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October 1, 2019

The Honorable Ronald D. Kouchi
Senate President
415 South Beretania Street
Hawaii State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Scott K. Saiki
Speaker, House of Representatives
415 South Beretania Street
Hawaii State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Kouchi and Speaker Saiki:

Subject: *The Complexities of Enforcing Title IX and Related Laws: Past History, Current Status, and Future Directions*

We are pleased to inform you that an electronic copy of the Bureau's latest publication: *The Complexities of Enforcing Title IX and Related Laws: Past History, Current Status, and Future Directions,* which was prepared in response to Act 110, Session Laws of Hawaii (2018), has been transmitted to you via the Legislature's web-based application.

For your convenience and immediate access, we have enclosed a PDF attachment of this report. In addition, an electronic copy of the report should be available on the Bureau's Library website within forty-eight hours.

We expect to print a limited number of hard copies, which will be available from the Bureau's Library once a printer has been selected and the copies have been printed and delivered.

We hope this publication will be of assistance to you and your staff. If you have any questions or require further assistance, please contact Rina Chung by phone at 587-0666 or by email at r.chung@capitol.hawaii.gov.

Title IX Study

Very truly yours,

C A Carter-Yamauchi

Charlotte A. Carter-Yamauchi
Director

jl
Attachment
ec: Senators
Representatives

THE COMPLEXITIES OF ENFORCING TITLE IX AND RELATED LAWS: PAST HISTORY, CURRENT STATUS, AND FUTURE DIRECTIONS

Primary Researcher:

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Report No. 2, 2019

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FOREWORD

This report was prepared in response to Act 110, Session Laws of Hawaii 2018 (House Bill No. 1489, H.D.1, S.D. 2, C.D. 1 (2018)), which directed the Legislative Reference Bureau to conduct a study of existing Title IX enforcement practices and procedures, including a review of related state laws prohibiting discrimination on the basis of sex.

The Bureau acknowledges and would like readers to note that this report is a product of the work of not only the Primary Researcher, but of other current and former Bureau research staff such as Matthew Coke, Lance Ching, Raya Salter, and others.

The Bureau extends its appreciation to all those who generously provided information and assistance in the preparation of this report.

Charlotte A. Carter-Yamauchi
Director

October 2019

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EXECUTIVE SUMMARY

Scope of the Study

This report is in response to Act 110, Session Laws of Hawaii 2018 (Act 110), requiring the Legislative Reference Bureau (Bureau) to "conduct a study of existing Title IX enforcement practices and procedures on the federal level and in other jurisdictions," and to provide findings and recommendations, including proposed legislation, on "an appropriate enforcement mechanism" for the state corollary to Title IX of the federal Education Amendments of 1972, 20 United States Code §1621 *et seq.* (Title IX), which was established by Act 110. Specifically, Act 110 required the study to include:

- A detailed review of enforcement entities responsible for overseeing the investigation and adjudication of complaints under Title IX and related state sex discrimination laws;

- An examination of issues related to service and standing for bringing applicable complaints;

- A review of the various remedies for violation that may be available to an aggrieved party, including alternative dispute resolution, injunctive relief, and civil damages; and

- An examination of any potential inconsistencies between multiple state and federal compliance mandates and regulatory schemes.

The Bureau has endeavored to provide the reader with a firm understanding of the impetus for the Title IX law, the law's impact on education, developments in the law's interpretation and application over the years, recent issues that have arisen in federal and state enforcement of the law, anti-discrimination policies administered by the Hawaii Department of Education and the University of Hawaii System for their respective campuses, attempts by other states to implement a state corollary to Title IX in their respective jurisdictions, and necessary considerations with respect to meaningful enforcement of a Hawaii state corollary to Title IX.

Overview of Title IX

Title IX is a federal law that prohibits sex-based discrimination in any federally-funded educational program. The law protects against discrimination on the basis of sex in many contexts found in an educational setting, including student recruitment and admission, educational programs and activities, and employment. Title IX applies to public and private elementary, secondary, and post-secondary schools and any education or training program that receives federal funding (recipient institution). The law provides protection to students, their parents and guardians, and employees of a recipient institution. Further, the federal courts have held that sexual harassment and sexual assault also constitute sex-based discrimination

prohibited by Title IX. Federal court decisions have further interpreted Title IX to hold schools liable for incidents of teacher-on-student sexual harassment and student-on-student sexual harassment, as well as retaliation against individuals for reporting incidents of harassment.

Title IX Enforcement

Enforcement of Title IX is complex and involves multiple entities at multiple levels in a shifting and dynamic regulatory framework. Enforcement of Title IX has been further complicated by ongoing changes to the guidance adopted by the United States Department of Education (USDOE), and recent policy changes by the current federal administration have led to uncertainty among schools as to whether their existing enforcement efforts will be compliant with newly proposed federal Title IX requirements.

Recipient institutions subject to Title IX are the initial administrators of the statute among their students and staff. At the federal level, the Office for Civil Rights (OCR) of the USDOE and the Civil Rights Division of the United States Department of Justice (USDOJ) oversee compliance by the recipient institutions. Generally, a recipient institution must demonstrate compliance by: conducting a mandatory self-evaluation of its anti-discrimination policies and practices; giving assurances to the USDOE that it will comply with the law's provisions; notifying students, applicants, and employees of its nondiscrimination policy; designating an employee to coordinate Title IX compliance; and adopting internal grievance procedures.

At the federal level, the OCR investigates and resolves discrimination complaints against recipient institutions and provides technical assistance. When violations are found, the OCR seeks to facilitate voluntary compliance by the institution, but the agency may suspend, terminate, or refuse to grant federal financial assistance to the institution when compliance is not achieved. The Civil Rights Division of the USDOJ also has enforcement authority, concurrent with the OCR. The Civil Rights Division generally responds to complaints of Title IX violations that have been forwarded to it by the OCR or received independently from an aggrieved party who wishes to file a complaint.

The OCR provides guidance to recipient institutions through resource materials, question-and-answer documents, or "Dear Colleague" Letters. Such informal guidance serves to assist institutions in implementing Title IX and supplements the requirements of Title IX set forth in the statute itself and in agency regulations. Many of the current policies and procedures used by institutions have been informed by agency guidance. For example, past "Dear Colleague" Letters have shaped institutional practices in selecting qualified Title IX coordinators, facilitating equal opportunities for men's and women's intercollegiate athletics programs, and addressing harassment and bullying. Most notably, a 2011 "Dear Colleague" Letter established many of the practices that recipient institutions currently follow in preventing and responding to complaints of sexual violence and emphasized the agency's attention to the rights of victims. Among other things, the 2011 "Dear Colleague" Letter offered a comprehensive definition of "sexual violence" and described key requirements for responding to reported sexual harassment and sexual violence. A comprehensive 2014 Question and Answer

document provided additional detailed clarification to institutions of their responsibilities when responding to Title IX complaints.

However, in 2017, under the new presidential administration, the USDOJ and the USDOE rescinded much of the previous informal guidance to recipient institutions, and the USDOE announced its intent to adopt new regulations related to the enforcement of Title IX. While the regulation adoption process is pending, the USDOE has issued interim guidance that, among other things: changes the standard for defining sexually harassing conduct, offers institutions the option to apply a lower standard of proof when determining responsibility for violations of the institution's sexual misconduct policy, clarifies that there is no fixed time frame within which an institution must complete Title IX investigations, allows institutions to limit the right to appeal a decision on responsibility or disciplinary sanctions solely to the responding party, and relaxes limitations on an institution's ability to facilitate an informal resolution to Title IX complaints under certain circumstances. Responses to the interim guidance have been mixed, and many institutions have expressed a preference to maintain their current policies after expending significant resources to comply with agency guidance under the previous administration.

New Title IX regulations are expected to make significant changes to the policies and practices that recipient institutions must follow. The period for the public to comment on the proposed regulations closed earlier this year, but is unclear when the USDOE will publish its finalized regulations. Until the USDOE adopts final regulations, it appears that the state of Title IX enforcement will remain in transition.

Title IX Compliance in Hawaii

The University of Hawaii System (UH System) and the Hawaii Department of Education (HDOE) each have respective Title IX enforcement infrastructure in place, including key policies and procedures (some of which simultaneously address other types of discrimination). The OCR initiated compliance reviews for the HDOE in 2011 and for the University of Hawaii at Manoa (UH Manoa) in 2013. Both the HDOE and UH Manoa agreed to address concerns and/or violations identified by the OCR. In response, the HDOE and the UH System each began efforts to strengthen their compliance with Title IX. Some of the planned reforms have yet to be fully implemented as of this writing, such as the proposed HDOE rules that aim to establish Title IX-compliant internal grievance procedures to address discriminatory conduct that targets HDOE students. Although the proposed rules were recently approved by the Hawaii Board of Education, they have yet to be signed by the Governor. Nevertheless, it appears that substantial efforts have been and continue to be made by both the UH System and HDOE to fulfill their obligations under their respective resolution agreements and to implement measures designed to achieve compliance with Title IX.

Title IX Enforcement has Evolved to Focus on Sexual Violence

Recent attention on incidents of sexual harassment, sexual assault, and other forms of sexual violence on campuses has raised concerns over the adequacy of the policies and procedures used by recipient institutions to address these issues. This has led to greater interest in efforts to reduce and prevent sexual violence at post-secondary campuses. Recent state efforts have emphasized clarifying statutory definitions of "affirmative consent" to sexual activity, clarifying the role of law enforcement in investigating reports of sexual assault on campus, clarifying requirements for notating serious conduct code violations on student transcripts, and addressing the role of legal counsel in the campus adjudication process. Analytical reviews conducted by third parties have addressed selected post-secondary recipient institutions' policies and procedures for responding to complaints of sexual violence, including sexual harassment and sexual assault. One review focused on the extent to which procedural due process is provided to protect the rights of students accused of sexual assault. Another review examined more broadly the extent of institutions' compliance with Title IX and the related Clery Act, including Title IX notification requirements, availability of incident reporting options, compliance with the OCR's guidance on disciplinary proceedings, and compliance with mandatory crime reporting under the Clery Act.

State Corollaries to Title IX Vary in Scope and Enforcement

A number of states, including Hawaii, have enacted laws to promote sex or gender equity in education or prohibit sex or gender discrimination in education, sometimes by explicitly conditioning the receipt of state funds on compliance with the state law. This report examines laws of this nature in the following ten states: Alaska, California, Hawaii, Kentucky, Maine, Nebraska, New Hampshire, New York, Rhode Island, and Washington. The Bureau has characterized these laws as "state corollaries to Title IX" based upon the apparent intent and purpose of these laws to prohibit discrimination in education on the basis of sex, even if the language used therein does not closely resemble the language of the Title IX statute and implementing regulations.

The Title IX corollaries of the ten states examined vary significantly in the scope of the institutions that they cover. Five of the states have a single law addressing sex or gender equity in education, four of which cover both K-12 and post-secondary education. The law of the fifth state covers only K-12 education. Two other states each have two separate laws that address sex or gender equity in K-12 education and post-secondary education, respectively. The remaining three states each have three laws, all of which differ with respect to their scope.

The eighteen state laws examined also vary in their coverage of private educational institutions. Seven of the laws examined apply to public (i.e., state-run) schools only. Eight state laws apply to schools that receive state funds, (i.e., the provisions apply to public as well as potentially to private schools). New York is unique among the ten states in that all three of its Title IX corollaries apply to both public and certain private schools, regardless of whether the schools receive state funds.

Most of the state laws examined generally follow one of two different approaches to enforcement responsibility. Eleven of the eighteen state laws examined give authority to a local- or state-level board or executive officer within a school, school board, or state-level education system. Three other state laws enforce their state corollaries wholly or partly through an independent agency. In these states, complaints of gender- or sex-based discrimination are filed with a human rights commission or human rights division that is independent from the agency that runs the respective educational institutions. There are a few state laws that do not clearly fall within these categories. For example, enforcement responsibility of Kentucky's corollary is given to the state agencies that extend state financial assistance to an education program or activity. The statutes establishing two of Hawaii's three state corollaries appear to be silent as to which entity is responsible for administrative enforcement.

Finally, the state laws examined also vary with regard to the right to bring a private right of action. Half of the state laws examined expressly authorize a person who alleges discrimination to bring a private right of action. One state law establishes a private right of action but does not state who has standing to bring an action under the law. Two state laws expressly provide that they do not establish a private right of action. The remaining state laws examined are silent on a private right of action.

Observations and Conclusions

Based upon our findings of the present fluid nature of federal Title IX guidance, the ongoing nature of the reforms being made within Hawaii's public education systems to comply with Title IX and whether these reforms will meet the current federal administration's proposed Title IX requirements, and the existence of varied state Title IX corollary enforcement models, the Bureau makes no specific recommendation at this time on an appropriate enforcement mechanism for Chapter 368D, HRS. However, the Bureau offers the following observations and conclusions for consideration by Hawaii's policy-makers.

Currently, the USDOE is in the process of adopting agency regulations that administer Title IX. Although draft regulations were released for public comment, it is not clear what the final regulations will include or when they will be finalized. Given this uncertainty, it may be prudent to postpone amendments to Hawaii's corollary to Title IX to avoid conflicts between Hawaii's law and the new federal regulations. However, adopting a wait-and-see approach may be less advantageous if there are significant unforeseen delays in the process of adopting new Title IX regulations.

Other states that have enacted laws that parallel Title IX at the state level offer insight into an array of enforcement options.

In creating a Title IX corollary for Hawaii, there are many factors the Legislature may wish to consider, including:

- Given that Chapter 368D, HRS, has an effective date of January 1, 2020, and that an aggrieved party may file a claim for administrative relief from that date, under section 368D-1(f), HRS, the Legislature may wish to consider:

  (1) How to address these potential claims in the absence of an explicit process in place; or

  (2) Whether, in the meantime, the rights of an aggrieved party at a public institution will be sufficiently protected under HDOE's pending, and UH System's recently established, rules, policies, and procedures;

- Specifying clearly the scope of conduct to which section 368D-1, HRS, would apply;

- Clarifying whether enforcement would be based on contractual principles similar to Title IX, under which a recipient institution risks losing funding due to the institution's failure to comply with the law, or whether enforcement would involve a non-financial penalty, such as the issuance of a cease and desist order, imposition of compliance monitoring on the institution, or other equitable remedies;

- Designating or creating an appropriate agency to enforce Chapter 368D, HRS;

- Considering whether clarification is needed to section 368D-1, HRS, to specify whether "student" refers to current, former, and/or prospective students, in light of issues raised in recent federal appellate cases relating to a student's standing to sue a recipient institution;

- Specifying the administrative or judicial remedies or relief that may be granted to aggrieved persons;

- Clarifying the appealability of administrative decisions related to a complaint and other procedures related to appeals;

- Specifying the details of the complaint process, including: the manner in which investigations or hearings would be conducted and by whom; applicable time frames for filing, responding to, investigating, scheduling a hearing on, issuing a decision on, and appealing, a complaint; and the respective rights of complainants and respondents at different phases of the complaint process;

- Clarifying how Chapter 368D, HRS, will be construed in relation to other federal and state anti-discrimination laws if conflicts or inconsistencies arise among those laws;

- Considering whether to require periodic reports to the Legislature by the educational programs and activities that must comply with section 368D-1, HRS;

- If the Legislature deems it appropriate, determining elements of the enforcement process that may be established through the administrative rulemaking process; and

- Conforming the language of existing Hawaii statutes and/or administrative rules with that of section 368D-1, HRS, which specifies that discrimination on the basis of "sex" includes sex discrimination that is based on "gender identity or expression" and "sexual orientation." More specifically, conforming amendments would appear to be necessary to sections 302A-461, HRS, and 302A-1001, HRS.

GLOSSARY OF ACRONYMS

AAC	Alaska Administrative Code
AS	Alaska Statutes
CCR	California Code of Regulations
C.F.R.	Code of Federal Regulations
CMR	Code of Maine Rules
CRCB	Civil Rights Compliance Branch (of the Hawaii Department of Education)
CRD	Civil Rights Division (of the United States Department of Justice)
CTE	Career and Technical Education
EEO	Equal Employment Opportunity Office (of the State of Hawaii)
EEOC	United States Equal Employment Opportunity Commission
EOEA	Equal Opportunity in Education Act (of Nebraska)
EOPEA	Equal Opportunity in Postsecondary Education Act (of Nebraska)
FERPA	Family Educational Rights and Privacy Act
HAR	Hawaii Administrative Rules
HCRC	Hawaii Civil Rights Commission
HDOE	Hawaii Department of Education
HEW	United States Department of Health, Education, and Welfare
HRS	Hawaii Revised Statutes
KRS	Kentucky Revised Statutes
MRS	Maine Revised Statutes
NAAG	National Association of Attorneys General
NASPA	National Association of Student Personnel Administrators
NFEP	Nebraska Fair Employment Practice Act
NPRM	Notice of Proposed Rulemaking
NYCRR	Compilation of Codes, Rules, and Regulations of the State of New York
OCR	Office for Civil Rights
OIE	Office of Institutional Equity (of the University of Hawaii)
OSFSS	Office of School Facilities and Support Services (of the Hawaii Department of Education)
UCP	Uniform Complaint Procedure (of California)
UH	University of Hawaii
UHBOR	University of Hawaii Board of Regents
U.S.C.	United States Code
USDOE	United States Department of Education
USDOJ	United States Department of Justice
VAWA	Violence Against Women Act

Chapter 1

INTRODUCTION

Scope of the Study

Act 110, Session Laws of Hawaii 2018 (Act 110)—the measure that was the genesis for this report—is attached as Appendix A. Specifically, Act 110 requires the Legislative Reference Bureau (Bureau) to "conduct a study of existing Title IX enforcement practices and procedures on the federal level and in other jurisdictions," and to provide findings and recommendations, including proposed legislation, on "an appropriate enforcement mechanism" for the corollary to Title IX of the federal Education Amendments of 1972, 20 United States Code §1621 *et seq*. (Title IX) that was established in state law by Act 110. Hawaii's state law corollary to Title IX (Title IX corollary) is codified in section 368D-1, Hawaii Revised Statutes (HRS), and was amended by Act 177, Session Laws of Hawaii 2019.[1]

Given the complexity of the subject matter studied, the Bureau has endeavored to provide the reader with a firm understanding of the impetus for the Title IX law, the law's impact on education, developments in the law's interpretation and application over the years, issues that have arisen in federal and state enforcement of the law, other states' approaches to enforcing their respective Title IX corollaries, and the many factors to be considered in establishing a detailed enforcement mechanism for Hawaii's Title IX corollary.

Organization of the Study

This section provides a brief overview of the study and describes how it is organized.

Chapter 2 covers the history and background of Title IX of the Education Amendments of 1972 and discusses in detail the law's scope, application, and interpretation.

Chapter 3 provides a detailed review of the federal agencies responsible for overseeing the investigation and adjudication of Title IX complaints and identifies the remedies for violations that may be available to an aggrieved party. Chapter 3 also summarizes the United States Department of Education's (USDOE) proposed changes to the Title IX regulations, which could significantly alter the manner in which educational institutions that receive federal funding pursuant to Title IX (recipient institutions) respond to complaints involving sexual harassment and sexual assault.

[1] Act 177, Session Laws of Hawaii 2019, amended section 368D-1, Hawaii Revised Statutes (HRS), to clarify that certain activities are exempt from the law's prohibition on sex-based discrimination. These exempt activities include the membership practices of social fraternities or sororities and the maintenance of sex-segregated living facilities by an educational institution receiving state funds.

Chapter 4 focuses mainly on the status of Title IX compliance by the Hawaii Department of Education (HDOE) and University of Hawaii System, including respective efforts by these entities to strengthen their compliance.

Chapter 5 provides further information on the specific issue of sexual harassment and sexual assault on college and university campuses, and it highlights some of the ways in which state legislatures and state attorneys general have attempted to address the issue. Chapter 5 also discusses various aspects of post-secondary recipient institutions' policies and procedures for responding to campus sexual violence.

Chapter 6 examines selected laws of other states that are seemingly modeled after Title IX, or that appear to function as state corollaries to Title IX (based on their prohibition against sex- or gender-based discrimination across a wide range of contexts in state-funded education), as well as the enforcement process in each state, including remedies that are available.

Chapter 7 reiterates salient points from earlier chapters and offers several observations and conclusions regarding the timing and framing of an enforcement mechanism for Hawaii's Title IX corollary; varying approaches to enforcing a Title IX corollary, based on the laws of the states examined in Chapter 6; and other considerations relevant to establishing an enforcement mechanism for Hawaii's Title IX corollary. However, for the reasons explained below, Chapter 7 stops short of proposing a specific enforcement approach or mechanism for Hawaii's Title IX corollary.

Limitations of the Study

As of this writing, the USDOE's intended changes to its Title IX regulations, as well as the HDOE's intended changes to its administrative rules relevant to Title IX compliance, have yet to be finalized and may be subject to further changes. In the case of the federal Title IX regulations, an official copy of the proposed regulation changes was published on November 29, 2018, and the original sixty-day public review and comment period was ultimately extended to February 15, 2019. To date, it appears that the federal agency has taken no further official action, but the proposed changes are expected to be finalized sometime in Fall 2019. In the case of the Hawaii Administrative Rules, the HDOE initially proposed rule changes in October 2018 and published a revised version in February 2019 in response to stakeholder feedback. A public hearing on the revised proposal was held on July 16, 2019. In August 2019, the HDOE's proposed rule changes were approved by the Hawaii Board of Education and now await the Governor's approval.

Based upon our findings of the present fluid nature of federal Title IX guidance, the ongoing nature of the reforms being made within Hawaii's public education systems to comply with Title IX and whether these reforms will meet the current federal administration's proposed Title IX requirements, and the existence of varied state Title IX corollary enforcement models, the Bureau makes no specific recommendation at this time on an appropriate enforcement mechanism for Chapter 368D, HRS, and therefore offers no proposed legislation.

Terminology Used

Readers will note that the terms "sexual harassment," "sexual assault," "sexual violence," and "sexual misconduct" appear throughout this report. "Sexual misconduct" appears to be the USDOE's current umbrella term of choice for offenses of a sexual nature, while "sexual violence" appears to have been the preferred term during the immediately preceding federal administration. The Bureau has endeavored to use the terms "sexual misconduct" and "sexual violence" as they appeared in source documents consulted during this study, including official government documents of the different administrations. However, there are instances in this report where the Bureau has chosen to use the more generally understood terms "sexual harassment" and "sexual assault" to denote what appear to be the sexual offenses most often discussed in the Title IX context.

