming of disputes over the meaning of "sex" and discrimination on the basis thereof has created regulatory whiplash frustrating law enforcement, school districts, and families alike. The latest proposed regulatory iterations of Title IX in 2022 takes a significant stride forward as the more extensive interpretations of discrimination will once again allow the Office for Civil Rights to protect children through administrative investigation and agreements. The new proposed regulations' recognition of the interrelationship between Title IX sexual harassment protections and protections on the basis of disability pursuant to Section 504 and the IDEA is a start, but far from a satisfactory finish.