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Chapter 2

HISTORY AND BACKGROUND OF TITLE IX

Part I. Overview

Title IX of the Education Amendments of 1972 (Title IX)[1] "is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity."[2] The primary purpose of the law is to prevent federal funds from being used to support sex-based discrimination and "to provide individual citizens effective protection against those practices."[3] As discussed below, Title IX protects against sex-based discrimination in various contexts found in an educational setting, from recruitment and admission of students, to the provision of education programs and activities, to employment in education programs and activities. As long as a school receives federal financial assistance, all of its programs and operations are subject to Title IX, regardless of whether the programs occur on- or off-campus.[4]

Title IX's comprehensive protections apply to traditional educational institutions, including public and private elementary, secondary, and post-secondary schools, as well as any education or training program that receives federal funding.[5] Moreover, the law protects students, their parents and guardians, and employees of a covered entity.[6]

A. Circumstances Surrounding the Enactment of Title IX

The enactment of Title IX has its roots in the civil rights era. As the citizenry's awareness of social and economic injustices grew, so did their desire to seek greater equality among the sexes. According to the United States Department of Justice, "[a]s the women's civil rights movement gained momentum in the late 1960's and early 1970's, sex bias and

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[1] Title IX of the Education Amendments of 1972, 20 United States Code (U.S.C.) §1681 *et seq*.
[2] *Overview of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq.*, United States Department of Justice, *available at* https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq (last visited September 28, 2018).
[3] *Id*.
[4] *See Frequently Asked Questions About Sex Discrimination,* Office for Civil Rights, United States Department of Education, *available at* https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html (last visited September 29, 2018).
[5] *See Overview of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681* et seq., *supra* note 2. Examples of education or training programs that receive federal funding and must therefore comply with Title IX include: (1) a boater education program sponsored by a county parks and recreation department that receives funding from the United States Coast Guard; (2) state and county level courses in disaster planning that are funded by the Federal Emergency Management Agency (FEMA); and (3) vocational training for inmates housed in a facility that receives financial assistance from the United States Department of Justice. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Common Rule, 65 Fed. Reg. 52857, 52859 (August 30, 2000), *available at* https://www.govinfo.gov/app/details/FR-2000-08-30/00-20916.
[6] *See Frequently Asked Questions About Sex Discrimination, supra* note 4.

discrimination in schools emerged as a major public policy concern."[7] Americans, more cognizant of the effects of sex-based discrimination in the workplace, were becoming interested in addressing sex-based discrimination in the education system and its effect on the achievements of women and girls.[8]

Before the enactment of Title IX, women faced systemic discrimination in education, as seen in the form of admission quotas, more stringent test score and grade requirements, less access to scholarship funding, exclusion from stereotypically "male" programs such as medicine, more difficulty obtaining faculty tenure, exclusion from faculty clubs, and more.[9] In 1970, only eight percent of women, versus fourteen percent of men, aged twenty-five and older were college graduates.[10] By comparison, in 2016, that figure was thirty-three percent for both women and men.[11]

Intending to address these disparities, Congress held a series of hearings in the summer of 1970 to examine discrimination against women.[12] These hearings led to the introduction of bills in 1971 and 1972 that sought to prohibit sex discrimination in education, with the 1972 effort ultimately succeeding.[13] President Richard Nixon signed the Title IX legislation into law on June 23, 1972.[14] Hawaii's own Patsy Mink, the first female United States Representative of color, was a strong supporter of this effort, along with Oregon representative Edith Green and Indiana senator Birch Bayh.[15] After Mink's death in 2002, Title IX was officially renamed the Patsy T. Mink Equal Opportunity in Education Act.[16]

B. Scope and Application of Title IX

The key provision of Title IX states, with certain exceptions, that "[n]o 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

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[7] *Title IX Legal Manual*, Civil Rights Division, United States Department of Justice, January 11, 2001, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/ixlegal.pdf (last visited August 13, 2018), at 16.
[8] *See id*.
[9] *See Equal Access to Education: Forty years of Title IX*, United States Department of Justice, June 23, 2012, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf (last visited August 13, 2018), at 2.
[10] *See Rates of High School Completion and Bachelor's Degree Attainment Among Persons Age 25 and Over, By Race/Ethnicity and Sex: Selected Years, 1910 Through 2016*, National Center for Education Statistics, Digest of Education Statistics: 2016, Table 104.10, *available at* https://nces.ed.gov/programs/digest/d16/tables/dt16_104.10.asp (last visited September 11, 2018).
[11] *See id*.
[12] *See Title IX Legal Manual*, *supra* note 7, at 16-17.
[13] *See id*. at 17-19.
[14] *See id*. at 19.
[15] *See id*. at 17-19. *See also* Kristina Chan, *The Mother of Title IX: Patsy Mink*, Women's Sports Foundation, April 24, 2012, *available at* https://www.womenssportsfoundation.org/education/mother-title-ix-patsy-mink/, and *Title IX - The Nine*, American Civil Liberties Union, *available at* https://www.aclu.org/other/title-ix-nine (last visited September 11, 2018).
[16] *See The Mother of Title IX: Patsy Mink* and *Title IX - The Nine*, *supra* note 15.

financial assistance[.]"[17] "Federal financial assistance" includes funds for facility construction or repair; scholarships, loans, or other funds paid to or on behalf of students; the provision of services of federal personnel; sale or lease of federal property "for the purpose of assisting the recipient;" and contracts that provide assistance to an education program or activity.[18] Federal Title IX regulations use the term "recipient" to refer to an entity that operates an education program or activity that receives federal financial assistance.[19] For clarity and consistency, this report will use the term "recipient institution," whenever possible, to mean recipients of Title IX funding that are educational institutions unless the term is specifically indicated to include other entities whose primary mission is not educational, but who operate an educational program or activity. "Program or activity" includes, among other things, the operations of a state or local government agency or of a post-secondary educational institution.[20]

Other provisions of the Title IX law include the following:

- Each federal department and agency that extends federal financial assistance to any education program or activity is required to issue rules, regulations, or orders that effectuate the law's prohibition on sex discrimination in education programs and activities. Failure to comply with any such requirements adopted by a department or agency may result in termination or denial of federal financial assistance. Any action taken by a federal department or agency to effectuate the anti-discrimination provisions of Title IX is subject to judicial review.[21]

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[17] 20 U.S.C. §1681(a). Additionally, subsection (a) of related regulation 34 Code of Federal Regulations (C.F.R.) §106.31 specifies that discrimination on the basis of sex is prohibited under any academic, extracurricular, research, occupational training, or other education program or activity. Readers should be aware that the meaning of the phrase "on the basis of sex" is expected to be addressed by the United States Supreme Court (Court) during oral arguments on October 8, 2019. On that date, the Court is scheduled to hear a trio of cases that collectively raise the question of whether "sex" means biological sex at birth or should be interpreted more broadly to include gender identity and sexual orientation. These three cases involve Title VII, which prohibits employers from discriminating against employees because of race, color, religion, sex, and national origin. However, because federal courts have often looked to Title VII precedents to inform their interpretation of Title IX, the Court's decision in the upcoming cases could significantly affect the meaning of discrimination based on "sex" under Title IX. Furthermore, it has been noted that a broader reading of "sex" could have implications for athletics under Title IX. For example, Title IX's protections could extend to transgender female athletes who are biologically male and request to compete on female-only teams. *See* oral arguments calendar for October 2019, Supreme Court of the United States website, at https://www.supremecourt.gov/ (citing *Bostock v. Clayton County, GA* (17-1618), *Altitude Express, Inc. v. Zarda* (17-1623), and *R.G. & G.R. Harris Funeral Homes v. EEOC* (18-107); Christine J. Back, *Harris Funeral Homes: Implications for Gender Identity and Athletics under Title IX,* Congressional Research Service, August 19, 2019, *available at* https://fas.org/sgp/crs/misc/LSB10342.pdf; and Chapter 2, notes 103 to 105, and accompanying text, *infra*.

[18] *See* 34 C.F.R. §106.2(g).

[19] *See* 34 C.F.R. §106.2(i). According to the Office for Civil Rights of the United States Department of Education, "[i]f any part of a school district or college receives any Federal funds for any purpose, all of the operations of the district or college are covered by Title IX." *Title IX Resource Guide*, Office for Civil Rights, United States Department of Education, April 2015, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf (last visited August 30, 2018).

[20] *See* 34 C.F.R. §106.2(h).

[21] *See* 20 U.S.C. §1682. The procedure for suspending, terminating, or otherwise refusing to grant or continue federal financial assistance to a recipient institution is explained in Chapter 3, notes 78 to 81, and accompanying text, *infra*.

- Title IX protects persons who are blind or who have severely impaired vision from being denied admission in any course of study offered by a recipient of federal financial assistance (but does not require the provision of any special services based on a person's blindness or visual impairment).[22]

- Title IX does not prevent a recipient institution from maintaining sex-segregated living facilities.[23]

While many are aware that Title IX requires parity between men's and women's school athletics programs, the scope of Title IX's protection is broad and encompasses much more. The law and its implementing regulations,[24] often referred to as the "federal Title IX rules," aim to ensure, for example, that male and female students have equal access to classes and academic programs, regardless of the subject matter, which may have been traditionally "male" or "female"; that students are not required to participate in sex-segregated athletic or extracurricular activities without a compelling reason; that applicants for admission to a college or university (post-secondary institution) are not treated differently on the basis of sex for financial aid, student housing benefits, or any other service or benefit provided to students; that athletic scholarships are not disproportionately available to members of one sex but not the other; that applicants for employment at a post-secondary institution are not treated differently on the basis of sex; or that professors are not denied promotion or tenure on the basis of sex. Additionally, court cases that interpret Title IX have expanded the law's protections even further.

Title IX's implementing regulations describe various *contexts* in which sex-based discrimination may be allowed, as well as numerous discriminatory *acts* that are prohibited. Prohibited discriminatory actions in each of the following contexts are summarized as follows:

1. Admission and Recruitment of Students

Certain recipient institutions shall not deny a person admission to the institution on the basis of sex, subject the person to discrimination in the admissions process, or discriminate on the basis of sex in recruiting students. This provision applies to "institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education[,]" but does not apply to public institutions of undergraduate higher education that have "traditionally and continually" from their establishment had a policy of admitting only students of one sex.[25] Prohibited acts include:[26]

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[22] *See* 20 U.S.C. §1684.
[23] *See* 20 U.S.C. §1686.
[24] *See* 34 C.F.R. Part 106 (originally published in the Federal Register, 40 Fed. Reg. 24128 (June 4, 1975)).
[25] *See* 34 C.F.R. §106.15(d) and (e). It should be noted, however, that the admissions policies of traditionally single-sex public colleges have been challenged on Equal Protection grounds. *See Fitzgerald v. Barnstable School Committee*, notes 30 and 66, *infra*, at 257. Private institutions of undergraduate higher education are not explicitly addressed in the prohibition on sex discrimination in the admission and recruitment of students, or in the exemption therefrom.
[26] *See* 34 C.F.R. §§106.21 through 106.23 (Subpart C).

- Giving preference based on a person's sex, applying admission quotas on the basis of sex, or otherwise treating one person differently from another on the basis of sex.

- Using a test or other criterion for admission that has a disproportionately adverse effect on members of one sex, unless, for example, use of the test or criterion is shown to be a valid predictor of success in the education program or activity being offered.

- Applying rules that take into account a person's actual or potential parental, family, or marital status if the rule treats persons differently on the basis of sex.

- Discriminating against a person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom.

- Making a pre-admission inquiry as to an applicant's marital status.

- Giving preference to an applicant on the basis of the applicant's having attended an educational institution or entity that admits students of only or predominantly one sex, if giving such a preference has the effect of discriminating on the basis of sex.

- Recruiting primarily or exclusively at educational institutions or entities that admit students of only or predominantly one sex, if doing so has the effect of discriminating on the basis of sex.

2. Provision of Education Programs and Activities

A recipient institution shall not, on the basis of sex, exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination in any academic, extracurricular, research, occupational training, or other education program or activity that it operates. Prohibited acts include:[27]

- Treating one person differently from another on the basis of sex in determining whether the person qualifies for any aid, benefit, or service that is provided by the recipient institution.

- Providing different aid, benefits, or services, or providing aid, benefits, or services in a different manner, on the basis of sex.

- Aiding or perpetuating discrimination against a person by providing significant assistance to any agency, organization, or person that discriminates

[27] *See* 34 C.F.R. §§106.31 through 106.43 (Subpart D).

on the basis of sex in providing any aid, benefit, or service to students or employees.

- Applying different rules, imposing different fees or requirements, or offering different services or benefits related to housing (but there is no prohibition on providing separate student housing on the basis of sex).

- Providing housing to students of one sex that is, on the whole, disproportionate in quantity to the number of students of that sex applying for such housing, or that is, on the whole, not comparable in quality and cost to housing that is provided to students of the other sex.

- Providing toilet, locker room, or shower facilities to students of one sex that are not comparable to such facilities provided to students of the other sex (but there is no prohibition on providing separate facilities on the basis of sex).

- Providing access to classes and extracurricular activities separately on the basis of sex, or requiring or refusing participation therein on the basis of sex (but certain exceptions are allowed, such as separation of students by sex in physical education classes where a sport involves bodily contact).

- Excluding a person from admission to a vocational education institution on the basis of sex.

- Discriminating on the basis of sex when providing counseling or guidance services to a student or applicant for admission.

- Providing different amounts of financial assistance or applying different eligibility criteria for financial assistance on the basis of sex (but a recipient institution may assist in administering scholarships or other financial aid pursuant to a will, trust, or other legal instrument that requires an award to be made to members of a specified sex, provided that the overall effect of the award of the financial aid does not discriminate on the basis of sex).

- Assisting an agency, organization, or person that makes employment available to the recipient institution's students when the agency, organization, or person discriminates on the basis of sex in its employment practices.

- Providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to students, or spouses, families, or dependents of students, differently on the basis of the student's sex.

- Discriminating against a student, or excluding a student from an education program or activity, on the basis of the student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate separately.

- Excluding a person from participation in, denying a person the benefits of, or treating a person differently from another person in any interscholastic, intercollegiate, club, or intramural athletics program (but a recipient institution may operate or sponsor separate teams for members of each sex where selection for the teams is based on competitive skill or the activity involved is a contact sport).

- Denying equal athletic opportunity for members of both sexes with respect to interscholastic, intercollegiate, club, or intramural athletics.

3. Employment in Education Programs and Activities

A recipient institution, on the basis of sex, shall not exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination in employment, or recruitment, consideration, or selection therefor. This prohibition applies to any term, condition, or privilege of employment, including advertising for a position; the application process; hiring; promotion; award of tenure; demotion; layoff; termination; rate of pay; job assignments and classifications; position descriptions; terms of collective bargaining agreements; the privilege of being granted, and returning from, leaves of absence, pregnancy leave, or leave to care for children or dependents; fringe benefits available by virtue of employment; selection and financial support for training, such as sabbatical or professional development conferences; and employer-sponsored social or recreational activities. Prohibited acts include:[28]

- Limiting, segregating, or classifying applicants or employees in any way that could adversely affect an applicant or employee's employment opportunities or status because of sex.

- Entering into any contractual or other relationship that directly or indirectly has the effect of subjecting employees or students to prohibited discrimination.

- Granting preferences to applicants for employment on the basis of the applicant's having attended an educational institution or entity that admits students of only or predominantly one sex, if giving such a preference has the effect of discriminating on the basis of sex.

- Administering or operating any test or other criterion for any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex, unless, for example, the use of the test or criterion is shown to predict validly successful performance in the position being offered.

[28] *See* 34 C.F.R. §§106.51 through 106.61 (Subpart E).

- Indicating a preference, limitation, specification, or discrimination based on sex in any employment-related advertisement, unless the person's sex is a bona fide occupational qualification for the position being offered.

- Making a pre-employment inquiry of the marital status of an applicant for employment (but a pre-employment inquiry of the sex of an applicant is not prohibited, provided that the inquiry is made equally of applicants of both sexes and if the results of the inquiry are not used to engage in prohibited discrimination).

C. Exceptions to Title IX's Coverage

Title IX and its implementing regulations allow a number of exceptions to the general prohibition against sex-based discrimination.[29] For example, the prohibition does not apply to educational institutions that are controlled by a religious organization whose religious tenets are inconsistent with application of Title IX or that exist primarily to train individuals for military service.[30] Nor does the prohibition affect the membership practices of fraternities and sororities or their scouting groups, or preclude father-son or mother-daughter activities at educational institutions (so long as opportunities provided to each sex are reasonably comparable).[31]

Part II. Court Opinions Interpreting Title IX

Today, Title IX's protections against sex-based discrimination extend beyond what is contained in the enacted statute. The United States Supreme Court, over time, has interpreted the intent and language of Title IX to allow additional remedies to persons aggrieved by intentional violations of the law, such as bringing civil lawsuits and recovering money damages, as well as obtaining other forms of relief.[32] However, it has been some years since the United States Supreme Court issued a significant opinion in a Title IX case. Recent decisions by lower federal courts and state courts, while not "law of the land," may indicate a trend toward greater judicial scrutiny of who may bring a Title IX claim and of the disciplinary procedures used by recipient institutions when adjudicating a complaint of sexual assault.

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[29] *See* 20 U.S.C. §1681(a)(2) through (8).

[30] Notwithstanding the exclusion of military service schools from Title IX's coverage, the single-sex admissions policies of such schools have been challenged as violating the Equal Protection Clause of the United States Constitution. *See Fitzgerald v. Barnstable School Committee*, note 66, *infra*, at 257 (citing *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the men-only admissions policy at Virginia Military Institute violated the Equal Protection Clause)).

[31] *See* 20 U.S.C. §1681(a)(2) through (8). Exceptions also include membership in organizations traditionally limited to persons of one sex, such as voluntary youth service organizations.

[32] Act 110, Session Laws of Hawaii 2018, specifically required the Legislative Reference Bureau to review the remedies available under Title IX. Many of these remedies are discussed in this part.

A. U.S. Supreme Court Cases

1. Ability of a Person Injured by a Violation of Title IX to Sue

Commencing with the enactment of Title IX but prior to the 1979 United States Supreme Court's (Court) decision in *Cannon v. University of Chicago*,[33] it was not clear whether Title IX allowed an aggrieved party to bring a civil lawsuit. In *Cannon*, a female plaintiff alleged that she had been denied admission to the respective medical schools of the University of Chicago and Northwestern University because she was female.[34] According to the lower courts, the plaintiff had no basis for a lawsuit that could be asserted in a federal court.[35] For purposes of reviewing the case, the Court accepted the facts alleged by the plaintiff to be true.[36] The Court held that, although the Title IX statute did not *expressly* authorize a private right of action (the right to bring a lawsuit), there was an *implied* right of action, and the history of Title IX clearly indicated that Congress intended to create such a remedy.[37]

2. Recognition That Sexual Harassment and Sexual Assault Constitute Sex Based Discrimination

Perhaps one of the most significant developments (and one that resonates in the current era of the "Me Too" movement in which victims of sexual harassment and sexual assault have been bringing their experiences to light) was the Court's recognition that Title IX prohibits sexual harassment and sexual abuse in education.[38] In *Franklin v. Gwinnet County Public Schools*,[39] the Court strengthened Title IX's protections by holding that a plaintiff who was a student subjected to sexual harassment and sexual assault by a teacher may seek monetary damages in an action brought to enforce Title IX. Although the plaintiff's school was aware of, and investigated, numerous complaints against the teacher, the school administration took no action to stop the teacher's behavior and discouraged the plaintiff from pressing charges.[40] The Court first noted it had previously held that a supervisor's sexual harassment of a subordinate because of that subordinate's sex constituted discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964.[41] Reasoning that "the same rule should apply when a teacher sexually harasses and abuses a student" as Congress "surely did not intend for federal moneys to

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[33] *Cannon v. University of Chicago*, 441 U.S. 677 (1979).
[34] *See id.* at 680.
[35] *See id.*
[36] *See id.* at n.2.
[37] *See id*. at 683 and 694. Among other things, the Court pointed to the fact that the Title IX statute "explicitly confers a benefit on persons discriminated against on the basis of sex," finding that the plaintiff "is clearly a member of that class for whose special benefit the statute was enacted." The Court further noted that as of the 1972 enactment of Title IX, Title VI of the Civil Rights Act of 1964, upon which Title IX was patterned, "had already been construed as creating a private remedy." *See id*. at 694 and 696.
[38] The Title IX statute and implementing regulations contained no explicit mention of sexual harassment, sexual assault, or any other offenses of a sexual nature.
[39] *Franklin v. Gwinnet County Public Schools*, 503 U.S. 60 (1992).
[40] *See id.* at 63-64.
[41] *See id.* at 75 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64).

be expended to support the intentional actions it sought by statute to proscribe[,]" the Court recognized that sexual harassment and sexual assault also constitute prohibited sex discrimination under Title IX.[42]

3. Wide Range of Remedies Available Under Title IX

The *Franklin* opinion, discussed above, is also noteworthy because it addressed the extent of remedies that are available under Title IX.[43] Up to this point, Title IX had been interpreted to provide only injunctive relief mandating that a recipient institution take a particular course of action to correct the discrimination at issue. In *Franklin*, the Court not only concluded that monetary damages to a plaintiff may be warranted under certain circumstances, but also reaffirmed the general legal presumption that "the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute" unless Congress clearly directed otherwise.[44] After examining the state of the law before and after Title IX's passage, especially amendments made subsequent to the *Cannon* decision, the Court concluded that this presumption was valid because Congress had never acted to limit the remedies available to a complainant in a suit brought under Title IX.[45]

Accordingly, *Franklin* can be viewed as support for the proposition that a court is authorized to impose a wide range of remedies for Title IX violations, including punitive damages.[46] However, subsequent decisions by the United States Supreme Court and Fourth Circuit Court of Appeals appear to cast doubt on whether the award of punitive damages under Title IX is appropriate.[47]

4. Extent of a Recipient Institution's Liability for Teacher-on-Student Sexual Harassment

In *Gebser v. Lago Vista Independent School District*,[48] the Court specifically addressed "the contours" of the liability of a school district for damages under Title IX. In *Gebser*, a police officer discovered a teacher employed by the school district engaging in sexual intercourse with

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[42] *See id*. at 75.
[43] *See id*. at 65.
[44] *See id*. at 70-71.
[45] *See id*. at 71-73.
[46] *See* National Women's Law Center, *Breaking Down Barriers: A Legal Guide to Title IX and Athletic Opportunities*, at 83 (2007) (citing *Ernst v. W. States Chiropractic Coll.*, No. 97-36115, 97-36210, 1999 U.S. App. LEXIS 28500, at *2 (9th Cir. Nov. 1, 1999) (reinstating award of punitive damages)), *available at* https://www.nwlc.org/sites/default/files/pdfs/breaking_down_barriers_2007.pdf.
[47] *See Breaking Down Barriers: A Legal Guide to Title IX and Athletic Opportunities, supra* note 46, at 75, 83 (citing *Barnes v. Gorman*, 536 U.S. 181, (2002) (punitive damages are not available under private suits brought under Title VI of the Civil Rights Act of 1964 [upon which Title IX was modeled], nor under the Americans with Disabilities Act of 1990 or the Rehabilitation Act of 1973, since it is not the appropriate remedy for violations of contractual obligations created by legislation enacted pursuant to Congress' Spending Clause authority), and *Mercer v. Duke Univ.*, 50 Fed. Appx. 643, (4th Cir. 2002) (unpublished opinion) (based on applicability of Title VI jurisprudence to Title IX cases, punitive damages are not available in private actions brought to enforce Title IX)).
[48] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

a female student. Based on the discovery, the teacher was arrested and his employment was terminated.[49] Prior to his arrest, the teacher had initiated and engaged in sexual contact with the same student on multiple occasions during class time, but the student never reported the teacher's conduct to school officials.[50] The school principal was only aware of complaints brought by parents of other students that the teacher had made offensive comments during class.[51] The principal advised the teacher to be careful about future classroom comments and notified the school's guidance counselor.[52] However, the principal did not notify the school district's superintendent, who also served as the district's Title IX coordinator, of the parents' complaints.[53] The student and her mother filed suit against the teacher and the school district alleging violations of state and federal law, including Title IX.[54]

In addressing the extent of the school district's liability, the Court acknowledged that its decision six years prior in *Franklin v. Gwinnett County Public Schools* had not examined this issue in detail.[55] The Court held that damages may be recovered from the school district in a situation involving teacher-on-student sexual harassment only if "an official of the school district 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."[56] The Court, after engaging in a detailed analysis of the congressional intent behind and the contractual nature of the Title IX statute,[57] explained that the Title IX statute "contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice" and that the statute's "express means of enforcement–by administrative agencies–operates on an assumption of actual notice to officials of the funding recipient."[58]

With respect to the "deliberately indifferent" language, the Court explained that a school district's liability for damages would be premised on the school district's failure to respond ("an official decision by the recipient not to remedy the violation") to a violation that had been brought to the attention of an official of the school district.[59] Because the school district was found to have had no actual notice of any wrongdoing by the teacher with regard to a sexual relationship with the plaintiff student, and therefore no opportunity to respond to a formal complaint or act with deliberate indifference thereto, the Court declined to hold the school district liable for damages under Title IX.[60]

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[49] *See id*. at 277-78.
[50] *See id.*
[51] *See id*.
[52] *See id*.
[53] *See id*.
[54] *See id*. at 278-79.
[55] *See id*. at 277 and 281.
[56] *See id*. at 277.
[57] The Title IX statute "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *See id*. at 286.
[58] *See id* at 288. Title IX's administrative enforcement process is explained in greater detail in Chapter 3.
[59] *See id*. at 290.
[60] *See id*. at 291-93.

5. Liability of a Recipient Institution for Student-on-Student Sexual Harassment

The following year, in *Davis v. Monroe County Board of Education*,[61] the Court considered the question of whether a school board may face liability in a private cause of action for damages when a student of a school under the board's jurisdiction sexually harassed a fellow student.[62] Broadening the application of its decision in *Gebser*, the Court held that a school board that receives federal funding under Title IX may be found liable for acts of student-on-student harassment, "but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities."[63] The Court specified, however, that in order to be actionable, the harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit[,]"[64] as opposed to "simple acts of teasing and name-calling . . . even where these comments target differences in gender."[65]

A subsequent case involving student-on-student sexual harassment, *Fitzgerald v. Barnstable School Committee*,[66] is notable for its recognition that Title IX is not the exclusive mechanism for addressing discrimination on the basis of sex in education.[67] In *Fitzgerald*, the United States Supreme Court held that Title IX plaintiffs have additional recourse under 42 United States Code (U.S.C.) §1983 when the discrimination violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (also known as a "section 1983 claim").[68] The Court explained that a section 1983 claim may proceed "parallel and concurrent to" a Title IX claim, even though this separate federal law's scope of protection and standard for establishing liability differ from those of Title IX.[69] In its decision, the Court also referenced the additional "tangible benefits," such as damages, attorney's fees, and costs, that are available to plaintiffs under a section 1983 claim.[70]

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[61] *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).
[62] *See id*. at 633.
[63] *See id*. at 633. The Court explained that "[d]eliberate 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." *See id*. at 644.
[64] *See id*. at 633.
[65] *See id*. at 652 (In this case, a parent filed suit against a county school board and school officials seeking damages for the sexual harassment of her daughter by a fifth-grade classmate. The District Court dismissed Davis's Title IX claims on the ground that Title IX did not provide grounds for a private right of action for student-on-student harassment. The United States Court of Appeals for the Eleventh Circuit affirmed. The Supreme Court, in holding that a student-on-student harassment private right of action was permissible under Title IX, reversed the decision of the Court of Appeals).
[66] *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009) (Parents filed suit under Title IX and 42 U.S.C. §1983 on behalf of their daughter, a kindergarten student who alleged a third-grade male student sexually harassed her on the school bus. The Court of Appeals for the First Circuit ruled that the claims under 42 U.S.C. §1983 were properly dismissed by the District Court because Title IX's implied private remedy was "sufficiently comprehensive" to preclude the §1983 claims. The Supreme Court reversed the decision for the reasons discussed in this paragraph).
[67] *See id*. at 258.
[68] *See id*. at 255-59.
[69] *See id*. Under a section 1983 claim, a plaintiff may sue individuals and certain government entities for a discriminatory act that allegedly resulted from a government entity's custom, policy, or practice.
[70] *See id*. at 254.

6. Liability of a Recipient Institution for Retaliation Against a Teacher Who Protested the Sex Discrimination Experienced by Students

In *Jackson v. Birmingham Board of Education*,[71] the Court faced the question of whether Title IX's implied private right of action covers claims of retaliation for complaints about sex discrimination.[72] In this case, a physical education teacher who also served as the school coach of the girls' basketball team complained to supervisors that the girls' team was being treated unequally with respect to funding and access to athletic equipment and facilities.[73] Instead of receiving a response to his complaints, the teacher received unfavorable performance evaluations and lost his coaching position as well as additional pay that he was receiving for coaching, thus reducing his total earnings.[74] Citing the intentional nature of retaliation and the fact that retaliation involves subjecting a person to differential treatment, the Court held that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action."[75]

B. Appellate (or Lower Court) Cases

1. Uncertainty as to Effect of a Plaintiff's Non-Student Status at the Recipient Institution Being Sued

The right of an aggrieved individual who has been discriminated against with respect to educational programs or activities to sue a recipient institution for violating Title IX has been clearly established.[76] However, one issue that has arisen in federal appellate cases is whether standing to sue is limited to current students of the recipient institution being sued.

In *K.T. v. Culver-Stockton College*,[77] a 2017 case heard by the United States Court of Appeals for the Eighth Circuit (Eighth Circuit), the plaintiff was a sixteen-year-old high school student visiting a college campus as a potential recruit to its women's soccer program. The plaintiff alleged that, during the course of the campus visit, she attended a party at an on-campus

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[71] *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005).
[72] *See id*. at 171.
[73] *See id.*
[74] *See id*. at 171-72.
[75] *See id*. at 173.
[76] *See Cannon v. University of Chicago*, *supra* note 33. *But cf. Seamons v. Snow,* 864 F. Supp. 1111, 1116 (D. Utah 1994), affirmed in part, reversed in part, and remanded, 84 F.3d 1226 (10th Cir. 1996) (high school student's parents did not have standing to assert discrimination claim under Title IX on their own behalf, where they were not students at the school and did not allege that they were discriminated against with respect to educational programs or activities).
[77] *K.T. v. Culver-Stockton College*, 865 F.3d 1054 (8th Cir. 2017).

fraternity house where she was served alcohol and sexually assaulted by a fraternity member.[78] The trial court dismissed the plaintiff's claim because she was not a student of Culver-Stockton College at the time of the incident. The trial court reasoned that, under the standard articulated in the *Davis* case,[79] the school would be liable under Title IX only if its deliberate indifference subjected its *own* students to harassment.[80] On appeal, the Eighth Circuit assumed that the plaintiff's non-student status did not disqualify her from bringing a Title IX harassment complaint but affirmed the trial court's decision, for a technical reason unrelated to the plaintiff's non-student status.[81] Despite the outcome on appeal, this case is significant as an example of a trial court interpreting Title IX in a narrow manner with respect to the class of persons who may bring a private cause of action.

In 2018, the United States Court of Appeals for the First Circuit (First Circuit) decided a case in which the plaintiff's non-student status had a direct bearing on the outcome. The plaintiff in *Doe v. Brown University*,[82] a college student at a school other than Brown University (Brown), reported to local law enforcement authorities that she had been drugged at a local bar, then taken to the Brown campus and sexually assaulted by members of Brown's football team.[83] The trial court decided the case in favor of Brown, concluding that the plaintiff's non-student status at that recipient institution made her ineligible to bring suit under Title IX.[84] The First Circuit affirmed the lower court's ruling, concluding that a cause of action under Title IX is limited to "persons who experience discriminatory treatment while participating, or at least attempting to participate, in education programs or activities *provided by the defendant institution*[.]"[85] (Emphasis in original.) The First Circuit clarified, however, that non-students (such as members of the public attending public lectures or sporting events) might be protected by Title IX if they are among the persons taking part or attempting to take part in the defendant institution's educational program or activity.[86]

Given the inconsistent interpretation between the United States courts of appeals and the absence of Supreme Court precedent on the issue, there is no clear answer as to whether the right to sue under Title IX is limited to current students of a recipient institution.

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[78] *See id.* at 1056.
[79] *See* notes 61 to 65, and accompanying text, *supra*.
[80] *See K.T. v. Culver-Stockton College*, *supra* note 77, at 1056.
[81] *See id.* at 1057. The plaintiff ultimately lost the appeal because the court found that her complaint "failed to state a plausible claim to survive dismissal under Rule 12(b)(6) [failure to state a claim upon which relief can be granted]." *See* Rule 12(b)(6), Federal Rules of Civil Procedure, *available at* https://www.uscourts.gov/sites/default/files/cv_rules_eff._dec._1_2018_0.pdf.
[82] *Doe v. Brown University*, 896 F.3d 127 (1st Cir. 2018).
[83] *See id*. at 128-29.
[84] *See id*. at 129-30.
[85] *See id.* at 132.
[86] *See id*. at 132-33.

2. Concerns over Inadequate Due Process Protections for, and Gender Bias Against, Accused Students

Another issue raised in the federal courts of appeals is the extent to which students who are accused of sexual harassment and are undergoing a recipient institution's disciplinary process are entitled to due process protections. For example, in *Doe v. Baum*,[87] the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) considered the case of a male student (the plaintiff) who alleged that the University of Michigan's disciplinary proceedings against him in a sexual assault complaint violated his due process rights and constituted sex-based discrimination under Title IX.[88] Specifically, the university found, pursuant to an institutional disciplinary proceeding, that the plaintiff was responsible for sexually assaulting a female student at a fraternity party.[89] Faced with the possibility of expulsion, the plaintiff voluntarily withdrew from the university.[90] The plaintiff then sued the university. In concluding that the plaintiff had plausible claims that should be allowed to proceed to trial on the merits, the Sixth Circuit noted the following:

(1) There is a "substantial interest at stake" for students undergoing school disciplinary hearings for sexual misconduct;[91]

(2) The "opportunity to be heard" is the constitutional minimum for due process, and the United States Supreme Court has instructed lower courts to consider "the parties' competing interests" in determining the parameters of the hearing in a given case;[92] and

(3) In line with this directive, the Sixth Circuit previously held that a student accused of misconduct is entitled to a hearing before the student can be suspended or expelled, and that when the credibility of the parties is at issue, the hearing must include "an opportunity for cross-examination."[93]

However, the Sixth Circuit acknowledged that an accused student does not necessarily have the right to directly cross-examine the accuser (in light of the further harm or harassment that a cross-examination may inflict on an alleged victim) or other witnesses, but indirect cross-examination through an agent on the accused student's behalf could be considered.[94]

Other federal and state court cases have also addressed due process and erroneous outcome claims.[95] However, the outcomes of these cases indicate that courts have not been

[87] *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).
[88] *See id*. at 585-87.
[89] *See id*. at 578-80.
[90] *See id*. at 580.
[91] *See id*. at 582.
[92] *See id*. at 581.
[93] *See id*.
[94] *See id*. at 583.
[95] *See* Emily D. Safko*, Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 Fordham Law Review 2289 (2016) at 2308 and 2311,

consistent in determining what constitutes a due process violation.[96] It has been observed that court decisions concerning these and other related issues with respect to accused students in Title IX sexual assault cases constitute a "rapidly developing area of the law."[97]

Part III. Laws Related to Title IX

A. Title VI of the Civil Rights Act of 1964

As referenced earlier in this chapter,[98] Congress intentionally used Title VI of the Civil Rights Act of 1964 (Title VI)[99] as a model for Title IX.[100] Title VI banned discrimination based on race, color, or national origin in programs or activities receiving federal funding. Because of nearly identical language contained in the two statutes, and the "explicit" assumption by the drafters that Title IX "would be interpreted and applied just as Title VI had been[,]"[101] judicial decisions interpreting Title VI have been deemed applicable to Title IX, with some exceptions.[102]

B. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (Title VII)[103] is another federal civil rights law that is related to Title IX. Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin, generally by employers with fifteen or more employees.[104] Courts have regularly cited to Title VII cases for guidance in interpreting Title IX.[105]

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available at https://ir.lawnet.fordham.edu/flr/vol84/iss5/16 (citing *Sterret v.Cowan*, 85 F. Supp. 3d 916 (E.D. Mich. 2015), appeal dismissed, No. 15-1121 (6th Cir. Feb. 6, 2015); *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994); and *Doe v. Regents of the University of California San Diego*, No. 37-2015-00010549-CU-WM-CTL (Cal. Super. Ct. July 10, 2015) (order granting petition for writ of mandamus), appeal docketed, No. D068901 (Cal. Ct. App. Sept. 11, 2015)).

[96] *See Are Campus Sexual Assault Tribunals Fair? The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law, supra* note 95, at 2307.

[97] *See* Samantha Harris, *Due Process Legal Update: Settlements, Trials, and More*, July 27, 2016, *available at* https://www.thefire.org/due-process-legal-update-settlements-trials-and-more/.

[98] *See* note 37, *supra*.

[99] 42 U.S.C. §2000d *et seq.*

[100] *Title IX Legal Manual*, *supra* note 7, at 8.

[101] *See Cannon v. University of Chicago, supra* note 33, at 696 (citing 117 Cong.Rec. 30408 (1971) (Sen. Bayh)).

[102] *See Title IX Legal Manual*, *supra* note 7, at 9-10.

[103] 42 U.S.C. 2000e. *et seq.*

[104] *See id.*

[105] *See, e.g., Doe v. Brown University*, *supra* note 82, at 132 n.5.

C. Clery Act

1. Campus Crime Reporting Requirements

The Clery Act[106] is another law that is often cited in conjunction with Title IX with respect to addressing campus sexual violence. Enacted in 1990, the law requires post-secondary institutions that participate in federal student aid programs to prepare an "annual security report" on campus crime statistics and institutional policies and procedures for reporting criminal acts or "other emergencies" that occur on-campus, as well as other related details.[107] The report must disclose statistical information from the three most recent calendar years on certain categories of crimes that occurred on-campus or occurred at certain specified types of off-campus locations.[108] The types of crimes that must be addressed in the report include "primary crimes," such as homicide, robbery, aggravated assault, burglary, and sex offenses (specifically, rape, fondling, incest, and statutory rape).[109] Also required to be reported are statistics on: arrests and referrals for disciplinary actions (e.g., alcohol and drug law violations); hate crimes; and dating violence, domestic violence, and stalking.[110]

The report must be submitted to the United States Department of Education and also be made available to the campus community, including current and prospective students.[111] In this manner, the Clery Act fosters transparency by requiring, in certain circumstances, institutions to issue a timely warning to the campus community about crimes that have been reported to campus security or local law enforcement and that are considered by the institution to pose a threat to students and employees.[112]

2. Additional Requirements, Including Awareness and Prevention Efforts

The Clery Act was amended in 2013 to include new requirements that increase transparency of post-secondary institutions' procedures for handling sexual assault complaints,

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[106] Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. §1092(f). The law was named after Jeanne Clery, a freshman at Lehigh University who was sexually assaulted and murdered in her dorm room.

[107] *See Background Information: Clery Act Reviews*, Office of Federal Student Aid, United States Department of Education, *available at* https://studentaid.ed.gov/sa/es/sites/default/files/fsawg/datacenter/cleryact/CleryDataCenterv3.pdf (last visited September 25, 2018). *See also* 34 C.F.R. §668.46 (the Clery Act's implementing regulations).

[108] *See* 34 C.F.R. §668.46(c)(1). Under the definition of "Clery geography" in 34 C.F.R. §668.46(a), the off-campus locations include the recipient institution's "noncampus buildings and property" and "[p]ublic property within or immediately adjacent to and accessible from the campus."

[109] *See id.* It has been noted that the Clery Act's definitions of sexual offenses are "distinct from, and broader than," definitions of sexual offenses found in state and federal laws. *See* Tammi Walker, *Fixing What's Wrong With How Universities Adjudicate Sexual Misconduct Claims: How Procedural Changes Can Encourage Cooperation,* 2018 WISCONSIN LAW REVIEW 111, 117 (citing Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination,* 21 PSYCHOLOGY, PUBLIC POLICY, AND LAW 1, 2 (2015)).

[110] *See* 34 C.F.R. §668.46(c)(1).

[111] *See Background Information: Clery Act Reviews, supra* note 107.

[112] *See* 34 C.F.R. §668.46(e).

establish minimum standards for those procedures, and augment sexual assault education and prevention efforts.[113] The legislation amending the Clery Act was contained in the Violence Against Women Reauthorization Act (an act to reauthorize the Violence Against Women Act of 1994),[114] and is sometimes referred to as the Campus Sexual Violence Elimination Act, or "SaVE Act".[115] The amendments include the requirement that a post-secondary institution's annual security report include a policy statement that addresses: (1) programs of the institution that prevent domestic violence, dating violence, sexual assault, and stalking; and (2) procedures that the institution will follow in response to reported incidents of domestic violence, dating violence, sexual assault, or stalking, including a statement of the applicable evidentiary standard in institutional conduct code proceedings that occur as a result of a reported incident.[116]

More specifically, the policy statement must provide for:

- "Education programs to promote awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking," including "primary prevention and awareness programs" for all incoming students and new employees;[117]

- "Possible sanctions or protective measures that [the] institution may impose" pursuant to an institutional disciplinary procedure for rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking;[118]

- "Procedures that victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred," including information on preserving evidence and "the victim's option . . . to notify proper law enforcement authorities, including on-campus and local police;"[119]

- "Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking," including a "prompt, fair, and impartial investigation and resolution" by trained officials, as well as equal treatment of accusers and the accused with respect to the opportunity to

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[113] *See* Section 304, Pub. L. No. 113-4, 127 Stat. 54 (2013).
[114] The Violence Against Women Act of 1994, Pub. L. 103-322, 108 Stat. 1902 (1994) (also known as "VAWA"). VAWA established, among many other things, the availability of grant funding to institutions of higher education to "develop and strengthen trauma informed victim services and strategies to prevent, investigate, and respond to sexual assault, domestic violence, dating violence, and stalking." *See OVW Grants and Programs*, "Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program," Office on Violence Against Women, United States Department of Justice, *available at* https://www.justice.gov/ovw/grant-programs (last updated February 5, 2019).
[115] *See* Rachel Marshall, *Will it Really SaVE You? Analyzing the Campus Sexual Violence Elimination Act*, Legislation and Policy Brief 6, no. 2 (2014): 271-293, at 272, *available at* https://digitalcommons.wcl.american.edu/lpb/vol6/iss2/3/.
[116] *See generally* amendments as codified at 20 U.S.C. §1092(f)(8).
[117] 20 U.S.C. §1092(f)(8)(B)(i).
[118] 20 U.S.C. §1092(f)(8)(B)(ii).
[119] 20 U.S.C. §1092(f)(8)(B)(iii).

have an advisor present during an institutional disciplinary proceeding and the provision of written notification of any outcome;[120]

- Information describing how the institution will protect the confidentiality of victims, to the extent allowed by law;[121]

- Written notification to students and employees about "counseling, health, mental health, victim advocacy, legal assistance, and other services available to victims[;]"[122] and

- Written notification to victims about "options for, and available assistance in, changing academic, living, transportation, and working situations," regardless of whether or not the victim "chooses to report the crime to campus police or local law enforcement."[123]

[120] 20 U.S.C. §1092(f)(8)(B)(iv).
[121] 20 U.S.C. §1092(f)(8)(B)(v).
[122] 20 U.S.C. §1092(f)(8)(B)(vi).
[123] 20 U.S.C. §1092(f)(8)(B)(vii).

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Chapter 3

THE TITLE IX ENFORCEMENT PROCESS

Part I. Overview

A. Multiple Entities and Layers Involved in Title IX Enforcement

Enforcement of Title IX of the federal Education Amendments of 1972, 20 United States Code §1621 *et seq*. (Title IX) is anything but a simple or straightforward matter. It involves multiple entities and takes different forms, depending on the layer of enforcement involved.

The initial layer of enforcement rests with educational institutions that receive federal financial assistance in return for promising to comply with the requirements of Title IX (recipient institutions). Accordingly, each recipient institution must designate at least one employee to serve as its Title IX coordinator, whose role includes ensuring the institution's fulfilment of certain basic obligations.

The next layer is the federal government, which oversees the recipient institutions' Title IX compliance through two agencies, the Office for Civil Rights of the United States Department of Education (OCR and USDOE, respectively) and the Civil Rights Division of the United States Department of Justice (CRD and USDOJ, respectively). The OCR's enforcement responsibilities include investigating complaints about and conducting compliance reviews of recipient institutions, informing institutions of possible Title IX violations, and helping institutions achieve voluntary compliance. The OCR may also refer certain complaints to the CRD for investigation. The CRD's enforcement efforts are more selective than the OCR's: the CRD may investigate complaints received from the OCR, as well as complaints received independently, and may participate in private litigation in the federal courts, but all on a discretionary basis.

Federal courts provide yet another layer of enforcement, and persons aggrieved by violations of Title IX may bring private lawsuits, regardless of whether they have previously initiated a complaint with the OCR or CRD.

B. Dynamic Nature of Title IX Enforcement

Dynamic enforcement policies further complicate Title IX. Early research for this study revealed recent and significant changes to Title IX's enforcement. The OCR's expectations for compliance by recipient institutions has changed over the years, as reflected in the informal policy guidance documents (OCR guidance) that it periodically issues to facilitate recipient institutions' compliance with Title IX. Generally speaking, OCR guidance may address an important or timely enforcement issue. It may even revisit an issue addressed in prior guidance and reinforce or depart from the earlier position taken. OCR guidance is also subject to change

with each incoming federal administration, depending on that administration's policy goals and priorities. For example, several times in 2017, federal administration officials publicly criticized OCR guidance that was issued by the preceding administration because the earlier guidance appeared to impose additional Title IX compliance requirements upon recipient institutions, without the benefit of undergoing the formal rulemaking process.

Historically, OCR guidance has addressed issues as varied as participation in school athletics, accommodations for pregnant and parenting students, access to career and technical education programs, and protections for transgender students. However, in the past decade, one particular Title IX issue—recipient institutions' responses to campus complaints of sexual harassment and sexual assault—seems to have received greater attention and emphasis from the OCR, recipient institutions, the federal courts, and the news media. Accordingly, in November 2018, the USDOE released a formal proposal to amend the federal regulations that implement Title IX (also known as Title IX regulations or Title IX rules)[1] to specifically address this issue, as well as other Title IX issues to a lesser extent. If promulgated, the proposed regulations would have significant ramifications for:

(1) The extent to which sexual harassment rises to the level of a civil rights issue under Title IX;

(2) A recipient institution's liability for complaints of sexual harassment and sexual assault; and

(3) Procedures that recipient institutions must follow when investigating and adjudicating these types of complaints.

Given the potential for confusion created by these pending changes, this chapter attempts to clearly distinguish the Title IX regulations' requirements as they currently exist, previously issued OCR guidance documents that are still valid as well as prior guidance that has been rescinded, interim OCR guidance that is to be applied until further notice, and the current federal administration's proposed changes to Title IX regulations that may take effect in the near future.

C. Structure of Chapter

The remainder of this chapter is structured as follows:

- Part II explains the philosophy behind the federal government's approach to enforcing Title IX and describes the basic obligations that recipient institutions must fulfill in order to comply with Title IX.

[1] *See*, e.g., Federal Register Tutorial, National Archives, *available at* https://www.archives.gov/federal-register/tutorial/online-html.html (last visited November 28, 2018) (explaining that the terms "rules" and "regulations" are used interchangeably).

- Part III details the respective enforcement processes and activities of the OCR and CRD, and includes data on the factual basis and ultimate disposition of complaints submitted to the OCR.

- Part IV provides context on the role of OCR guidance and examples of previously issued guidance. It also discusses the 2017 rescission of prior OCR guidance that addressed transgender students and victims of sexual violence, and it summarizes the interim guidance that clarifies how OCR is currently evaluating recipient institutions' compliance with Title IX in cases involving campus sexual misconduct.

- Part V discusses the future of federal Title IX enforcement in light of the USDOE's proposed changes to the Title IX regulations and some of its anticipated impacts.

Part II. Title IX Enforcement Among Recipient Institutions

A. Enforcement Philosophy

Title IX's implementing regulations require that each recipient institution evaluate the effects of its policies and practices with respect to fulfilling the law's requirements, modify any policies or practices as needed, and take appropriate remedial actions to eliminate the effects of discrimination that may have resulted from adhering to certain policies and practices.[2] This approach reflects the intent of the federal agency[3] that promulgated the regulations: to require recipient institutions to engage in a "searching self-examination to identify any discriminatory policies or practices which may exist within their institutions."[4] It was also the agency's goal to "preserve federal resources by limiting agency involvement in addressing noncompliance by requiring federal recipients to amend their discriminatory practices in light of the institution's unique culture, practices, and traditions."[5] In other words, it was anticipated that recipient institutions would be in the best position to assess the extent of their compliance with the law's mandates and, accordingly, take any necessary corrective actions.

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[2] *See* 34 Code of Federal Regulations (C.F.R.) §106.3(c).

[3] The federal agency that promulgated Title IX's implementing regulations was known at the time as the United States Department of Health, Education, and Welfare (HEW). Subsequently, in 1979, HEW was restructured into the present-day Department of Education (USDOE) and Department of Health and Human Services. *See* Laura L. Dunn, Esq., *Changes to Title IX Guidance on Campus Sexual Violence*, 33 University of Maryland The Faculty Voice 2, Winter 2017/18, at 2, 6, *available at* http://www.lauraldunnesq.com/uploads/1/1/8/7/118710949/2018.01.pdf (the Faculty Voice is an independent faculty newspaper of the University System of Maryland). Ms. Dunn is associated with the University of Maryland's Francis King Carey School of Law and is the founder and executive director of SurvJustice, a "national not-for-profit organization that increases the prospect of justice for all survivors of sexual violence through effective legal assistance, policy advocacy, and institutional training." *See* http://www.survjustice.org/about.html.

[4] *See Changes to Title IX Guidance on Campus Sexual Violence, supra* note 3, at 6 (quoting Statement by Carl W. Weinberger, Secretary of Health, Education, and Welfare, HEW News (June 3, 1975) at 5-6).

[5] *See id.*

B. Compliance by Recipient Institutions

A recipient of federal financial assistance must agree to comply with Title IX, inform the public about its anti-discrimination policy, and have the necessary personnel and procedures in place to both comply with and enforce the law. The recipient institution must also develop strategies to correct discrimination. Hawaii's recipient institutions, like all other Title IX recipients, must create and maintain a framework that allows aggrieved persons to seek redress from illegal sex-based discrimination. Below is a detailed description of the basic obligations that recipient institutions must fulfill in order to comply with Title IX, as required by the Title IX regulations still in effect as of this writing.

1. Self-Evaluation

Title IX's implementing regulations, when promulgated, gave recipient institutions one year to conduct a mandatory self-evaluation of their current policies and practices and to evaluate the effects of those policies and practices on the admission of students, treatment of students, and employment of academic and non-academic staff working in connection with education programs or activities.[6] Recipient institutions were required to modify any policies and practices that did not comply with the regulations and take appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from those policies and practices.[7]

2. Giving of Assurances

Title IX requires recipient institutions, at the time of applying for federal financial assistance, to provide significant assurances that they will comply with the law's provisions.[8] These assurances must include language that commits the applicant to undertake whatever action is necessary to eliminate any existing sex discrimination or to eliminate the effects of past discrimination.[9] The effects of past discrimination must be eliminated whether that discrimination occurred prior to or subsequent to the submission of the assurance.[10] With the exception of cases in which federal financial assistance is extended to provide a recipient institution with real property, structures on real property, or personal property, the duration of the recipient institution's obligations under the assurance continues for the period during which the financial assistance is extended.[11]

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[6] *See* 34 C.F.R. §106.3(c). The regulations required that the self-evaluation be performed "within one year" of the regulations' July 21, 1975, effective date. *See* 34 C.F.R. §106.1.
[7] *See id*.
[8] *See* 34 C.F.R. §106.4(a).
[9] *See id.*
[10] *See id.*
[11] *See* 34 C.F.R. §106.4(b). In cases where federal financial assistance is extended to provide real property (or structures thereon), the recipient institution's obligations under the assurance continues during the time that the real property or structures are used to provide an educational program or activity. Where federal funds are used to provide personal property, the recipient institution's obligations under the assurance last for as long as the institution retains ownership or possession of the property.

3. Dissemination of Policy

Under Title IX, recipient institutions must implement specific and continuing steps to notify specified parties (including applicants for admission, prospective employees, parents of students, and unions with collective bargaining agreements with the institution) that it does not discriminate on the basis of sex and that it is required by Title IX to not engage in prohibited sex-based discrimination.[12] This requirement is crucial in putting all persons who potentially would have dealings with the recipient institution on notice as to their rights. Beyond an initial written notification to students, employees, alumni, and the general public of the existence of a nondiscrimination policy, the recipient institution must also ensure that any of its publications aimed at potential students or employees contain a statement of the nondiscrimination policy.[13]

4. Designation of Title IX Coordinator

Title IX also requires that recipient institutions designate at least one employee to coordinate Title IX compliance.[14] The designated employee is responsible for implementing the recipient institution's Title IX compliance efforts, including the investigation of Title IX complaints. The coordinator's name, office address, and telephone number must be provided to all of the recipient institution's students and employees.[15]

5. Adoption of Grievance Procedures

One of the most important aspects of Title IX enforcement is the requirement that recipient institutions adopt and publish internal grievance procedures that provide for the "prompt and equitable resolution" of student and employee complaints alleging that Title IX has been violated.[16] With regard to complaints of sexual harassment or sexual assault, the Title IX regulations do not require recipient institutions to utilize a specialized grievance procedure or one that is separate from the grievance procedure used for other types of Title IX complaints.[17] It should be noted that an act that constitutes a violation of Title IX may also violate a recipient institution's own policies and codes of conduct, such as a policy that prohibits sexual harassment or a code of conduct that prohibits the bullying and harassment of students and employees. This is not to say, however, that the mere existence of such institutional policies and codes necessarily means that a Title IX-compliant grievance procedure is also in place.[18]

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[12] *See* 34 C.F.R. §106.9(a).
[13] *See* 34 C.F.R. §106.9.
[14] *See* 34 C.F.R. §106.8(a).
[15] *See id.*
[16] *See* 34 C.F.R. §106.8(b).
[17] *See id.*
[18] For example, a recipient institution may have in place a student code of conduct that prohibits harassment of a student by another student and articulates the process used to address the complaint. Title IX protects students more broadly from conduct perpetrated by teachers and other staff employed by the student's school, as well as by third parties. Thus, a student code of conduct may be insufficient to address a student's complaint of harassment by a non-student. Additionally, even if a student decides not to utilize the complaint process available through the student code of conduct, or if the identity of the perpetrator is unknown, the recipient institution may still have an obligation under Title IX to investigate and address the effects of the behavior that prevents an affected student's access to an education. *See* Association for Student Conduct Administration, *Student Conduct Administration &*

In determining whether a particular grievance procedure promptly and equitably resolves a complaint (regardless of whether sexual harassment or other sexual misconduct is involved), the OCR will consider whether the recipient institution has:

- Provided students, parents of elementary and secondary school students, and employees notice (that is easily understood, easily located, and widely distributed) of the recipient institution's grievance procedures, including how to file a complaint;[19]

- Applied the grievance procedures to complaints filed by students or on their behalf alleging discrimination or harassment carried out by employees, other students, or third parties;[20]

- Provided for adequate, reliable, and impartial investigation of complaints, including an equal opportunity to present witnesses and other evidence;[21]

- Designated and followed reasonably prompt time frames for major stages of the grievance process;[22]

- Notified the parties of the outcome of the complaint;[23] and

- Given an assurance that the recipient institution will take steps to prevent recurrence of the conduct that gave rise to the complaint and to correct its discriminatory effects on the complainant and others, if appropriate.[24]

Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses, 2014, at 3 and 7, *available at* https://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf.

[19] *See* USDOE Office for Civil Rights (OCR) Letter of Findings to Dr. Christina Kishimoto, Superintendent, Hawaii Department of Education (HDOE), OCR Reference No. 10115003 (January 19, 2018) (OCR Letter of Findings for HDOE), at 11, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10115003-a.pdf. *See also Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, OCR, 66 Fed. Reg. 5512 (January 19, 2001) at 20, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (*2001 Revised Sexual Harassment Guidance*) and *Q&A on Campus Sexual Misconduct,* OCR (September 2017) (*2017 Q&A*), Answer to Question 4 ("What are the school's obligations with regard to complaints of sexual misconduct?"), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (last visited September 24, 2018) (affirming the factors that the OCR considers in determining whether a grievance procedure promptly and equitably resolves a complaint, as stated in the *2001 Revised Sexual Harassment Guidance*). The *2017 Q&A* recognizes the continued applicability of the *2001 Revised Sexual Harassment Guidance*.

[20] *See* OCR Letter of Findings for HDOE, *supra* note 19, at 11.

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

C. Relevance of the Family Educational Rights and Privacy Act to Grievance Procedures

The OCR's consideration of two of the above factors—the provision of equal opportunity to present witnesses and other evidence and notification as to the outcome of the complaint—may potentially trigger a conflict with a federal privacy law. The Family Educational Rights and Privacy Act (FERPA),[25] enacted in 1974, contains a general prohibition on the disclosure of information from a student's "education record" without the consent of the student or the student's parent.[26] A student's education record generally consists of "records, files, documents, and other materials" containing information "directly related to a student" and that are "maintained by an educational agency or institution" or by a person acting on the agency or institution's behalf.[27] When a student reaches the age of eighteen or is attending a post-secondary institution, the student holds the right to consent or not to consent to the release of information from the student's education record.[28]

According to the OCR, FERPA requirements may affect Title IX complaints when:

- A student is found to have harassed another student. Because information about the complaint, investigation, and outcome necessarily becomes "part of the harassing student's education record,"[29] FERPA is relevant with respect to the need for a recipient institution to notify the parties of the outcome of the complaint.[30] Under Title IX, "it is an important part of taking effective responsive action" for the recipient institution to "inform the harassed student of the results of its investigation and whether it counseled, disciplined, or otherwise sanctioned the harasser."[31] Moreover, "[t]his information can assure the harassed student that the school has taken the student's complaint seriously and has taken steps to eliminate the hostile environment and prevent the harassment from recurring."[32] The USDOE has interpreted FERPA as

[25] 20 United States Code (U.S.C.) §1232g.
[26] *See id.* The Family Educational Rights and Privacy Act (FERPA) aims to give parents control over their children's education records by ensuring that federal funds are not extended under any "applicable program" to any educational agency or institution that denies or prevents parents from inspecting and reviewing the education records of their children who are or have been a student of the educational agency or institution.
[27] *See* 20 U.S.C. §1232g(a)(4)(A). Education records do not include, for example, "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement" or "records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice." *See* 20 U.S.C. §1232g(a)(4)(B).
[28] *See* 20 U.S.C. §1232g(d).
[29] *See 2001 Revised Sexual Harassment Guidance*, *supra* note 19, at vii.
[30] *See id.*
[31] *Id.*
[32] *Id.*

"not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation," on the reasoning that whether or not harassment was found to have occurred is information that "directly relates to the victim."[33] However, the USDOE has taken the position that "there is a potential conflict between FERPA and Title IX if the school discloses to the harassed student any *sanction or discipline* imposed upon the student who was found to have engaged in harassment."[34]

- A student accuses a teacher or another employee of the recipient institution of harassment. The student's allegations would be documented in the student's education record, thus creating a potential conflict: although FERPA would protect the identity of the student accuser from being disclosed, under Title IX, the accused teacher or employee "may need the name of the accuser and information regarding the nature of the allegations in order to defend against the charges."[35] This potential conflict directly impacts the ability of a recipient institution to provide an equal opportunity to each party to present witnesses and other evidence, given that the ability to present witnesses and other evidence is essential to an effective defense. The Department has stated that "neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment."[36]

FERPA's prohibition on the disclosure of student education records was recently cited by a commentator as an obstacle to determining the true impacts of Title IX policy changes[37] regarding sexual harassment and sexual assault at post-secondary recipient institutions.[38] The commentator points out that schools "almost always err on the side of nondisclosure," resulting in "little data on how well campus adjudications are handling the problem of sexual harassment

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[33] *Id.*

[34] *Id.* The *2001 Revised Sexual Harassment Guidance,* at 37, n.102, elaborates on disclosures that, in the USDOE's view, do not violate FERPA:

> The Family Educational Rights and Privacy Act (FERPA) does not prohibit a student from learning the outcome of her complaint, i.e., whether the complaint was found to be credible and whether harassment was found to have occurred. It is the Department's current position under FERPA that a school cannot release information to a complainant regarding disciplinary action imposed on a student found guilty of harassment if that information is contained in a student's education record unless — (1) the information directly relates to the complainant (e.g., an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution.

[35] *See id.* at viii.

[36] *See id.* at viii and 22.

[37] *See* explanation of OCR's Title IX policy changes concerning institutional responses to sexual harassment and sexual assault, part IV, subpart B, item 6 (discussion on 2011 and 2014 OCR guidance), and subpart C (discussion on 2017 rescission of prior OCR guidance and release of OCR interim guidance), *infra*.

[38] *See, e.g.,* Adam Goldstein, Op-Ed., *What They're Not Talking About with Title IX That Really Matters*, Washington Post, December 20, 2017, *available at* https://www.washingtonpost.com/news/grade-point/wp/2017/12/20/what-theyre-not-talking-about-with-title-ix-that-really-matters. The author is a legal fellow at the Foundation for Individual Rights in Education, also known as FIRE.

and assault, and therefore, no metric to measure changes."[39] Accordingly, the commentator concludes that any "meaningful reform of Title IX" will require amendments to FERPA.[40]

Part III. Enforcement by Federal Agencies

All recipient institutions subject to Title IX are required to administer the law in a compliant manner and are subject to the enforcement oversight of the OCR, as well as the CRD. Both the OCR and the USDOJ[41] share jurisdiction for enforcing Title IX, while having responsibility for enforcing additional federal civil rights laws. However, the OCR appears to take the lead in Title IX enforcement, while the USDOJ plays a complementary role. What follows is an explanation of the Title IX enforcement processes and activities of these two agencies.

A. Office for Civil Rights, United States Department of Education

1. Overview

The mission of the OCR is "to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."[42] The agency is headquartered in Washington, D.C., and its twelve enforcement offices conduct the bulk of its enforcement activities.[43] Hawaii is serviced by the OCR's region X office located in Seattle, Washington.[44]

The OCR's enforcement activities include investigating and resolving discrimination complaints against recipient institutions, initiating compliance reviews of recipient institutions, and providing technical assistance to recipient institutions to ensure that their policies comport with the requirements of Title IX and other civil rights laws that the OCR enforces.[45]

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[39] *See id.* The commentator explained the lack of sufficient data as follows:

> We don't know how many hearings are held every year; how many of those hearings find the accused responsible; how many appeals there are; how frequently the hearings are before a panel, as opposed to a single investigator (an individual who questions witnesses and writes a report without a hearing); for panels, how many require unanimous findings; how the definitions of offenses vary from place to place; or how many cases are overturned on appeal.

[40] *See id.*

[41] The implementing regulations that govern the United States Department of Justice's (USDOJ) enforcement of Title IX are contained in 28 C.F.R. Part 54 and are nearly identical to those governing enforcement by the OCR.

[42] *About OCR*, USDOE website, https://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last visited November 30, 2018).

[43] *See id.*

[44] *See id.*

[45] *See id.* Other civil rights laws that the OCR enforces include laws that prohibit discrimination on the basis of: race, color, or national origin (Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq*.); disability (Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §701); and age (Age Discrimination Act of 1975, 42 U.S.C. §§6101-6107).

The procedures that the OCR uses to ensure that recipient institutions comply with Title IX requirements are identical to the procedures it uses to enforce a related civil rights law, Title VI of the Civil Rights Act of 1964 (as noted in Chapter 2, the Title IX law was modeled after Title VI).[46] The OCR attempts to help recipient institutions achieve voluntary compliance with civil rights laws.[47] The Title IX regulations that address compliance procedures explicitly require the OCR, "to the fullest extent practicable," to "seek the cooperation of recipients in obtaining compliance" and "provide assistance and guidance to recipients" to help them comply voluntarily with the law.[48] Recipients, in turn, are required to keep records and submit "complete and accurate compliance reports" to the extent deemed necessary by the USDOE for determining whether the recipient is in compliance.[49]

In furtherance of seeking voluntary compliance, these regulations also require the OCR to:

- Conduct periodic compliance reviews to determine if the practices of recipient institutions comply with the law;[50]

- Receive written complaints from persons who believe they have been subjected to discrimination that is prohibited by Title IX;[51]

- Promptly investigate when any information, including a compliance review, report, or complaint, indicates a possible failure to comply with Title IX (and where appropriate, review the relevant practices and policies of the recipient institution, the circumstances that gave rise to the possible noncompliance, and other factors relevant to the question of whether the recipient in fact failed to comply);[52] and

- Resolve by informal means, whenever possible, a recipient institution's failure to comply, as determined through an OCR investigation, after notifying the institution of its failure to comply (or, alternatively, inform the recipient institution, and the complainant if applicable, that no action is warranted following an investigation conducted by the OCR).[53] Chapter 4 provides examples involving the Hawaii Department of Education and University of Hawaii of this resolution process, in which resolution agreements are

[46] *See* 34 C.F.R. §106.71. Title IX's implementing regulations specifically provide that the procedures the OCR must use to ensure compliance with Title IX shall be the same procedures it uses to do so for Title VI: "The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, part 101."
[47] *See About OCR*, *supra* note 42.
[48] 34 C.F.R. §100.6(a).
[49] 34 C.F.R. §100.6(b).
[50] 34 C.F.R. §100.7(a).
[51] 34 C.F.R. §100.7(b).
[52] 34 C.F.R. §100.7(c).
[53] 34 C.F.R. §100.7(d).

voluntarily entered into by recipient institutions for the purpose of resolving a complaint or compliance review.

In addition to the administrative regulatory requirements described above, the OCR has established procedures for filing and processing complaints.[54] Of note:

- A person or organization may file a complaint on its own,[55] or a complaint may be filed on behalf of another person or another group.[56]

- Complaints may be filed using a standardized complaint form that is provided by the OCR, or by writing a letter to the OCR.[57]

- While a complaint must include information about the person or class of persons injured by the alleged discriminatory act, it is not necessary to provide the name of the injured person.[58] However, when investigating or resolving complaints, the OCR may need to reveal to outside parties certain details about the injured person (such as name and age) in order to verify facts or obtain additional information.[59] Furthermore, if the OCR communicates information about a complaint (such as the recipient institution involved, date of complaint, type of discrimination alleged, date of complaint resolution, or basis for the OCR's decision) to the media or the general public, the OCR will not divulge the name of the person making the complaint or the name of the person on whose behalf the complaint was made.[60]

- A complaint must generally be filed within one hundred eighty calendar days of the date that the alleged discrimination occurred. The OCR may grant a waiver of this time limitation in certain circumstances.[61]

- The OCR may dismiss a complaint if, for example, it is being addressed by a recipient institution's formal grievance procedures and is still pending, provided that the OCR expects the recipient institution to provide a

[54] The OCR publishes a Case Processing Manual that details the procedures it uses to ensure compliance with the civil rights laws it enforces. The manual was updated in March 2018 and again in November 2018. *See Case Processing Manual*, OCR, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf. The OCR also provides summary information on how a person may file a discrimination complaint and how the OCR processes complaints. *See How to File a Discrimination Complaint With the Office for Civil Rights,* USDOE website, https://www2.ed.gov/about/offices/list/ocr/docs/howto.html (last modified September 25, 2018); *see also How the Office for Civil Rights Handles Complaints*, USDOE website, at https://www2.ed.gov/about/offices/list/ocr/complaints-how.html (last modified November 27, 2018).

[55] *See How to File a Discrimination Complaint With the Office for Civil Rights*, *supra* note 54.

[56] *See id.*

[57] *See id.*

[58] *See id.*

[59] *See How the Office for Civil Rights Handles Complaints*, *supra* note 54. The OCR explains that any disclosure of such information will be made in a manner that is consistent with FERPA and other federal laws that relate to the privacy of personal information.

[60] *See id.*

[61] *See id.*

comparable resolution process based on legal standards that are acceptable to the OCR.[62] Similarly, the OCR may dismiss a complaint that has been investigated by "another Federal, state, or local civil rights agency" and the resolution process used was comparable based on legal standards that are acceptable to the OCR.[63] Moreover, the OCR may dismiss a complaint if the person or organization that filed the complaint has also brought a civil action involving the same recipient institution, based on the same operative facts, in state or federal court.[64] If the OCR dismisses a complaint under any of these scenarios, it will inform the complainant that the complaint may be re-filed within sixty days of completion of the other entity's action.[65]

- The OCR's role during complaint investigations is that of a "neutral fact-finder" (as opposed to advocating for one party over another).[66]

- The OCR uses a "preponderance of the evidence" standard[67] to determine whether a recipient institution failed to comply with the law.[68] The determination is explained in a written "letter of findings" to both the complainant and the recipient institution.[69] Following a determination that a recipient institution failed to comply, the OCR will initiate the informal resolution process.[70] A recipient institution may agree to engage in this process and, if so, would negotiate and sign a written, voluntary resolution agreement that details the actions it will undertake to remedy the particular Title IX violation identified by the OCR.[71] The extent of the recipient institution's adherence to the agreement is monitored and verified by the OCR.[72]

- A complainant may appeal the OCR's dismissal of a complaint or finding that a recipient institution was not in compliance with Title IX by filing an appeal with OCR within sixty calendar days of the date indicated on the letter of finding or the dismissal. After giving a recipient institution an opportunity to respond to the appeal, OCR will issue a written decision on the appeal to the parties.[73]

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[62] *See id.*
[63] *See id.*
[64] *See id.*
[65] *See id.*
[66] *See id.*
[67] But *see* notes 206 to 208, and accompanying text, *infra*.
[68] S*ee How the Office for Civil Rights Handles Complaints*, *supra* note 54.
[69] *See id.*
[70] *See id.*
[71] *See id.*
[72] *See id.*
[73] *See id.*

It should be noted that filing a complaint with the OCR is not a prerequisite to filing a private lawsuit in federal court for violation of Title IX.[74] The OCR does not represent complainants or otherwise participate in lawsuits, but it may decide to refer a complaint to the USDOJ CRD for action if a recipient institution fails to take remedial action to address its noncompliance with Title IX.[75]

Additionally, an important distinction exists between the OCR's administrative enforcement process and private lawsuits that may be independently brought. As discussed in Chapter 2, United States Supreme Court precedent has established that in order to be held liable for monetary damages in a Title IX lawsuit alleging sexual harassment or sexual assault, a school district or school board receiving federal funds under Title IX must have demonstrated its "deliberate indifference" to acts of sexual harassment or sexual assault of which it was *actually aware*. However, the USDOE has the authority to "'promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate,' even in circumstances that would not give rise to a claim for money damages."[76] In other words, the "deliberate indifference" standard of liability does not apply to the administrative enforcement process, which "requires enforcement agencies such as the OCR to *make schools aware of* potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms."[77] (Emphasis added.)

If the OCR is unable to secure a recipient institution's voluntary compliance with Title IX, it may suspend, terminate, or otherwise refuse to grant or continue federal financial assistance to the institution. However, the OCR must first advise the recipient institution of its failure to comply and provide the institution with an opportunity to be heard as well as prior written notice of the hearing date and time.[78] If a hearing examiner issues a ruling that funding should be discontinued, the ruling may be reviewed by the Secretary of Education, at the Secretary's discretion.[79] Any suspension or termination of funding would not take effect until thirty days after the Secretary of Education has filed with the appropriate congressional committees a written report of the circumstances and grounds for the decision.[80] Even after a suspension or termination of funding has occurred, a recipient institution may restore its eligibility to receive funding by demonstrating that it has corrected its noncompliance.[81]

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[74] *See id.*
[75] *See id. See also* note 83, and accompanying text, *infra.* A memorandum of understanding specifying the nature and extent of collaborative enforcement efforts between the OCR and the Civil Rights Division of the USDOJ, which appears to be from 2014, is available at https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf.
[76] *See 2001 Revised Sexual Harassment Guidance*, *supra* note 19, at ii (quoting *Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998)).
[77] *See id.* at iii-v.
[78] *See* 34 C.F.R. §§100.8 and 100.9.
[79] *See* 34 C.F.R. §100.10.
[80] *See* 34 C.F.R. §110.8(c).
[81] *See* 34 C.F.R. §100.10(g).

Although Title IX allows the USDOE to withdraw financial support from a recipient institution that has been found to have violated Title IX, it appears that the imposition of this ultimate sanction has rarely, if ever, occurred.[82]

The OCR also has the authority to refer a case to the USDOJ with a recommendation that enforcement proceedings be brought under federal law or pursue other proceedings under state or local law.[83]

2. Proportion of OCR Complaints Involving Title IX, Relative to Other Anti-Discrimination Laws; Staffing and Workload

In addition to enforcing Title IX's prohibition on sex discrimination, the OCR is responsible for enforcing federal civil rights laws that prohibit other types of discrimination (race, color, national origin, disability, and age) in educational settings.[84] An OCR report addressed to the President and the Secretary of Education contains detailed information on the agency's activities during fiscal year 2016.[85] Among other things, the report provided information on the total number of complaints received that year, with further information for each type of discrimination alleged.[86]

For example:

- The OCR received a total of 16,720 complaints during the fiscal year, which the agency described as "by far the highest one-year total" in its history and 61% higher compared to the previous fiscal year.[87]

- Sex discrimination (i.e., Title IX) complaints (7,747 in all) constituted 46% of the total 16,720 complaints received, though the OCR noted what appears to have been an irregularity (that 6,157 of the 7,747 complaints were filed by a single individual who alleged discrimination in the athletics programs of multiple schools).[88] In contrast, sex discrimination complaints constituted only 28% of all complaints received during fiscal year 2015.[89]

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[82] Tyler Kingkade, *Why It's Unlikely North Carolina Schools Would Lose Federal Funding Over HB2*, Huffington Post, May 10, 2016, *available at* https://www.huffingtonpost.com/entry/north-carolina-federal-funding_us_57320239e4b096e9f092b9c6.
[83] *See* 34 C.F.R. §100.8(a).
[84] *See* note 45, *supra*.
[85] *Securing Equal Educational Opportunity: Report to the President and Secretary of Education, Fiscal Year 2016,* OCR, December 2016, *available at* https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf (last visited September 29, 2018), at 24. The fiscal year 2016 report appears to be the most recent report of its kind that is available on the USDOE's website.
[86] *See id.* at 7-8 and, more generally, the report as a whole.
[87] *See id*. at 7.
[88] *See id.* at 7-8, 24. The report did not provide the name of this individual.
[89] *See id*. at 7.

- The remaining 54% of complaints in fiscal year 2016 involved disability discrimination (36%, or 5,936 complaints), race or national origin discrimination (15%, or 2,439 complaints), and age discrimination (3%, or 581 complaints).[90]

The OCR report further stated that its staffing level "has generally declined over the life of the agency even though complaint volume has exponentially increased[.]"[91] The OCR notes that it had 11% fewer staff members at the end of fiscal year 2016 than it did ten years earlier, while the volume of complaints received "nearly tripled" during that same ten-year period.[92] The OCR report also noted significant increases in the number of complaints that arose from certain discrete Title IX issue areas. For example, sexual violence complaints increased by 277% in K-12 education and by 831% in post-secondary education.[93]

3. Issue Prevalence in Title IX Complaints Received by the OCR

In fiscal year 2016, the OCR resolved 1,346 of the 7,747 Title IX discrimination complaints it received during that period.[94] The top four issues that gave rise to complaints, followed by the number of complaints in parentheses, are: athletics (6,251);[95] sexual harassment, gender harassment, or sexual violence (673); different treatment, exclusion, or denial of benefits (396); and retaliation (346).[96] Other issues spurring Title IX complaints were: "other" unspecified issues (195); employment (141); procedural requirements (130); discipline (61); admissions (32); pregnancy or parenting (23); grading (22); financial assistance or scholarships (12); and dissemination of policy (5).[97]

4. Disposition Statistics for Complaints Received by the OCR

There are a number of possible outcomes for certain Title IX complaints filed with the OCR. Statistical data compiled and analyzed by a third party, *The Chronicle of Higher Education,* pertaining to 801 complaints involving allegations of sexual harassment that were filed from 2003 through 2013, showed that only 12% of complaints resulted in a referral to another agency or a resolution of the complaint.[98] More specifically: 4% were referred to

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[90] *See id*. at 7-8.
[91] *See id*. at 8.
[92] *See id.*
[93] *See id.* at 7.
[94] *See id.* at 24.
[95] It appears that the high number of athletics-related complaints, and consequently the total number of all complaints, is attributable to the OCR receiving a record-high number of total complaints that year (16,720, or a 61 percent increase from the previous year), as well as the fact that the majority of all Title IX complaints the OCR received that year had been filed by a *single* complainant (not identified by name in the OCR report) who alleged discrimination in the athletic programs of *multiple* schools. *See id.* at 7.
[96] *Id*. at 24 (figure 13).
[97] *Id*. at 24 (figure 13). It should be further noted that the number of issues raised exceeded the number of complaints received by the OCR, given that a single complaint may have raised more than one issue.
[98] *See* Jonah Newman and Libby Sander, *A Promise Unfulfilled?*, The Chronicle of Higher Education, April 30, 2014, embedded chart, *available at* https://www.chronicle.com/article/Promise-Unfulfilled-/146299 (last visited

another agency; in 6% of the complaints, the recipient institution agreed to take remedial action *before* any formal finding by the OCR of non-compliance; and in the remaining 2% of complaints, the recipient institution agreed to take remedial action *after* a finding by the OCR of non-compliance.[99] The remaining 88% of complaints were dismissed or administratively closed[100] following the opening of an investigation, with 10% dismissed at the outset due to the OCR being unable to obtain the complainant's consent to investigate; 26% determined to be untimely filed or exceeding the OCR's jurisdiction; 21% determined to be either incoherent or insufficiently detailed or not pursued because the complainant withdrew the complaint or could not be contacted; 17% administratively closed prior to completion of the OCR investigation; and 14% closed after completion of the OCR investigation with no evidence of the recipient institution's non-compliance with Title IX.[101]

Data recently released by the OCR indicated that, in fiscal years 2017 and 2018, the OCR, "on average, [has] resolved almost double the number of civil rights complaints per year compared to the prior eight fiscal years. Additionally, OCR has achieved a 60% increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights[,]" including an "80% increase in Title IX (sex discrimination) case resolutions requiring corrective action[.]"[102]

B. Educational Opportunities Section, Civil Rights Division, United States Department of Justice

The Educational Opportunities Section of the USDOJ's Civil Rights Division (CRD) "works to uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society," by enforcing federal civil rights statutes that prohibit discrimination on the basis of race, color, sex, disability, religion, familial status, and national origin.[103] With respect to complaints involving civil rights in the context of education, including Title IX, the CRD's enforcement activities are focused on conducting investigations, negotiating

July 30, 2019). While the main article is viewable, the link to the chart embedded therein appears to be no longer functional. A scanned copy of what purports to be the original printed article is available at the University of Oregon's website, at https://president.uoregon.edu/sites/president2.uoregon.edu/files/chronicle_article-a_promise_unfulfilled.pdf.

[99] *See A Promise Unfulfilled?, supra* note 98.

[100] Administrative closure occurs when the OCR issues a closure letter but does not make findings or enter into a resolution agreement, such as when an OCR investigation overlaps with action taken by another agency. *See* Nick DeSantis, *Federal Sex-Assault Investigations Are Being Resolved More Often. These 11 Cases Show How*., The Chronicle of Higher Education, August 3, 2017, *available at* https://www.chronicle.com/article/Federal-Sex-Assault/240848.

[101] *See A Promise Unfulfilled?, supra* note 98.

[102] Press release, *New Data Show Secretary DeVos' Reforms to the Office for Civil Rights are Driving Better Results for Students*, USDOE (July 10, 2019), *available at* https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students.

[103] *About the Division,* USDOJ Civil Rights Division (CRD) website, http://www.justice.gov/crt/about-division (last modified December 13, 2018).

out-of-court settlements, litigating cases in federal court, and collaborating with the OCR and other agencies.[104]

While the CRD may investigate selected complaints that were forwarded by the OCR or received independently of the OCR from a party wishing to file a complaint, it ultimately has the discretion to accept or decline a case for investigation or litigation.[105] Unlike the OCR, the CRD does not utilize a standardized complaint form and does not require complaints to be filed with the agency within a particular time period.[106] Any interested person may file a complaint with the CRD that alleges a possible Title IX violation by a recipient institution, including students, parents, community members, and organizations.[107] The complaint may be made in writing or by telephone.[108] The CRD will accept a complaint for investigation that it believes raises "an issue of general public importance," and any subsequent litigation would be undertaken with the United States as the plaintiff.[109] If the CRD decides not to investigate a complaint, it will notify the complainant accordingly.[110]

Detailed analysis by a third party of Title IX complaints processed by the CRD, similar to the analysis of OCR complaints published in *The Chronicle of Higher Education*, does not seem to be readily available. However, the Bureau conducted its own analysis of cases listed on the USDOJ's website in which the CRD intervened to address discrimination (based on disability, national origin, race, religion, or sex) in education.[111] The CRD's intervention took various forms, including initiation of investigations or compliance reviews, direct court filings, and participation in resolution agreements.[112] Per the Bureau's analysis, approximately twenty-two of the one hundred fifty cases on this list involved a Title IX claim. Of these Title IX cases, the issues that gave rise to complaints, with the number of complaints in parentheses, consisted of: sexual harassment, gender harassment, or sexual violence (15); athletics (4); different treatment, exclusion, or denial of benefits (2); and admissions (1).[113] The earliest CRD intervention involving a Title IX case took place in 1990 and the most recent occurred in 2016.[114]

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[104] *See How to File a Complaint*, USDOJ, CRD website, https://www.justice.gov/crt/how-file-complaint (last modified March 29, 2019), which contains a link to an undated document titled *Information About Filing a Complaint With the U.S. Department of Justice, Civil Rights Division and the U.S. Department of Education, Office for Civil Rights*, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/09/22/filecomp.pdf (explaining the differences between the complaint processes and enforcement mechanisms used by each agency).
[105] *See Information About Filing a Complaint With the U.S. Department of Justice, Civil Rights Division and the U.S. Department of Education, Office for Civil Rights, supra* note 104, at 4.
[106] *See id*. at 3.
[107] *See id*.
[108] *See id*.
[109] *See id*. at 4.
[110] *See id*.
[111] *See Educational Opportunities Cases,* USDOJ CRD website, https://www.justice.gov/crt/educational-opportunities-cases (last visited July 2, 2019).
[112] *See id.*
[113] *See id.*
[114] *See id.*

Part IV. Guidance Issued by the OCR

A. Role of Guidance and Policy Shifts

OCR policy guidance documents attempt to increase recipient institutions' compliance with Title IX by clarifying the law's requirements and the institutions' responsibilities.[115] OCR guidance also serves to fill in "gaps" that have not been fully addressed by the Title IX statute or implementing regulations or to share important information in an expedient manner.[116] The Agency guidance may take the form of resource manuals or handbooks, question-and-answer documents, or "Dear Colleague" Letters[117] that are sent to administrators at recipient institutions. However, because informal guidance was not subject to the formal (and often lengthy) process of adopting regulations, informal guidance may be more readily changed or invalidated by a subsequent federal administration with different policy priorities. While the USDOE's official position is that its guidance documents "represent the [Department's] . . . current thinking on a topic . . . [and] do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations[,]"[118] it appears that OCR guidance has, at times, shifted the contours of Title IX's protections.

B. Selected Examples of OCR Guidance

Over the years, the OCR has issued guidance on a wide range of Title IX issues.[119] The following examples appear to be currently applicable, with the exception of 2011 and 2014 agency guidance addressing sexual violence that was rescinded in 2017.

1. Obligation to Designate a Title IX Coordinator

A "Dear Colleague" Letter dated April 24, 2015, reminded recipient institutions that all school districts, colleges, and universities that receive federal funding under Title IX "must

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[115] *See generally Sex Discrimination Policy Guidance*, USDOE website, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html.

[116] *See id.* According to the OCR, there are times when "the guidance OCR issues directly responds to emerging trends in discriminatory behavior, as reflected in the Civil Rights Data Collection, requests OCR receives for technical assistance, and complaint investigations."

[117] *See id.* The OCR explains that "Dear Colleague" Letters are utilized "when precedent-setting cases in the courts clarify specific elements of application of the law," in order to "help ensure that the general public understands how the decisions apply to schools, districts, and educational institutions of higher learning."

[118] *See Types of Guidance Documents*, USDOE website, https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html (last modified July 22, 2019). More specifically, a "guidance document" is "an agency statement of general applicability and future effect, other than a regulatory action (as defined in Executive Order 12866, as further amended, § 3(g)), that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue." Guidance documents are further categorized into those that are "significant" and "economically significant" based on their anticipated impacts.

[119] The USDOE website has a comprehensive list that describes OCR policy guidance addressing sex-based discrimination and covers the years 1975 through 2017. *See Sex Discrimination Policy Guidance, supra* note 115. The website also provides a general listing of OCR policy guidance relating to all the civil rights laws it enforces. *See Policy Guidance Index*, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html (last modified December 21, 2018). On both lists, guidance that is no longer valid is marked "archived."

designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities" under Title IX.[120] Although the designation of a Title IX coordinator is a basic requirement that is explicitly stated in the Title IX implementing regulations,[121] the OCR discovered that some of the most "egregious and harmful" violations of Title IX occurred when a recipient institution had either ignored this directive or had not provided a Title IX coordinator with adequate training or authority to effectively monitor the recipient institution's compliance with Title IX.[122] In an effort to address this glaring problem, the OCR reiterated its past guidance on the responsibilities of a Title IX coordinator, highlighted specific factors that are relevant to the selection of a Title IX coordinator, and urged recipient institutions to support their Title IX coordinators by boosting their visibility in the educational setting and ensuring that coordinators are appropriately trained and have "comprehensive knowledge in all areas" of their responsibility.[123] The OCR further provided a separate letter addressed to Title IX coordinators detailing a coordinator's responsibilities and a resource guide of recommended "best practices" for Title IX coordinators.[124]

2. Athletics

In a "Dear Colleague" Letter dated April 20, 2010, the OCR addressed the test that it uses to determine whether a recipient institution is "effectively accommodating the athletic interests and abilities of its students to the extent necessary to provide equal athletic opportunity."[125] This determination is relevant to the broader question of whether, in accordance with Title IX's implementing regulations, a recipient institution that "operates or sponsors interscholastic, intercollegiate, club or intramural athletics" is providing "equal athletic opportunity for members of both sexes."[126]

The "Three-Part Test," as it has come to be known, stems from the OCR's 1979 written policy interpretation of Title IX's requirements for intercollegiate athletics.[127] The parts of the test were clarified in OCR "Dear Colleague" Letters in 1996 and 2005.[128] Two important points should be kept in mind. First, despite its name, the "Three-Part Test" does not require that recipient institutions satisfy all three parts to demonstrate compliance with Title IX. Instead, the test allows flexibility by giving a recipient institution "three individual avenues to choose from"

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[120] *See* "Dear Colleague" Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, OCR (April 24, 2015), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf ("Dear Colleague" Letter from Catherine E. Lhamon on Title IX Coordinators), at 1.
[121] *See* note 14, and accompanying text, *supra.*
[122] *See* "Dear Colleague" Letter from Catherine E. Lhamon on Title IX Coordinators, *supra* note 120.
[123] *See id.* at 1.
[124] The letter to Title IX coordinators, dated April 24, 2015, is available at https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf, while the resource guide, dated April 2015, is available at https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf.
[125] *See* "Dear Colleague" Letter from Russlynn Ali, Assistant Secretary for Civil Rights, United States Department of Education Office for Civil Rights (April 20, 2010), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf (April 20, 2010, "Dear Colleague" Letter), at 2.
[126] *See* 34 C.F.R. §106.41(c).
[127] *See* April 20, 2010, "Dear Colleague" Letter, *supra* note 125, at 2.
[128] *See id.*

in providing equal athletic opportunity to male and female students.[129] Second, the Three-Part Test may be applied beyond the world of intercollegiate athletics. While the test references "intercollegiate athletics," the OCR has explained that the general principles of its 1979 policy interpretation, on which the test is based, "often will apply" to interscholastic, club, and intramural athletic programs."[130]

Under the Three-Part Test, a recipient institution may demonstrate that it is providing its students with non-discriminatory opportunities to participate in athletics if *any one* of the following statements is true of the institution:

(1) Intercollegiate level participation opportunities for male and female students are provided in numbers "substantially proportionate to their respective enrollments";

(2) There is a history and continuing practice of expanding programs for the members of the sex that is, and has been, underrepresented among intercollegiate athletes, and the program expansion is "demonstrably responsive to the developing interests and abilities of the members of that sex"; or

(3) There is not a history and continuing practice of expanding programs for the members of the sex that is underrepresented among intercollegiate athletes, but the interests and abilities of the members of that sex have been "fully and effectively accommodated by the present program."[131]

The 2010 letter is significant because it withdrew prior guidance issued in 2005 that allowed recipient institutions to use the results of student interest surveys to demonstrate compliance with the third part of the Three-Part Test, and instead, the letter reinstated the OCR's prior approach to demonstrating compliance.[132] The current, reinstituted approach involves the OCR's consideration of three questions: whether there is unmet interest in a particular sport; whether there is sufficient ability to sustain a team in that sport; and whether there is a reasonable expectation of competition for the team.[133] A "yes" response to *all three* of these questions will result in the OCR finding that, for purposes of the third part of the Three-Part Test, the recipient institution is not "fully and effectively" accommodating the interests and abilities of the underrepresented sex.[134]

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[129] *See id*. at 3.
[130] *See id*. at 2, note 8.
[131] *See id.* at 3.
[132] *See id.* at 2. The OCR's explanation for withdrawing its 2005 guidance acknowledged that the guidance promoted "reliance on a single survey instrument to demonstrate that an institution is accommodating student interests and abilities" in accordance with the third part of the test. The OCR went on to state that the 2005 guidance was "inconsistent with the nondiscriminatory methods of assessment set forth in the 1979 Policy Interpretation and the 1996 Clarification and do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys, under Part Three."
[133] *See id.* at 2-4.
[134] *See id.* The 2010 letter identifies additional criteria used by the OCR to further evaluate a recipient institution's response to each of the three questions underlying the third part of the test.

3. Pregnant and Parenting Students

A June 25, 2013, "Dear Colleague" Letter stressed the importance of supporting pregnant and parenting students in order to maximize their rate of graduation from high school and their successful pursuit of higher education and employment.[135] The letter explained that 26% of public high school dropouts (male and female combined) cited parenthood as a significant reason for leaving school, that only 51% of young women who became mothers before age twenty had earned a high school diploma by age 22, and that only 2% of young women who became mothers before age eighteen went on to earn a college degree.[136] Accompanying the letter was a pamphlet intended to assist school administrators, teachers, and counselors, as well as parents and students, in bolstering the rates of high school and college graduation for these students.[137] The letter also reminded recipient institutions that pregnant students must be accommodated in the same manner as students with a temporary medical condition, and thus, for example, a student who is absent from school due to pregnancy or childbirth must be excused for as long as the absence is deemed medically necessary, and upon return to school, the student must be allowed to return to "the same academic and extracurricular status as before her medical leave began."[138]

4. Career and Technical Education (CTE) Programs

In a "Dear Colleague" Letter dated June 15, 2016, the OCR and the USDOE's Office of Career, Technical, and Adult Education jointly reminded recipient institutions that "all students, regardless of their sex or gender, must have equal access to the full range of CTE programs offered."[139] The term "CTE programs" refers to classes and programs in which the primary purpose is to prepare students for careers in a technical, skilled, or semi-skilled occupation or trade, or for study in a technical field, as well as any activities related to those programs.[140] The letter cited statistics indicating disproportionately low numbers of women enrolled in CTE programs that include training for higher-paying positions (such as plumbers and electricians) and disproportionately high numbers of women in programs that include training for traditionally lower-paying positions (such as childcare workers and cosmetologists).[141] Among other things, the letter encouraged recipient institutions to make proactive efforts to increase enrollment of an underrepresented sex in CTE programs, even in the absence of unlawful sex-based discrimination.[142]

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[135] *See* "Dear Colleague" Letter from Seth Galanter, Acting Assistant Secretary for Civil Rights, OCR (June 25, 2013), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf, at 1.
[136] *See id.*
[137] *See id.*
[138] *See id.* at 2.
[139] "Dear Colleague" Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, OCR, and Johan E. Uvin, Deputy Assistant Secretary, USDOE Office of Career, Technical, and Adult Education (June 15, 2016), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201606-title-ix-gender-equity-cte.pdf, at 1.
[140] *See id.*
[141] *See id.* at 3.
[142] *See id.* at 2.

5. Harassment and Bullying

In a "Dear Colleague" Letter from October 26, 2010, the OCR reminded recipient institutions of their legal obligations to address harassment and bullying under Title IX and other federal anti-discrimination laws enforced by the OCR.[143] This letter addressed various types of student-on-student harassment and bullying that violate multiple anti-discrimination laws, not just Title IX.[144] The OCR recognized that schools are increasingly adopting anti-bullying policies to foster and maintain a safe learning environment for all students.[145] However, the OCR also emphasized that a school that has adopted an anti-bullying policy and responds to incidents in accordance with the policy is not necessarily complying with federal anti-discrimination laws.[146] In other words, these federal laws place very specific obligations on recipient institutions that may *exceed* the requirements of a school-based anti-bullying policy. Among other things, the ten-page letter provided detailed information on various forms of harassing conduct, the point at which recipient institutions have a responsibility to address incidents of harassment, and specific actions that recipient institutions may need to take to ensure that they respond to incidents in a way that complies with federal law.

Examples of the letter's guidance include the following:

- "School districts may violate [the anti-discrimination laws enforced by the OCR] and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees."[147]

- "Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."[148]

- "A school is responsible for addressing harassment incidents about which it knows or reasonably should have known."[149]

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[143] *See generally* "Dear Colleague" Letter from Russlynn Ali, Assistant Secretary for Civil Rights, OCR (October 26, 2010), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. The other federal anti-discrimination laws referenced in the letter protect persons on the basis of race, color, or national origin (Title VI of the Civil Rights Act of 1964) as well as disability (Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990).
[144] *See id.*
[145] *See id*. at 1.
[146] *See id.*
[147] *Id*. at 1.
[148] *Id*. at 2.
[149] *Id.*

- "[S]chools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment."[150]

- "When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred . . . the inquiry should be prompt, thorough, and impartial."[151]

- "If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring."[152]

The letter included hypothetical factual scenarios to illustrate four different types of harassment (based on race, color, or national origin; sex; gender; and disability) and how the school's failure to recognize student misconduct as discriminatory harassment had the effect of violating other students' civil rights.[153] Each hypothetical example was followed by an explanation of actions the school could have taken to respond to the misconduct in a way that complies with federal law.[154] The letter ended by encouraging recipient institutions to "reevaluate the policies and practices . . . [used] to address bullying and harassment to ensure that they comply with the mandates of the federal civil rights laws" and referred institutions to a list of relevant OCR guidance documents that spanned the years 1994 through 2008.[155]

The OCR also advised recipient institutions that, depending on the extent of the harassment that has occurred, there may be a need to train students, their families, and institutional employees on how to recognize harassment and how to respond appropriately.[156] The OCR additionally advised that recipient institutions should take steps to prevent future harassment and retaliation against persons who were subjected to, complained of, or witnessed harassment.[157]

6. Sexual Violence

An April 4, 2011, "Dear Colleague" Letter clarified that Title IX prohibits sexual harassment as well as "sexual violence." Although the 2011 letter, and the 2014 Questions and

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[150] *Id.*
[151] *Id.*
[152] *Id*. at 2-3. The steps that should be taken depend on the extent of the harassment and may include: separating the perpetrator and target of the harassment in a manner that does not penalize the student who was harassed; providing counseling for both parties; providing additional services to the harassed student to address the effects of the harassment; disciplining the perpetrator; training students, families of students, and school employees to recognize harassment and how to respond; and instituting new policies against harassment and new procedures for reporting harassment, as well as wide dissemination of information on existing policies and procedures).
[153] *See id*. at 4-9.
[154] *See id*.
[155] *See id*. at 9-10.
[156] *See id*. at 3.
[157] *See id*.

Answers document that further clarified the 2011 letter,[158] were subsequently withdrawn by the USDOE,[159] sexual harassment and other forms of sexual misconduct continue to be treated as potential violations of Title IX for enforcement purposes. However, as noted later in this chapter, there was a subsequent shift in the *severity* of sexual misconduct that obligates a recipient institution to address the misconduct under Title IX.[160]

a. 2011 "Dear Colleague" Letter

To fully understand the current state of federal requirements, one must be aware of the historical context in which those requirements evolved, beginning with the 2011 "Dear Colleague" Letter. The nineteen-page 2011 "Dear Colleague" Letter defined "sexual violence" as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent" due to the person's drug or alcohol use, or an intellectual or other disability.[161] The letter defined sexual violence to include "rape, sexual assault, sexual battery, and sexual coercion."[162] The letter further instructed recipient institutions as to the nature of sexual harassment and a recipient institution's obligation to address it:

- "Sexual harassment is unwelcome conduct of a sexual nature" that includes "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature" including sexual violence.[163]

- Sexually harassing conduct "creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."[164]

- A single instance of sexual harassment, such as rape, may be sufficiently severe to create a hostile environment.[165]

- A recipient institution that "knows or reasonably should know about student-on-student harassment that creates a hostile environment" is required to "take immediate action to eliminate the harassment, prevent its recurrence, and

[158] *See* notes 185 to 187, and accompanying text, *infra*.
[159] *See* notes 193 to 201, and accompanying text, *infra*.
[160] This shift is due to the replacement of the 2011 and 2014 guidance documents with an interim Question and Answer document issued by the USDOE in September 2017. *See* notes 202 to 212, and accompanying text, *infra*. Moreover, the definition of what qualifies as "sexual harassment" that falls under the purview of Title IX may further change, if the changes to Title IX's implementing regulations that were proposed by the USDOE in November 2018 are ultimately promulgated and become substantive law. *See* notes 216 to 243, and accompanying text, *infra*.
[161] *See* archived "Dear Colleague" Letter from Russlynn Ali, Assistant Secretary for Civil Rights, OCR (April 4, 2011) (*Archived 2011 "Dear Colleague" Letter on Sexual Violence*), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf, at 1.
[162] *Id*. at 1-2.
[163] *Id*. at 3.
[164] *Id*.
[165] *See id*.

address its effects."[166] Such action includes conducting a prompt investigation, which is separate and distinct from one conducted by local law enforcement, "to determine what occurred and then take appropriate steps to resolve the situation."[167] The recipient institution's investigation must be "prompt, thorough, and impartial."[168]

Additionally, the 2011 "Dear Colleague" Letter set out in detail the key requirements that recipient institutions must follow when responding to complaints of sexual harassment and sexual violence,[169] many of which were already contained in the Title IX regulations and the OCR's 2001 Revised Sexual Harassment Guidance (previously discussed in this chapter).[170] Beyond this recap of existing requirements, the letter appeared to reflect greater support for victims throughout the Title IX investigation process. For example:

- A recipient institution is required to promptly take any steps necessary to protect the complainant pending a final outcome of the investigation, which may include assisting the complainant to avoid contact with the alleged perpetrator through a change in academic or living arrangements, and providing counseling, medical services, and academic support services.[171]

- A recipient institution may allow mediation as an informal means to resolve a complaint, but should not require a harassed student to resolve the problem directly with the alleged perpetrator.[172] In no event should mediation be used to address an allegation of sexual assault, even when agreed to by both parties.[173]

- Recipient institutions are "strongly discouraged" from allowing the parties to directly question or cross-examine each other during a hearing, which, when done by an alleged perpetrator, may traumatize or intimidate an alleged victim.[174]

- Although sexually harassing conduct may violate both Title IX and criminal laws, a criminal investigation of the same incident, if conducted, does not negate the recipient institution's obligation under Title IX to resolve complaints promptly and equitably.[175] Thus, a recipient institution should inform a complainant of the right to make a criminal complaint, should not attempt to discourage or delay the complainant's reporting of the incident to

[166] *See id*. at 4.
[167] *See id*.
[168] *See id*. at 5.
[169] These key requirements pertain to the publication of a notice of non-discrimination, designation of a Title IX Coordinator, and the adoption and publication of internal grievance procedures.
[170] *See* discussion on "Compliance By Recipient Institutions", part II, subpart B, *supra*.
[171] *See Archived 2011 "Dear Colleague" Letter on Sexual Violence*, *supra* note 161, at 15-16.
[172] *See id*. at 8.
[173] *See id*.
[174] *See id*. at 12.
[175] *See id*. at 9-10.

local law enforcement authorities, and should not postpone its own Title IX investigation for the purpose of waiting until a criminal investigation or proceeding has ended.[176]

- Recipient institutions must use a "preponderance of the evidence" standard in evaluating complaints.[177] Preponderance of the evidence is a lower burden of proof for complainants to satisfy. It is the same standard used by the OCR in enforcement proceedings against recipient institutions and in fund termination hearings, as well as in courts to establish civil rights violations.[178] Grievance procedures that use the higher "clear and convincing" standard are deemed to be "not equitable under Title IX."[179]

Furthermore, the 2011 "Dear Colleague" Letter emphasized the need for equal treatment of both parties during Title IX proceedings.

Although the letter itself was later rescinded, the following substantive requirements continue to apply to recipient institutions today through the Clery Act,[180] which codified certain directives of the 2011 letter:

- Equal opportunity for the complainant and alleged perpetrator to present relevant witnesses and other evidence, have an attorney present at any stage of the proceedings, and appeal the recipient institution's decision.[181]

- Written notice to the complainant and alleged perpetrator of the outcome of the complaint and any appeal therefrom.[182]

- The possession of proper training or experience by all persons involved in the recipient institution's grievance procedures, including Title IX coordinators, investigators, and adjudicators in handling complaints of sexual harassment and sexual violence. These persons must also have knowledge of the recipient institution's grievance procedures, including any applicable confidentiality requirements.[183]

Moreover, the 2011 "Dear Colleague" Letter emphasized the importance of training and preventive efforts. The letter recommended that recipient institutions be proactive in preventing sexual harassment and sexual violence and implement preventive education programs (including information that encourages students to report sexual violence and assures them that "use of

[176] *See id*. at 10.
[177] *See id*. at 10-11.
[178] *See id*.
[179] *See id*. at 11.
[180] *See* Chapter 2, notes 106 to 123, and accompanying text, *supra*.
[181] *See Archived 2011 "Dear Colleague" Letter on Sexual Violence*, *supra* note 161, at 11-12.
[182] *See id*. at 13.
[183] *See id*. at 12.

alcohol or drugs never makes the victim at fault for sexual violence") and comprehensive victim support services.[184]

b. 2014 Questions and Answers on Title IX and Sexual Violence

As a follow-up to the 2011 "Dear Colleague" Letter on Sexual Violence, the OCR issued a Question-and-Answer (Q&A) document dated April 29, 2014.[185] Like the 2011 "Dear Colleague" Letter, the guidance contained in the 2014 Q&A document was rescinded by the USDOE's September 2017 press release.[186] The Q&A, comprehensive and detailed, totaled forty-six pages and resembled a technical manual in certain respects. The 2014 Q&A further clarified guidance that was set forth in the 2011 "Dear Colleague" Letter and provided additional guidance on recipient institutions' responsibilities when responding to Title IX complaints.

More specifically, the 2014 Q&A document addressed:

- A school's obligation to respond to sexual violence;
- Students protected by Title IX;
- Title IX procedural requirements;
- Reporting of incidents of sexual violence to the Title IX Coordinator by designated "responsible employees" who have an obligation to report;
- Confidentiality and a school's obligation to respond to sexual violence;
- Elements of Title IX investigations and hearings;
- Interim measures to protect complainants during the pendency of an investigation;
- Remedial actions to address the hostile environment created by sexual violence;
- Written notification to parties about the outcome of a complaint and any appeal therefrom;

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[184] *See id*. at 14-15.
[185] *See* archived Questions and Answers on Title IX and Sexual Violence, Catherine E. Lhamon, Assistant Secretary for Civil Rights, OCR (April 29, 2014) (*Archived 2014 Q&A*), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[186] *See* notes 193 to 201, and accompanying text, *infra*.

- Flexibility allowed in appeal procedures, such as whether to allow an appeal of the factual findings, remedies and sanctions, or both; provided that the appeal procedures apply to both parties equally;

- Title IX training, education, and prevention;

- Retaliation prohibited by Title IX;

- Title IX's lack of impingement on expressive activities or speech protected by the First Amendment;

- Requirements for recipient institutions under the Clery Act and the Violence Against Women Reauthorization Act (VAWA) of 2013; and

- Further available federal guidance and resources.[187]

C. 2017 Rescission of Prior OCR Guidance and Release of OCR Interim Guidance

In January 2017, a new President took office, and the following month, the USDOJ released an official statement by Attorney General, Jeff Sessions, announcing the withdrawal by the USDOJ and the USDOE of guidance relating to transgender students.[188] The withdrawn guidance, issued in 2015 and 2016, had interpreted Title IX and its implementing regulations as requiring recipient institutions to provide access to sex-segregated facilities (such as bathrooms and locker rooms) based on gender identity rather than biological sex.[189] Attorney General Sessions cited the insufficient legal analysis of the prior guidance and its questionable alignment with Title IX as shortcomings that warranted the withdrawal of the earlier guidance, while also noting the prerogative of Congress, state legislatures, and local governments to adopt laws or policies on the issue.[190]

Subsequently, a memorandum released by Attorney General Sessions in November 2017 explained that the USDOJ would no longer issue guidance documents to regulated entities that "effectively bind private parties without undergoing the rulemaking process."[191] The memorandum went on to stress that "guidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch . . .

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[187] *See Archived 2014 Q&A*, *supra* note 185.
[188] *See Statement by Attorney General Jeff Sessions on the Withdrawal of Title IX Guidance*, Office of Public Affairs, USDOJ, February 22, 2017, press release number 17-214, *available at* https://www.justice.gov/opa/pr/statement-attorney-general-jeff-sessions-withdrawal-title-ix-guidance (last visited August 13, 2018). *See also* "Dear Colleague" Letter from Candice Jackson, Acting Assistant Secretary for Civil Rights, OCR (September 22, 2017), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.
[189] *See Statement by Attorney General Jeff Sessions on the Withdrawal of Title IX Guidance*, *supra* note 188.
[190] *See id*.
[191] *Memorandum from the Office of the Attorney General* (November 16, 2017), *available at* https://www.justice.gov/opa/press-release/file/1012271/download (last visited August 13, 2018).

[and should not] create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements."[192]

Similarly, the new Secretary of Education, Betsy DeVos, announced the USDOE's intent to make fundamental changes to the manner in which Title IX complaints are investigated. This announcement was made in September 2017 during a policy speech in Washington, D.C.[193] The USDOE's proposal was part of a larger effort, pursuant to an Executive Order issued in February 2017, "to alleviate unnecessary regulatory burdens" by establishing a Regulatory Reform Task Force within each federal agency to evaluate existing regulations and "make recommendations to the agency head regarding their repeal, replacement, or modification."[194] Secretary DeVos indicated that the Department will develop proposed regulations that will undergo the public comment and review process before being finalized and adopted. More specifically, a departmental press release stated that the USDOE "intends to engage in rulemaking on Title IX responsibilities arising from complaints of sexual misconduct. The Department will solicit comments from stakeholders and the public during the rulemaking process, a legal procedure the prior administration ignored."[195]

The USDOE press release also rescinded the guidance provided in the 2011 "Dear Colleague" Letter on Sexual Violence and the 2014 Q&A on Title IX and Sexual Violence, noting that these documents did not comply with notice and public comment requirements, and were thus lacking in due process and fundamental fairness.[196] These rescinded guidance documents were viewed by the Department as reducing procedural due process for accused students.[197] For example, use of the less stringent "preponderance of the evidence" standard,[198] while defensible as being identical to the evidentiary standard used in a civil trial,[199] was criticized on the basis that parties to a civil trial have had the benefit of the pre-trial fact-finding discovery procedure that may take months or even years.[200] In contrast, the OCR's 2011 "Dear Colleague" Letter on Sexual Violence required designated and reasonably prompt time frames

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[192] *Id*.
[193] *See* Stephanie Saul and Kate Taylor, *Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations,* The New York Times, September 22, 2017, *available at* https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html.
[194] Each task force was directed to focus on regulations that, among other things, are "outdated, unnecessary, or ineffective;" "[i]mpose costs that exceed benefits;" and "[c]reate a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies." *See* Evaluation of Existing Regulations, 82 Fed. Reg. 28431 (June 22, 2017), *available at* https://www.regulations.gov/contentStreamer?documentId=ED-2017-OS-0074-0001&contentType=pdf.
[195] Press release, *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, USDOE (September 22, 2017), *available at* https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct (last visited August 13, 2018).
[196] *See id*.
[197] *See id.*
[198] *See* note 206, *infra*.
[199] *See Archived 2011 "Dear Colleague" Letter on Sexual Violence*, *supra* note 161, at 10.
[200] Kathryn Joyce, *The Takedown of Title IX*, The New York Times Magazine, December 5, 2017, *available at* https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html (citing Harvard Law School professor Nancy Gertner, *Sex, Lies and Justice,* American Prospect, January 12, 2015, *available at* http://prospect.org/article/sex-lies-and-justice).

for all major stages of a recipient institution's grievance process and noted that "a typical investigation takes approximately 60 calendar days following receipt of the complaint."[201]

In place of the rescinded guidance on sexual violence, the USDOE issued interim guidance in the form of a new Questions and Answers document dated September 2017 (2017 Q&A) that clarifies the manner in which the OCR will evaluate a recipient institution's Title IX compliance in addressing campus sexual misconduct until the new federal rules are in place. Secretary DeVos stated that the new interim guidance would "help schools as they work to combat sexual misconduct and will treat all students fairly," noting further that "the process also must be fair and impartial, giving everyone more confidence in its outcomes."[202]

The 2017 Q&A document affirms that a recipient institution is obligated, among other things, to respond appropriately to an incident of sexual misconduct where the institution "knows or reasonably should know of" the incident, regardless of whether a student has filed an actual complaint or requested that the institution take action.[203] However, the 2017 Q&A document also alters certain aspects of previously issued guidance.

1. Significant Changes

Significant changes made by the 2017 interim guidance include:

(1) Departing from the previous definition of sexually harassing conduct that creates a "hostile environment" (to which a school must respond),[204] and instead requiring that the conduct be "so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's program's or activities";[205]

(2) Giving recipient institutions a choice between using the lower "preponderance of the evidence" standard of proof[206] or the higher "clear

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[201] *See Archived 2011 "Dear Colleague" Letter on Sexual Violence*, *supra* note 161, at 12. *But see* notes 209 to 210, and accompanying text, *infra*.

[202] *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, *supra* note 195.

[203] *See* Q&A on Campus Sexual Misconduct, OCR (September 2017) (*2017 Q&A)*, Answer to Question 1 ("What is the nature of a school's responsibility to address sexual misconduct?"), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (last visited September 24, 2018). The interim guidance also provides that "when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond."

[204] Under the *Archived 2011 "Dear Colleague" Letter on Sexual Violence*, *supra* note 161, at 3, sexually harassing conduct "creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."

[205] *See 2017 Q&A, supra* note 203, Answer to Question 1 ("What is the nature of a school's responsibility to address sexual misconduct?").

[206] A "preponderance of the evidence" standard, also known as a "fifty-one percent standard," means that it is more likely than not that misconduct occurred. *See* Katherine Mangan, *What You Need to Know About the New Guidance on Title IX,* The Chronicle of Higher Education, September 22, 2017, *available at* https://www.chronicle.com/article/What-You-Need-to-Know-About/241277.

and convincing" standard of proof[207] when making findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the recipient institution's sexual misconduct policy. (In contrast, the April 4, 2011 "Dear Colleague" Letter on Sexual Violence required the use of the "preponderance of the evidence" standard);[208]

(3) Specifying that "[t]here is no fixed time frame under which a school must complete a Title IX investigation" and noting that the "OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution."[209] (It should be noted that the 2011 "Dear Colleague" Letter on Sexual Violence referenced a sixty-day period as a typical time frame for completing an investigation, to be evaluated on a case-by-case basis);[210]

(4) Allowing recipient institutions to decide whether to provide a process for appealing a finding of responsibility and whether an appeal may be brought by either party or only by the accused party (previous guidance encouraged recipient institutions to have an appeals process that either party could initiate);[211] and

(5) Permitting recipient institutions to facilitate an informal resolution to a Title IX complaint, such as mediation, if voluntarily agreed to by the parties, if deemed appropriate by the recipient institution for that particular complaint, and if certain other conditions are met (prior guidance asserted that mediation of alleged sexual assaults was not appropriate).[212]

2. Reaction to the OCR's Interim Guidance

In response to the OCR interim guidance on the handling of campus sexual misconduct complaints, many administrators at recipient institutions of higher learning expressed a desire to

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[207] A "clear and convincing evidence" standard requires more evidentiary proof than the "preponderance of the evidence" standard but is less stringent than the "beyond a reasonable doubt" standard that is required to obtain a conviction in a criminal case. *See id*.

[208] *See 2017 Q&A*, *supra* note 203, Answer to Question 8 ("What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?"); *What You Need to Know About the New Guidance on Title IX, supra* note 206; and *The Takedown of Title IX, supra* note 200 (reporting that roughly eighty percent of post-secondary recipient institutions with a fixed standard of proof used the "preponderance of the evidence" standard before 2011). *See also* notes 177 to 179, and accompanying text, *supra*.

[209] *See 2017 Q&A*, *supra* note 203, Answer to Question 5 ("What time frame constitutes a 'prompt' investigation?").

[210] *See Archived 2011 "Dear Colleague" Letter on Sexual Violence, supra* note 161, at 12-13. *See also* note 201, and accompanying text, *supra*.

[211] *See 2017 Q&A*, *supra* note 203, Answer to Question 11 ("How may a school offer the right to appeal the decision on responsibility and/or any disciplinary decision?"). *See also Archived 2014 Q&A, supra* note 185, at 37-38, and *What You Need to Know About the New Guidance on Title IX, supra* note 206.

[212] *See 2017 Q&A*, *supra* note 203, Answer to Question 7 ("After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?"); *What You Need to Know About the New Guidance on Title IX, supra* note 206.

maintain their respective institutions' current policies and practices for investigating Title IX claims, pending the finalization of changes to Title IX's implementing regulations that the USDOE was planning to propose.[213] It would appear that recipient institutions viewed such a sudden change as disruptive so soon after investing significant time and energy to comply with the 2011 OCR guidance and improve their responses to campus sexual violence.[214] Other Title IX administrators indicated their belief that the interim guidance "raises more questions than answers."[215]

Part V. The Future of Federal Title IX Enforcement

A. New Title IX Regulations on the Horizon

On November 16, 2018, the USDOE made public its long-anticipated proposal to amend Title IX's implementing regulations.[216] The Department's announcement was accompanied by a one-page fact sheet,[217] a detailed historical background and section-by-section summary of the proposed changes,[218] and a much lengthier document containing an unofficial version of the full text of the proposed changes, the Department's stated justification for each change, and an analysis of the proposal's various impacts (as required by federal law) such as financial impact.[219] In announcing its proposal, the Department emphasized the "historic" nature of

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[213] *See* National Association of Student Personnel Administrators (now known as NASPA—Student Affairs Administrators in Higher Education), *Background Brief: Title IX & Sexual Assault Prevention and Response*, publication date unknown, *available at* https://www.naspa.org/images/uploads/main/Title_IX_Sexual_Assault_Background_Brief_FINAL.pdf (last visited September 25, 2018), at 4 (citing Andrew Kreighbaum, *New Instructions on Title IX,* Inside Higher Ed, September 25, 2017, *available at* https://www.insidehighered.com/news/2017/09/25/education-department-releases-interim-directions-title-ix-compliance, and Sarah Brown, *What Does the End of Obama's Title IX Guidance Mean for Colleges?,* The Chronicle of Higher Education, September 22, 2017, *available at* https://www.chronicle.com/article/What-Does-the-End-of-Obama-s/241281). *See also* Jeremy Bauer-Wolf, *State Law Likely Conflicts With DeVos's Title IX Proposal*, Inside Higher Ed, December 13, 2018, *available at* https://www.insidehighered.com/news/2018/12/13/state-law-likely-conflicts-devoss-title-ix-proposal.

[214] *See What Does the End of Obama's Title IX Guidance Mean for Colleges?*, *supra* note 213. On this issue, one university administrator commented that "Higher ed just doesn't turn on a dime," (noting the fact that complying with the OCR's 2011 "Dear Colleague" Letter on Sexual Violence was a years-long process). Another university official who was interviewed for the article noted the number of campuses that have commenced Title IX investigations for a new batch of sexual misconduct allegations coinciding with the 2017 fall semester and the likelihood that those campuses will continue to abide by the 2011 guidance for now.

[215] *Id.*

[216] *See* press release, *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, USDOE (November 16, 2018), *available at* https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all (last visited November 28, 2018).

[217] *See U.S. Department of Education Proposed Title IX Regulation Fact Sheet*, USDOE (November 16, 2018), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf.

[218] *See Background & Summary of the Education Department's Proposed Title IX Regulation*, USDOE (November 16, 2018), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/background-summary-proposed-ttle-ix-regulation.pdf.

[219] *See* unofficial version of notice of proposed rulemaking, USDOE (November 16, 2018), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf. The official version of the Notice of Proposed

regulating sexual harassment under Title IX for the first time through the formal rulemaking process and providing a definition of sexual harassment for Title IX purposes.[220]

The Department's proposal became official upon publication as a Notice of Proposed Rulemaking (NPRM document) in the *Federal Register* on November 29, 2018, at which time a sixty-day public comment period commenced.[221] However, the public comment period was extended from January 28, 2019, to January 30, 2019, and then reopened for February 15, 2019, only.[222] As of the scheduled close of the public comment period on February 15, 2019, over one hundred thousand comments had been received.[223] In August 2019, it was reported that the Title IX regulations are expected to be finalized "later this [F]all."[224]

B. Impetus for the Proposed Amendments to Title IX Regulations

The Department explained that the impetus behind the proposal to amend the Title IX regulations included the following:

- Recipient institutions were uncertain whether OCR guidance that addressed how institutions evaluate complaints of sexual harassment were legally binding.

- Prior OCR guidance requiring use of the "preponderance of the evidence" standard and prohibiting alternative methods for resolving sexual harassment complaints, such as mediation, "generated particular criticism and controversy."[225]

Rulemaking was published in the Federal Register on November 29, 2018. *See* note 221, and accompanying text, *infra*.

[220] *See U.S. Department of Education Proposed Title IX Regulation Fact Sheet*, *supra* note 217, and *Background & Summary of the Education Department's Proposed Title IX Regulation*, *supra* note 218, at 1.

[221] *See* Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (NPRM document), 83 Fed. Reg. 61462 (proposed November 29, 2018) (to be codified at 34 C.F.R. Part 106), *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-11-29/pdf/2018-25314.pdf.

[222] *See* Reopening of Comment Period, Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 84 Fed. Reg. 4018 (February 14, 2019), *available at* https://www.regulations.gov/contentStreamer?documentId=ED-2018-OCR-0064-11187&contentType=pdf. The document clarified that comments submitted from January 31, 2019, through February 14, 2019, or after February 15, 2019, would not be accepted.

[223] However, according to the USDOE, the number of submitted comments may differ from the number publicly viewable, due to the agency's prerogative to withhold duplicate comments stemming from a mass e-mail campaign. *See* the USDOE's explanatory note on number of comments received, *available at* https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001.

[224] *See* Andrew Kreighbaum, *Title IX Emerges as Top Obstacle to Higher Ed Law Deal*, Inside Higher Ed, August 6, 2019, *available at* https://www.insidehighered.com/news/2019/08/06/title-ix-emerges-top-obstacle-higher-ed-law-deal.

[225] *See Archived 2011 "Dear Colleague" Letter on Sexual Violence*, *supra* note 161, at 8, 10-11.

- The OCR's prior guidance on sexual harassment pressured recipient institutions to "forgo robust due process protections," "captured too wide a range of misconduct," thus infringing on academic freedom and free speech, and "removed reasonable options" that recipient institutions would otherwise have for tailoring grievance procedures to the institutions' respective "pedagogical mission, resources, and educational community."[226]

C. Significance of Proposed Amendments

The Department describes the significance of the proposed amendments as follows:

> Overall, the existing regulations prohibiting sex discrimination remain intact and the proposed regulation adds new sections specific to sexual harassment. In broad strokes **the proposed regulation describes three things**:
>
> (1) ***What constitutes sexual harassment*** for purposes of rising to the level of a civil rights issue under Title IX;
>
> (2) ***What triggers a school's legal obligation to respond*** to incidents or allegations of sexual harassment; and
>
> (3) ***How a school must respond***.[227]

(Emphasis in original.)

More specifically, the proposal adds new sections to the Title IX implementing regulations (to be codified at 34 Code of Federal Regulations (C.F.R.) Part 106) that, among other things, would:

- ***Reduce the number of complaints involving sexual harassment and other forms of sexual misconduct that come within the purview of Title IX.*** This reduction would be achieved by defining "sexual harassment" to only include situations where:

  (1) An employee of the recipient institution conditions an aid, benefit, or service on an individual's participation in "unwelcome sexual conduct";

  (2) Unwelcome conduct on the basis of sex is "so severe, pervasive, and objectively offensive" that it prevents an individual from having equal access to the recipient institution's education program or activity; or

[226] *See* NPRM document, *supra* note 221, at 61464.
[227] *See Background & Summary of the Education Department's Proposed Title IX Regulation*, *supra* note 218, at 2.

(3) The conduct meets the definition of a "sexual assault" that must be included in the institution's annual security report to the USDOE pursuant to the Clery Act.[228]

Note, however, that this is a marked contrast from the OCR's 2011 "Dear Colleague" Letter on Sexual Violence (no longer applicable), in which sexual harassment was defined much more broadly as "unwelcome conduct of a sexual nature," including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature," as well as "sexual violence[.]"[229]

- ***Limit the scope of recipient institutions' liability for complaints of sexual harassment.*** This would be accomplished by requiring as a threshold matter that an institution have "actual knowledge" of sexual harassment in its education program or activity before it can be found to have violated of Title IX.[230] "Actual knowledge" is defined to only include incidents that were brought to the attention of the institution's Title IX Coordinator "or any official of the recipient who has authority to institute corrective measures on behalf of the recipient" (however, for incidents involving student-on-student harassment in elementary and secondary schools, actual knowledge by a teacher will suffice).[231] Generally speaking, an institution would be found in violation of Title IX if its response is "deliberately indifferent"—that is, "clearly unreasonable in light of the known circumstances."[232] Currently, this limitation on a recipient institution's liability applies only to recovery of money damages by plaintiffs in private litigation, as discussed earlier in this chapter.[233] However, the Department asserts that applying the same liability standard to the administrative enforcement context would benefit students and recipient institutions by providing clarity and uniformity in the treatment of sexual harassment complaints.[234]

- ***Require a separate and distinct grievance procedure for sexual harassment complaints.***[235] Notably, this procedure requires, among other things:

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[228] *See* NPRM document, *supra* note 221, at 61496. *See also id.* at 61464-61465 (background information citing the "overly broad definitions of sexual harassment," and other problems with Title IX's current enforcement by post-secondary recipient institutions, as the impetus for the USDOE's proposed regulations); Chapter 2, notes 106 to 112, and accompanying text, *supra* (discussing the Clery Act). Under 34 C.F.R. §668.46(a), the Clery Act defines "sexual assault" as "rape, fondling, incest, or statutory rape" as those terms are defined in the Federal Bureau of Investigation's Uniform Crime Reporting program.

[229] *See Archived 2011 "Dear Colleague" Letter on Sexual Violence*, *supra* note 161, at 3.

[230] *See* NPRM document, *supra* note 221, at 61497.

[231] *See id.* at 61496.

[232] *See id.* at 61497. The proposed new section also provides examples of when a response is not deliberately indifferent under specific articulated circumstances.

[233] *See* notes 76 and 77, and accompanying text, *supra.*

[234] *See* NPRM document, *supra* note 221, at 61466.

[235] *See id.* at 61497-61499. According to the Department, the current requirement that recipient institutions provide "prompt and equitable" grievance procedures and departmental guidance on meeting this standard notwithstanding, the lack of "clarity, permanence, and prudence of regulation properly informed by public participation in the full

(1) Written notice to the parties of the allegations in the complaint that potentially violate the recipient institution's code of conduct;

(2) Investigations of all formal complaints;

(3) Lack of conflicts of interest or bias among Title IX coordinators, investigators, and adjudicators (thus preventing, for example, the coordinator from serving as investigator and the investigator from serving as adjudicator);

(4) Equal opportunity for the complainant and the accused to inspect and review relevant evidence gathered in the course of the investigation and to present witnesses and evidence that would tend to prove or disprove the allegations;[236]

(5) The creation of an investigative report that fairly summarizes relevant evidence and distribution of the report to the parties for their review and written response;

(6) Conducting of a live hearing for institutions of higher educations (it is optional for elementary and secondary schools);

(7) A written determination of responsibility that is reached by using either the "preponderance of the evidence" standard or the "clear and convincing evidence" standard (but the "preponderance of the evidence" standard may be used only if the recipient institution also "uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction [as in the current complaint];" additionally, the evidentiary standard that is used for complaints against the institution's employees must also apply to complaints against students);[237]

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rulemaking process" has resulted in "hundreds of students" complaining to the OCR that their school did not provide this "prompt and equitable" process when responding to a report of sexual harassment. Moreover, "over 200 students" have sued their schools, claiming they were disciplined for sexual misconduct without having received due process protections. *See id.* at 61465.

[236] However, any cross-examination that is conducted must be through an "advisor" chosen by or aligned with that party. Moreover, inquiry into the complainant's sexual behavior or predisposition during cross-examination is prohibited, unless such evidence is offered "to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent." *See id.* at 61498.

[237] Observers have noted that the proposed requirement to use the same evidentiary standard for sexual harassment complaints against employees and students will likely result in more prevalent use of the higher "clear and convincing" standard, given that "[m]any union contracts and other agreements with faculty mandate" its use. *See* Laura Meckler, *Betsy DeVos Set to Bolster Rights of Accused in Rewrite of Sexual Assault Rules*, The Washington Post, November 14, 2018, *available at* https://www.washingtonpost.com/local/education/betsy-devos-set-to-bolster-rights-of-accused-in-rewrite-of-sexual-assault-rules/2018/11/14/828ebd9c-e7d1-11e8-a939-9469f1166f9d_story.html.

(8) A provision that allows both parties to appeal a determination of responsibility, if the recipient institution chooses to allow appeals at all;

(9) Provision of an equitable resolution to the complainant (including remedies designed to restore or preserve access to the recipient institution's education program or activity, where the accused has been found responsible for sexual harassment)[238] and to the accused (including the provision of due process before imposing any disciplinary measures);

(10) Conclusion of the grievance process within "reasonably prompt" timeframes for different stages of the process;[239] and

(11) While not mandatory, recipient institutions would also have the option to provide an informal resolution process for complaints of sexual harassment that obviates the need for a full investigation and adjudication, provided that specified conditions are met, including the voluntary, written consent of both parties.[240]

Additionally, the proposal would amend certain existing sections in 34 C.F.R. Part 106, including amendments that:

- Clarify that nothing in the federal Title IX rules would require a recipient to "infringe upon any individual's rights protected under the First Amendment or Due Process Clauses, or any other rights guaranteed by the U.S. Constitution;"[241]

- Prohibit the OCR from assessing monetary "damages" against a recipient institution as a remedy for a violation of any Title IX regulation (but this would not prohibit monetary payments that are part of an equitable remedy, such as reimbursement of an expense or reinstatement of a scholarship by the recipient institution); and

- Eliminate the requirement that religious institutions pre-emptively submit a written statement to the Department to qualify for the Title IX religious

[238] Under the Department's proposal, "supportive measures" are aimed at restoring or preserving the complainant's access to the recipient institution's education program or activity without "unreasonably burdening" the accused, and may include the following: "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures." *See* NPRM document, *supra* note 221, at 61496.
[239] *See id.* at 61497.
[240] *See id.* at 61499.
[241] *See id.* at 61480.

exemption (instead, they may simply raise the exemption in response to an investigation by the Department).[242]

As part of the public comment process, the USDOE invited feedback on specific questions raised in the proposal, including:

- Whether any of the proposed changes to the regulations would be inappropriate if applied to elementary and secondary schools, given the age and development abilities of their students;

- Whether the proposed new regulations that apply specifically to complaints of sexual harassment would be "unworkable" if applied to employees of recipient institutions who are accused of sexual harassment; and

- Whether requiring a uniform standard of evidence in all Title IX cases would be preferable to allowing recipient institutions to choose which standard to apply and, if so, what standard would be the "most appropriate."[243]

D. Reaction to the Proposed New Regulations

The Department's proposal appears to have garnered mixed responses. On one hand, the changes have been lauded as "a significant step forward" for both complainants and the accused, as well as "an important step toward restoring common sense and sanity" in the handling of Title IX complaints involving sexual misconduct.[244] With respect to the proposal's mandatory provision of a live hearing at post-secondary institutions, accused students who were summarily expelled without the opportunity to defend against the allegations reportedly expressed renewed confidence in the Title IX system, even though it was too late for them to benefit.[245]

On the other hand, some victim advocates argue that the proposed changes "would be *devastating* for survivors" (complainants) and discourage reporting of sexual harassment and sexual assault by defining "sexual harassment" so narrowly that it would be difficult to prove, remove off-campus harassment from the purview of school officials, and give accused students

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[242] *See id.* at 61462-61463 and 61480-61482.
[243] *See id.* at 61482-61483.
[244] *See* Justin Dillon, Op-Ed., *New Title IX Proposal Would Restore Fairness in Sexual-Misconduct Cases*, The Chronicle of Higher Education, November 19, 2018, *available at* https://www.chronicle.com/article/New-Title-IX-Proposal-Would/245131. The author is a partner at a law firm that represents both complainants and accused (more often the accused) parties in campus sexual misconduct investigations. He writes that in his law firm's experience, complainants "don't always want to punish the accused" and that the proposed Title IX regulations would "return agency" to complainants by allowing them to choose a full investigation or an alternative approach to resolution such as mediation.
[245] *See* Sarah Brown and Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, The Chronicle of Higher Education, November 16, 2018, *available at* https://www.chronicle.com/article/What-You-Need-to-Know-About/245118.

an advantage over complainants during the adjudication process.[246] (Emphasis in original.) Further, while the USDOE cited the need for greater due process for accused students as the justification for many of the proposed changes, critics have responded that Title IX was not enacted to protect perpetrators, but to ensure equal access to educational opportunities for victims of sex discrimination.[247] There was also criticism of a proposed requirement that an accused person be allowed to cross-examine the complainant, even indirectly through the accused person's attorney, noting that sexual assault "is about power and control" and thus "it is a bad idea to give the person with the power even more power to intimidate and hurt the victim."[248]

Additionally, a commentator who co-founded a victim's rights organization asserted that the most significant proposed changes to the Title IX regulations would "above all, protect schools" and "have nothing to do with protecting students, accused or otherwise."[249] The commentator noted that publicly available documents revealed that universities spent "tens of thousands of dollars" in 2018 to lobby the USDOE for changes to campus sexual assault policies, and that the proposed new regulations would reduce the regulatory burden on schools.[250] Yet another commentator observed that the proposal will clearly benefit attorneys because the resulting "gray space for campuses" could lead to "a flood of litigation."[251]

Moreover, it has been suggested that the USDOE's proposed changes to the Title IX regulations may be delayed or never take effect.[252] For example, if the USDOE's proposed

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[246] *See* Margaret Hazuka, *NWLC Submits Comment Telling Betsy DeVos to Keep Her #HandsOffIX*, National Women's Law Center Blog, February 5, 2019, *available at* https://nwlc.org/blog/nwlc-submits-comment-telling-betsy-devos-to-keep-her-handsoffix/.

[247] *See id.*

[248] *See What You Need to Know About the Proposed Title IX Regulations*, *supra* note 245.

[249] *See* Dana Bolger, Op-Ed., *Betsy DeVos's New Harassment Rules Protect Schools, Not Students*, The New York Times, November 27, 2018, *available at* https://www.nytimes.com/2018/11/27/opinion/betsy-devos-title-ix-schools-students.html. The author is a co-founder of Know Your IX, a "survivor- and youth-led project of Advocates for Youth that aims to empower students to end sexual and dating violence in their schools." *See* https://www.knowyourix.org/about/.

[250] *See Betsy DeVos's New Harassment Rules Protect Schools, Not Students, supra* note 249. *See also* NPRM document, *supra* note 221, at 61463 and 61488.

[251] *See What You Need to Know About the Proposed Title IX Regulations, supra* note 245.

[252] *See* Jeremy Bauer-Wolf, *State Law Likely Conflicts With DeVos's Title IX Proposal*, Inside Higher Ed, December 13, 2018, *available at* http://www.insidehighered.com/news/2018/12/13/state-law-likely-conflicts-devoss-title-ix-proposal. As stated in the article:

> The department will almost inevitably be sued once the regulations are final, said Peter F. Lake, a law professor and director of the Center for Excellence in Higher Education Law and Policy at Stetson University.
>
> If that happened and the actual implementation of the regulations was delayed, it could push the timeline into the next general election into 2020, Lake said -- he and others think there's a possibility the new rules never take effect.
>
> "No one has ever attempted to force a federally mandated court system on colleges," Lake said. "It's absolutely unprecedented."

regulations are challenged in court, it is likely their implementation may be delayed pending a decision.[253]

E. Comments on the Proposed New Regulations by Hawaii Recipient Institutions

The University of Hawaii (UH) System, Brigham Young University-Hawaii, and LDS Business College (collectively referred to as BYU-H/LDSBC) submitted comments on the proposed regulations.[254]

The UH System's comments on the proposed regulations[255] addressed one of the issues that Act 110, Session Laws of Hawaii 2018 (Act 110), required this study to examine: potential inconsistencies between multiple state and federal compliance mandates and regulatory schemes. The UH System's comments keenly highlighted the problems and uncertainties created by conflicts between the USDOE's proposal and two federal laws: Title VII of the Civil Rights Act of 1964 (Title VII),[256] which applies to employees of the UH System, and the Clery Act.[257] More generally, the UH System's testimony raised a host of specific concerns about potential inconsistencies in the manner that Title IX would be administered and the proposed new regulations.[258]

The UH System raised a significant concern regarding proposed new regulation 34 C.F.R. §106.45.[259] As drafted, the proposed regulation (§106.45) may prevent the University from investigating certain sexual harassment complaints under Title IX, even though the University may still have an obligation to address these complaints under Title VII, which applies to UH employees.[260] More specifically, it was pointed out that §106.45 would require dismissal of formal complaints alleging conduct that does not meet the proposed new definition of sexual harassment, despite "other state or federal laws that would require a recipient

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Professor Lake's reference to a "federally mandated court system" appears to cite the proposed new Title IX regulations' mandated adjudication procedure for sexual harassment cases at post-secondary recipient institutions. *See also* notes 235 to 240, and accompanying text, *supra*.

[253] *See State Law Likely Conflicts With DeVos's Title IX Proposal, supra* note 252.

[254] The NPRM document website features a downloadable spreadsheet of persons and organizations that submitted comments. The spreadsheet contains over 35,600 entries submitted during the period spanning November 29, 2018, through February 15, 2019. An electronic search of the spreadsheet did not locate any comment submitted by the Hawaii Department of Education or the Hawaii Board of Education.

[255] The University of Hawaii System's comments are available at https://www.regulations.gov/document?D=ED-2018-OCR-0064-31285.

[256] Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. *See* Chapter 2, notes 103 to 105, and accompanying text, *supra*.

[257] The Clery Act imposes additional requirements on post-secondary recipient institutions that participate in federal student aid programs with respect to investigating and reporting on-campus sexual violence. *See* Chapter 2, notes 106 to 110, and accompanying text, *supra*.

[258] *See* The University of Hawaii System's comments, *supra* note 255.

[259] Proposed new regulation 34 C.F.R. §106.45 relates to requirements for grievance procedures for addressing formal complaints of sexual harassment. *See* NPRM document, *supra* note 221, at 61471-61480. *See also* this chapter's discussion of the proposed grievance procedure, notes 235 to 240, and accompanying text, *supra*.

[260] *See* The University of Hawaii System's comments, *supra* note 255, at 1-2. *See also* Chapter 2, notes 103 to 105, and accompanying text, *supra* (discussion of Title VII).

[institution] to do more to address the allegations in the complaint."[261] Furthermore, §106.45 defines "sexual harassment" as including "[u]nwelcome conduct on the basis of sex that is so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity," whereas Title VII does not require all three elements ("conduct is severe *or* pervasive enough to create a hostile work environment that a reasonable person would consider intimidating, hostile, or abusive").[262] (Emphasis added.) Moreover, the UH System asserts that §106.45 would not require the investigation of informal complaints, whereas Title VII and state laws place an obligation on a recipient institution to investigate and address incidents of sexual harassment of which it "knew or should have known."[263]

The UH System further explained that language in the proposed new regulation 34 C.F.R. §106.44 limits the section's protection to persons "in the United States" affected by sexual harassment.[264] However, under the Clery Act, a recipient institution has an obligation to report sexual harassment that occurred outside of the United States but in the context of an international program of study.[265]

Additionally, the UH System's comments identified specific conflicts and inconsistencies that would arise when implementing the new regulations in their proposed form, including issues with cross-examination of witnesses, credibility determinations, and monetary damages.[266]

Meanwhile, the BYU-H/LDSBC's comments[267] emphasized the excessive financial and administrative burdens that the USDOE's "one-size-fits-all" proposal would create for small educational institutions.[268] In particular, BYU-H/LDSBC noted that the proposed ban on the "single-investigator model" of Title IX proceedings would require those schools to hire up to six additional personnel to address a relatively small number of formal investigations.[269]

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[261] *See* The University of Hawaii System's comments, *supra* note 255, at 1-2. The USDOE's proposal to amend the Title IX regulations includes defining "formal complaint" to mean "a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures consistent with §106.45." *See* NPRM document, *supra* note 221, at 61496. The USDOE's proposal does not define "informal complaint."
[262] *See* The University of Hawaii System's comments, *supra* note 255, at 1-2.
[263] *See id.*
[264] *See id.* at 2.
[265] *See id*.
[266] *See id*. at 3-6.
[267] Brigham Young University-Hawaii and LDS Business College's comments are available at https://www.regulations.gov/document?D=ED-2018-OCR-0064-14866.
[268] *See id*. at 1-2.
[269] *See id.*

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Chapter 4

ENFORCEMENT OF TITLE IX IN HAWAII

Part I. Background Information

A. Hawaii's Education System and Title IX Applicability

Title IX, Education Amendments of 1972 (Title IX) prohibitions on discrimination based on sex in educational programs and activities are broad in scope and apply to federally funded schools at all educational levels. If any part of a college or school district receives any federal funds for any purpose, all of that college or school district's educational programs or activities are subject to the requirements of Title IX.[1] The majority of schools in Hawaii, including for-profit schools, as well as libraries, museums, and vocational programs and agencies, receive federal funds and are subject to the requirements of Title IX. Each institution in Hawaii that receives federal financial assistance (recipient institution) must give assurances that the institution will undertake any necessary action to eliminate any existing sex discrimination or to eliminate the effects of past discrimination, in accordance with the requirements of Title IX.

In 2017, there were an estimated 232,075 students enrolled in the State's pre-Kindergarten (pre-K) through 12th grade public and private schools, and an estimated 92,533 students enrolled in the State's public and private undergraduate, graduate, and professional school programs (according to 2017 survey data from the United States Census Bureau and calculations by the Hawaii State Department of Business, Economic Development, and Tourism).[2] The largest educational institutions in the State are the Hawaii Department of Education (HDOE), with approximately 180,000 students[3] and the University of Hawaii (UH) System, which comprises three universities (51,063 students total) and seven community colleges (26,819 students total).[4] The UH System and the HDOE account for the majority of students enrolled in the State.

The largest private K-12 educational institutions in the State are Punahou School (3,742 students) and the Kamehameha Schools' Kapalama campus (3,192 students).[5] The largest private universities in the State are Hawaii Pacific University (4,086 students), Brigham Young University, Hawaii campus (3,040 students), and Chaminade University (2,228 students).[6]

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[1] *See* 20 United States Code (U.S.C.) §1681(a).

[2] *See* State of Hawaii Department of Business, Economic Development, and Tourism, 2018 State of Hawaii Data Book (Hawaii Data Book), at §3.01 (2019), *available at* http://files.hawaii.gov/dbedt/economic/databook/db2018/DB2018_final.pdf.

[3] *See* Hawaii State Department of Education (HDOE) Fact Sheet: Our Schools, *available at* http://www.hawaiipublicschools.org/DOE%20Forms/Intro.pdf (last visited August 27, 2019).

[4] *See* Hawaii Data Book, *supra* note 2, at §3.23. The number of students referenced is based on Fall enrollment of credit students in 2018.

[5] *See id.* at §3.08. The number of students in parentheses references enrollment for the 2017-2018 school year.

[6] *See id.* at §3.26. The number of students in parentheses references the total number of students enrolled in regular credit programs for Fall 2018.

Absent an exemption, all institutions subject to Title IX are required to follow the law's procedural and substantive requirements and are subject to enforcement by the Office for Civil Rights (OCR) of the United States Department of Education (USDOE) and the United States Department of Justice (USDOJ). As explained in Chapter 3,[7] the OCR investigates complaints that allege discrimination and also conducts compliance reviews, initiated at the OCR's discretion, to determine if policies, procedures, and actions of recipient institutions are consistent with civil rights laws.[8] Whether any individual educational institution is covered under Title IX can be a fact determinative inquiry.[9] For instance, Brigham Young University's Hawaii campus received exemptions from certain provisions of Title IX from the OCR based on the university's claim that it is an exempt religious organization.[10]

If the OCR finds sufficient evidence to support an allegation that a recipient institution is not in compliance with Title IX, the OCR's first course of action is to seek voluntary compliance by the institution. The use of voluntary compliance agreements is the OCR's primary Title IX enforcement method.[11] In a typical voluntary resolution agreement, a recipient institution agrees to take steps to come into Title IX compliance, often monitored by the OCR, as a condition of receiving federal financial assistance.[12] While infrequently used, two additional remedies are available to the OCR, if an institution does not remedy the Title IX violation. The OCR may seek to terminate federal funding for the institution through administrative proceedings.[13] The OCR may also refer the case to the USDOJ for enforcement in federal court.[14]

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[7] *See* Chapter 3, notes 42 to 83, and accompanying text, *supra.*
[8] *Title IX Legal Manual*, Civil Rights Division, United States Department of Justice (USDOJ), January 11, 2001, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/ixlegal.pdf, at 124.
[9] *See* the discussion on exceptions to Title IX's coverage, Chapter 2, notes 29 to 31, and accompanying text, *supra*.
[10] In 1989, Brigham Young University, Hawaii campus, received exemptions from 34 C.F.R. §§106.21(c) (marital or parental status of applicants for admission), 106.31 (education programs and activities), 106.36 (counseling of students and applicants for admission), 106.39 (health and insurance benefits and services), 106.40 (marital or parental status of students), and 106.57 (marital or parental status of employees); in 1997 and 1998, the university received exemptions from 34 C.F.R. §106.60(a) (pre-employment inquiries as to marital status). *See* Letter from William L. Smith, Acting Assistant Secretary for Civil Rights, Office for Civil Rights (OCR), Region IX, to Dr. Alton Wade, President, Brigham Young University, Hawaii Campus (May 18, 1989); *see also* Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, OCR, to Dr. Eric B. Shumway, President, Brigham Young University, Hawaii Campus (October 14, 1997) and Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, OCR, to Dr. Eric B. Shumway, President, Brigham Young University, Hawaii Campus (July 1, 1998), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-pre-2009.html (last visited August 29, 2018).
[11] *See* Title IX Legal Manual, *supra* note 8, at 133.
[12] *See id.* at 134-35
[13] *See id.* at 133.
[14] *See id.* at 133-34.

B. Hawaii's Move Toward Greater Title IX Compliance

The OCR initiated compliance reviews for the HDOE in 2011,[15] and the University of Hawaii at Manoa (UH Manoa) in 2013.[16] The HDOE compliance review was completed as of January 2018,[17] while the UH Manoa compliance review concluded in September 2017.[18] Both the HDOE and UH Manoa signed voluntary resolution agreements with the OCR in December 2017.[19]

Parts II and III of this chapter describe the UH System's and the HDOE's respective Title IX enforcement infrastructure, including key policies and procedures (some of which simultaneously address other types of discrimination). Parts II and III also discuss the OCR's findings in each of its respective compliance reviews of UH Manoa and the HDOE, and explain the reforms undertaken by those entities to comply with Title IX's mandates. While some of the planned reforms have yet to be fully implemented as of this writing, it appears that substantial progress has been made, and efforts continue.

Part II. The University of Hawaii System

The OCR's compliance review focused on a specific issue: whether or not UH Manoa responded "promptly and effectively" to complaints and reports of "sexual harassment," as required by Title IX.[20] Central to its review, the OCR indicated in its letter of findings relating to UH Manoa and the larger UH System that, for purposes of discussing compliance with Title IX, the term "sexual harassment" includes sexual violence.[21] Subsequent to the compliance review and resulting resolution agreement with UH Manoa, a number of changes (discussed in greater detail later in this part) were made across the UH System to foster greater understanding of and overall compliance with Title IX. For example, comprehensive and detailed information

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[15] *See* OCR Letter of Findings to Dr. Christina Kishimoto, Superintendent, HDOE, OCR Reference No. 10115003, January 19, 2018 (OCR Letter of Findings for HDOE), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10115003-a.pdf. *See also* letter from Dr. Christina M. Kishimoto, Superintendent, to The Honorable Catherine Payne, Chairperson, Board of Education, dated October 4, 2018 (2018 Letter to the Board), *available at* http://boe.hawaii.gov/Meetings/Notices/Meeting%20Material%20Library/GBM_10042018_Action%20on%20Chapter%2019.pdf (last visited November 11, 2018).

[16] *See* OCR Letter of Findings to Dr. David Lassner, Interim Chancellor, University of Hawaii at Manoa (UH Manoa), February 8, 2018, *available at* https://www.hawaii.edu/titleix/documents/8203/ (last visited Sep. 15, 2018) (OCR Letter of Findings for UH). *See also Title IX Compliance Review of UH Manoa Resolved*, University of Hawaii News, March 2, 2018 (UH Article), *available at* https://www.hawaii.edu/news/2018/03/02/title-ix-compliance-review-of-uh-manoa-resolved/ (last visited October 18, 2018).

[17] *See generally* the OCR Letter of Findings for HDOE, *supra* note 15.

[18] *See* the OCR Letter of Findings for UH, *supra* note 16, at 2-3.

[19] *See* Resolution Agreement, HDOE, OCR Docket No. 10-11-5003, December 20, 2017 (HDOE Resolution Agreement), *available at* http://khnl.images.worldnow.com/library/2d07be58-4816-4faa-9e08-19737fd4d88d.pdf (last visited November 11, 2018) and Resolution Agreement, UH Manoa, OCR Reference No. 10136001, December 28, 2017 (UH Resolution Agreement), *available at* https://www.hawaii.edu/titleix/documents/8200/ (last visited November 11, 2018).

[20] *See* OCR Letter of Findings for UH, *supra* note 16, at 1.

[21] *See id*.

about Title IX is now readily available to students, prospective students, and the general public through websites of the UH System and individual campuses.[22]

The remainder of this part examines:

- The UH System's current enforcement infrastructure for Title IX and policies and procedures that appear to be relevant to Title IX enforcement;
- UH Manoa and the broader UH System's level of compliance with Title IX, as determined by the OCR; and
- A timeline of compliance actions taken in response to the OCR's findings.

A. Overview of the UH System Title IX Enforcement Infrastructure

The UH System comprises three university campuses at Manoa, West Oahu, and Hilo; and seven community college campuses situated on the islands of Oahu, Maui, Kauai, and Hawaii.[23]

The UH System has a network of Title IX compliance offices at the UH System and individual campus level. The overarching Title IX coordinating body for the UH System is the Office of Institutional Equity (OIE), which was established in 2015.[24] The OIE oversees the UH System's centralized Title IX initiatives and provides technical assistance and Title IX compliance support to all UH System campuses.[25] The Office of Compliance and Title IX, which oversees Title IX compliance at the UH System's community college campuses, collaborates with the OIE to ensure compliance with the law. This collaboration includes providing investigation support, facilitating training programs, and coordinating partnerships with community-based agencies that provide services to student victims.[26]

Each UH System campus also has a Title IX Coordinator and at least one Deputy Coordinator.[27] The Title IX Coordinators and the deputies are responsible for implementing UH

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[22] *See, e.g.*, https://www.hawaii.edu/titleix/ (From the website, a user may access Title IX information, including relevant policies and procedures, a directory of Title IX resources, an online training course, an online report form that allows anonymous reporting, and a comprehensive 40-page Title IX Resource Guide).
[23] *See* the main page of the UH website, at https://www.hawaii.edu/.
[24] *See* the UH System Office of Institutional Equity (OIE) website, at https://www.hawaii.edu/titleix (last visited August 31, 2018).
[25] *See About the Office of Institutional Equity*, at https://www.hawaii.edu/titleix/learn/about/.
[26] *See Administrative Affairs, Compliance and Title IX,* at http://uhcc.hawaii.edu/ovpcc/administrative/compliance-and-title-ix.
[27] *See Title IX Coordinators*, at https://www.hawaii.edu/titleix/help/coordinator/. *But see* Letter from David Lassner, President and Chancellor, UH System, to Randy Perreira, Executive Director, Hawaii Government Employees Association (HGEA), and Sanford Chun, Executive Assistant for Field Services, HGEA (February 21, 2019), *available at* http://manoa.hawaii.edu/ovcafo/neworg_charts/reorg/ApprovedReorg-2019-03-28-ManoaReorg.pdf (pages 200-03 of the uploaded file). In the letter, President and Chancellor Lassner responded to concerns raised by the HGEA regarding UH Manoa's leadership reorganization plan (UH Manoa reorganization)

Title IX compliance efforts for both students and employees.[28] There are more than thirty Title IX Coordinators and Deputy Coordinators across the UH System.[29] The UH System, including its community colleges, also has Equal Employment Opportunity and Affirmative Action Offices that handle discrimination complaints involving employees and students, as well as applicants for employment or admission.[30] A visual representation of the relationship between the OIE, community college-level Office of Compliance and Title IX, and Equal Employment Opportunity Office (relative to the UH System administrative offices and campus Title IX Coordinators) may be found in Appendix B.[31]

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that involves, among other things, consolidating the UH System President position and UH Manoa Chancellor position into a single position. More specifically, the HGEA inquired with respect to Title IX:

> Please confirm whether the positions assigned to the current Manoa Chancellor's Office will remain UH Manoa positions after this reorganization and continue to function as they have, working within and providing service to the UH Manoa community. We believe that this clarification is very important for a program like the Office of Title IX which is currently and should continue to be campus based. There are valid concerns that this reorganization gives the appearance that the Title IX office will be a system level office.

The UH response to the HGEA's inquiry was as follows:

> Under the Phase 1 reorganization, the offices and positions under the immediate purview of the Chancellor's Office continue to serve their current functions, duties and responsibilities. Specifically, for Mānoa Title IX, the current functions of that unit remain to primarily serve the UH Mānoa community. As was described in the open meeting with many of the staff of these offices, the current Phase 2 plan calls for a hybrid office that brings together multiple System and Mānoa offices to provide improved services to the UH Mānoa campus while also serving certain system-level functions. We are well-aware of the federal requirement that UH Mānoa have a clearly identified Title IX coordinator so this will be a clear mandate for the Phase 2 reorganizaation [sic].

In April 2019, it was announced that the UH Board of Regents had approved the merging of the UH System President and UH Manoa Chancellor positions, as well as the creation of a new UH Manoa Provost position, under Phase 1 of the UH Manoa reorganization. *See New UH Manoa Leadership Structure Approved,* University of Hawaii News, April 2, 2019, *available at* https://www.hawaii.edu/news/2019/04/02/new-uh-manoa-leadership-structure-approved/. More information about the reorganization is *available at* https://manoa.hawaii.edu/reorg/ (information from 2018) and https://manoa.hawaii.edu/provost/reorg-phase-2/ (tentative timeline spanning April 2019 through July 2020) (last visited August 13, 2019).

[28] *See* Title IX Coordinators, *supra* note 27.

[29] *See id.*

[30] *See* the UH System Equal Employment Opportunity and Affirmative Action Office website, https://www.hawaii.edu/offices/eeo (last visited August 31, 2018).

[31] *See* Amended Notice of University of Hawaii Board of Regents Meeting, January 25, 2018, at VI, action item B (Progress Update on Sexual Harassment and Gender-Based Violence Programs at the University of Hawaii), *available at* https://www.hawaii.edu/offices/bor/regular/materials/201801250930/BOR_Meeting_of_01_25_18_Materials___FOR_UPLOAD.pdf. An in-depth presentation was made at the meeting to explain significant changes to the UH System's institutional response to issues of sex discrimination and gender-based violence. Included in the documents appended to the uploaded meeting notice were the presentation slides; the fourth slide (page 92 of the uploaded file) is a chart that shows the UH System's "new organizational structure" for ensuring Title IX compliance. In contrast, the second slide (page 90 of the uploaded file) shows the "siloed" compliance model used by the UH System prior to 2015. The Bureau notes that some of changes discussed in this presentation were implemented in response to a 2016 state law that established new requirements for the UH System's response to

The University is deemed to be officially notified of an alleged violation of Title IX when the allegation is reported to a Title IX Coordinator, Campus Security, "responsible employees,"[32] or local law enforcement authorities.[33] Persons considering reporting an alleged violation have the option to make a report to *both* the University and local law enforcement authorities, to *either* the University or local law enforcement authorities, or to neither.[34] If a criminal investigation results from the reported violation, the University will cooperate with law enforcement agencies.[35]

The UH Board of Regents' policies, executive policies, and administrative procedures apply across the UH System.[36] A number of these system-wide policies are related to Title IX administration. One such policy, which appears to be central to the UH System's Title IX compliance efforts, is Interim Executive Policy (EP) 1.204, the Interim Policy and Procedure on Sex Discrimination and Gender-Based Violence. Interim EP 1.204 and other relevant policies and procedures are discussed in further detail below.

1. Interim Executive Policy and Procedure on Sex Discrimination and Gender-Based Violence (Interim EP 1.204)

For context, it is important to understand that when the OCR began its compliance review of UH Manoa, the University evidently had three different procedures that could be applied to sexual harassment and sexual assault complaints.[37] The OCR found that separate and co-existing procedures "resulted in a grievance process that was potentially conflicting and confusing."[38] Subsequently, UH Manoa adopted the UH System's Interim EP 1.204 in September 2015.[39]

Interim EP 1.204, prohibits sex discrimination, sexual harassment, gender-based harassment (including harassment based on actual or perceived sex, gender, sexual orientation, gender identity, or gender expression), sexual exploitation, sexual assault, domestic violence,

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these issues. For more information on this state law (Act 208, Session Laws of Hawaii 2016), *see* Chapter 5, note 11, *infra*.

[32] A "responsible employee" is an employee of the UH System who must inform the Title IX Coordinator of the details of any sex discrimination that the responsible employee has become aware of, even when the person who disclosed the incident to the responsible employee does not want a report to be made. *See* Glossary, UH System Title IX and the Office of Institutional Equity website, at https://www.hawaii.edu/titleix/glossary/responsible-employees/.

[33] *See* Support Overview, UH System Title IX and the Office of Institutional Equity website, at https://www.hawaii.edu/titleix/help/overview/.

[34] *See id.* The UH System website for Title IX and the Office of Institutional Equity clarifies that "a criminal investigation is separate and distinct from the University of Hawai‘i's institutional response."

[35] *See id.*

[36] *See* the UH Systemwide Policies and Procedures Information System (UH Systemwide PPIS) page of the UH website, at https://www.hawaii.edu/policy/.

[37] *See* the OCR Letter of Findings for UH, *supra* note 16, at 7.

[38] *Id.*

[39] *See id.*

dating violence, and stalking.[40] It is a provisional policy intended to allow the UH System to comply with Title IX while various stakeholders, including collective bargaining representatives, are being consulted.[41] The policy provides that:

> Any person believing that they have been subjected to sex discrimination; sexual harassment; gender-based harassment, including harassment based on actual or perceived sex, gender, sexual orientation, gender identity, or gender expression; sexual exploitation; sexual assault; domestic violence; dating violence; or stalking should report the prohibited behavior immediately to the respective campus Title IX Coordinator.[42]

Interim EP 1.204 also prohibits retaliation against a person who seeks advice about filing a complaint, files or opposes a complaint, or participates in a complaint proceeding.[43]

The OCR noted that this interim policy and procedure is "not yet fully compliant with the procedural requirements of Title IX."[44] However, the OCR acknowledged that Interim EP 1.204 "addresses certain issues with the prior procedures[.]"[45] It should be noted that in 2015, a special task force was convened for the express purpose of reviewing the UH System's policy on the subject matters addressed in Interim EP 1.204.[46]

Key aspects of Interim EP 1.204 include:

a. Scope of Protection

Interim EP 1.204 covers students, faculty, staff, and third parties and applies to prohibited conduct that occurs on-campus or off-campus, provided that the off-campus conduct was connected to a University-sponsored program or activity or "may have a continuing adverse effect or could create a hostile environment on campus."[47]

b. Standard of Review

Interim EP 1.204 uses a "preponderance of the evidence" standard (whether it is more likely than not that the alleged prohibited conduct occurred) to determine whether there has been a policy violation.[48]

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[40] *See* Interim Executive Policy (EP) 1.204, Interim Policy and Procedure on Sex Discrimination and Gender-Based Violence, effective September 2015, at 1, *available at* https://www.hawaii.edu/policy/docs/temp/ep1.204.pdf.
[41] *See id.* at 1.
[42] *Id*. at 2.
[43] *See id.* at 9-10.
[44] OCR Letter of Findings for UH, *supra* note 16, at 7.
[45] *See id.*
[46] *See* Chapter 5, note 11, and accompanying text, *infra* (discussing the scope of work of the Act 222 Affirmative Consent Task Force).
[47] *See* Interim EP 1.204, *supra* note 40, at 2.
[48] *See id*. at 9.

c. Definitions of Related Terms

Interim EP 1.204 defines "sexual contact," "consent," and "incapacitation."[49]

d. Institutional Responsibilities

Interim EP 1.204 requires each campus to designate a Title IX Coordinator, provide "confidential resources" for students, and maintain advocacy offices.[50] "Confidential resources" are places where students may seek help related to the policy in a confidential manner.[51] Under the policy, a campus' confidential resources must be clearly designated as confidential and must also be registered and approved by the Title IX Coordinator.[52] Confidential resources include: counseling and mental health support services, including services aimed at specific types of students (e.g., pregnant or parenting students, disabled students, women, veterans, and lesbian, gay, bisexual, and transgender students); general health and medical services (including general medical care on a walk-in basis); assistance with navigating and accessing rights and resources located on and off-campus; and assistance in deciding whether to report an incident to the University and the police.[53] A student's use of a confidential resource does not formally put the University on notice of a specific allegation.[54] Rather, the student must give express written permission for a confidential resource to divulge information pertaining to a student, unless there exists an imminent physical threat or a legal obligation to reveal the information.[55] The UH System also has advocacy offices that provide students with a place to seek information, options, and specific support about their rights and resources under the policy.[56] Depending on the campus, the advocacy office may also be designated as a confidential resource.[57]

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[49] *See id*. at 7-9. The following definitions are related to the policy's prohibited acts:

> "Sexual contact" means "intentional touching or penetration of another person's clothed or unclothed body, including, but not limited to, the mouth, neck, buttocks, anus, genitalia, or breast, by another with any part of the body or any object in a sexual manner" and includes "causing another person to touch their own or another body in the manner described above."
> . . .
> "Consent" is defined as "affirmative, conscious, and voluntary agreement to engage in agreed upon forms of sexual contact." Mere silence or a lack of protest or resistance may not be interpreted as consent.
> . . .
> "Incapacitation" means "a mental or physical state in which a person lacks the ability to understand the consequences of their actions and, therefore, cannot make a rational, reasonable decision." By definition, a person who is incapacitated is unable to consent to sexual contact.

[50] *See id*. at 11-13.
[51] *See id*. at 13.
[52] *See id.*
[53] *See* UH Confidential Resources, UH System Title IX and the Office of Institutional Equity website, at https://www.hawaii.edu/titleix/help/confidential/.
[54] *See* Interim EP 1.204, *supra* note 40, at 13.
[55] *See id.*
[56] *See id.*
[57] *See id.* It appears that each campus in the UH System has the discretion to decide whether or not to have a separate advocacy office, or to make the advocacy office a confidential resource.

e. Reporting and Investigation Procedures and Sanctions

All complaints, allegations, and reports of behavior prohibited under Interim EP 1.204, including retaliation, should be made to a campus Title IX Coordinator.[58] The coordinator's responsibilities upon receiving notice of a complaint include informing the complainant of their rights under the policy, conducting a safety assessment with the complainant, and providing the complainant with written information on various interim measures available on-campus and any relevant community resources.[59] Interim measures are "services, accommodations, or other assistance" that are provided temporarily after receiving notice of a complaint but prior to any outcome being determined, for the purpose of preserving the complainant's academic and work experience, ensuring safety, protecting the integrity of the investigative and resolution process, and deterring retaliation.[60] These measures are available regardless of whether the complainant is pursuing formal disciplinary action against the perpetrator of the prohibited conduct.[61]

Once a complaint is made, it may proceed along one of several possible paths. The complaint may be resolved through informal resolution without any formal investigation, but any agreement reached must be documented and affirmed in writing by both parties.[62] The policy specifically prohibits the use of mediation to resolve a complaint involving violent behavior.[63] A complaint may also be resolved pursuant to a formal investigation and resolution, which includes a written notice of the allegation, a fact-finding investigation (in which the parties are prohibited from questioning each other during investigatory interviews),[64] a fact-finding report completed by the investigator and submitted to a designated decision-maker, and a determination by the decision-maker, based on the report's findings, as to whether a violation of Interim EP 1.204 occurred.[65] The decision-maker's role also includes imposing appropriate sanctions under the policy and issuing an outcome report.[66]

Sanctions against employees must be in accordance with any applicable collective bargaining agreements. Sanctions against students may include a warning, disciplinary probation, suspension, withholding of a senior or graduate student's degree for a specified time period, removal from university housing, expulsion, censure, restrictions from certain locations and activities, and required participation in an alcohol or drug education program.[67] Information that is deemed relevant to any of the foregoing sanctions (except for counseling or participation

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[58] *See id*. at 14.
[59] *See id*. at 16.
[60] *See id*. at 15.
[61] *See id*.
[62] *See id*. at 16-17.
[63] *See id*. at 17.
[64] Additionally, under the policy, each party may be accompanied to a meeting or related proceeding by a union agent or an advisor of their choice, but the University has the right to limit the roles of union agents and advisors. More specifically, advisors cannot speak for parties to the investigation, nor can they dictate the line or rationale of questioning. *See id*. at 18.
[65] *See id*. at 19.
[66] *See id*. at 19-20. A redacted copy of the outcome report must be provided to the parties and must include information on any sanctions imposed, whether systemic remedies are being considered or implemented, and the method for appealing the outcome.
[67] *See id*. at 21-23.

in an alcohol or drug education program) becomes part of a student's permanent record at the University. The information may be disclosed "in response to requests for which the student has given permission or as otherwise legally required."[68]

Appendix C includes a flowchart created by the OIE that illustrates Interim EP 1.204's reporting and investigation procedures.[69]

f. Other Provisions

The University will seek to complete the process of complaint investigation and resolution within sixty calendar days from the receipt of the complaint.[70] However, circumstances in certain cases may warrant an extension.[71] Both parties have an equal right to appeal a decision, and any such appeal would be handled by an appeal officer.[72]

2. Other Policies and Procedures

Interim EP 1.204 identifies other related policies and procedures. These are as follows:[73]

a. University Statement on Nondiscrimination and Affirmative Action (EP 1.202)

The statement affirms the University's commitment to "a policy of nondiscrimination on the basis of race, sex, age, religion, color, national origin, ancestry, handicap, marital status, arrest and court record, sexual orientation, and veteran status" in the contexts of admission and employment.[74]

b. Systemwide Student Disciplinary Sanctions (EP 7.205)

The policy allows for a campus, upon conclusion of student conduct code proceedings, to impose a system-wide sanction upon a student, including suspension or dismissal.[75] Any such sanction may be appealed.[76]

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[68] *See id.*
[69] *See* Reporting & Investigation Procedures Flowchart for Title IX Coordinators, OIE, *available at* https://www.hawaii.edu/titleix/documents/7621/.
[70] *See* Interim EP 1.204, *supra* note 40, at 25.
[71] *See id*.
[72] *See id*. at 24.
[73] *See id*. at 26-27.
[74] *See* https://www.hawaii.edu/policy/docs/temp/ep1.202.pdf.
[75] *See* https://www.hawaii.edu/policy/index.php?action=viewPolicy&policySection=ep&policyChapter=7&policyNumber=205.
[76] *See id.*

c. Systemwide Student Conduct Code (EP 7.208)

The code prohibits, among other things, acts of dishonesty such as cheating, plagiarism, and forgery of documents; disruption of teaching, research, and other UH activities; and conduct that threatens or endangers the health or safety of others.[77] Disciplinary proceedings pursuant to the code may be instituted against a student even when the student has potentially violated both the code and criminal law, regardless of the timing of criminal or civil court proceedings.[78] Similarly, a student who is exonerated in a criminal context may still face sanctions under the code.[79] Violations of the code are heard and decided by senior student affairs officers, student conduct administrators, student conduct boards, or appellate boards.[80]

d. Workplace Non-Violence (EP 9.210)

The policy prohibits work-related or workplace violence against students, faculty, staff, visitors, and contract employees that "materially and substantially interferes with an individual's work, academic performance, and/or workplace safety and/or otherwise subjectively and objectively creates a hostile environment."[81] More specifically, the prohibition applies to violent acts that involve physical attack, property damage, and written or verbal statements or non-verbal gestures that indicate to a reasonable person an intent to cause physical or mental harm.[82]

e. Discrimination Complaint Procedures for Students, Employees, and Applicants for Admission or Employment (Administrative Procedure 9.920)

Administrative Procedure (AP) 9.920 implements various UH Executive Policies in compliance with federal and state laws and regulations.[83] The procedure intends to provide an "equitable, timely, and effective means of resolving discrimination complaints."[84] Complaints brought under AP 9.920 may be resolved informally, including through alternative dispute resolution, provided that both parties agree to participate.[85] Complaints may also be resolved formally and subject to a factual investigation.[86] The investigating officer may determine, before

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[77] *See* https://www.hawaii.edu/policy/index.php?action=viewPolicy&policySection=ep&policyChapter=7&policyNumber=208. The code was updated in March 2019.
[78] *See id*.
[79] *See id*.
[80] *See id.*
[81] *See* https://www.hawaii.edu/policy/index.php?action=viewPolicy&policySection=ep&policyChapter=9&policyNumber=210.
[82] *See id.*
[83] *See* https://www.hawaii.edu/policy/docs/temp/ap9.920.pdf, at 1.
[84] *See id.*
[85] *See id*. at 5.
[86] *See id*. at 5-6.

or after the investigation has concluded, that the complaint lacks merit and thus close the case.[87] Otherwise, the investigating officer may complete the investigation and submit written findings to the campus decision-maker.[88] The decision-maker determines the remedy or corrective action appropriate to the case.[89] An outcome, as well as a case closure, may be appealed by either party.[90]

f. Related Policies

Other UH System policies that are not referenced in Interim EP 1.204 but also appear to be relevant to Title IX administration include the following:

i. Policy on Consensual Relationships (EP 1.203)

The policy prohibits "initiating or engaging in a new consensual relationship between employees and between employees and students wherein a power and control differential exists, including but not limited to situations in which one member has an evaluative and/or supervisory responsibility for the other."[91] Persons in consensual relationships that existed before the effective date of the policy or before one party in the relationship was placed in a supervisory capacity over the other party must disclose the relationship and manage potential conflicts of interest.[92] Sanctions for violating the policy include suspension, termination, or discipline under an applicable collective bargaining agreement.[93]

ii. Leaves of Absence for Pregnancy Related Disabilities (AP 9.360)

This policy requires an employee's pregnancy-related disability to be treated like any other temporary disability.[94] Employees have the right to return to their position after the temporary disability period has ended, unless a collective bargaining agreement or applicable personnel regulation provides otherwise.[95]

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[87] *See id*. at 6.
[88] *See id*. at 7.
[89] *See id*.
[90] *See id*. at 6-8.
[91] *See* https://www.hawaii.edu/policy/index.php?action=viewPolicy&policySection=ep&policyChapter=1&policyNumber=203.
[92] *See id.*
[93] *See id*.
[94] *See* https://www.hawaii.edu/policy/docs/temp/ap9.360.pdf, at 1.
[95] *See id*. at 1-2.

B. UH Manoa and UH System Title IX Compliance Status

1. Initiation of Compliance Review and Overview of Issues Examined

In 2013, the OCR initiated a proactive compliance review of Title IX compliance at the UH Manoa campus.[96] To the extent that UH System policies applicable to UH Manoa were involved, the OCR compliance review addressed UH System policies and practices as well. As part of its compliance review, the OCR ultimately reviewed sexual harassment reports and other documentary information from the period spanning 2010 through 2016.[97] The compliance review investigated whether UH Manoa: (1) properly designated an employee to coordinate Title IX compliance; (2) adopted and published grievance procedures that provided for the prompt and equitable investigations of reports of sexual harassment; and (3) appropriately responded to incidents of sexual harassment about which it knew or should have known.[98]

The OCR noted that UH Manoa, as well as the UH System, had proactively taken steps since the start of the compliance review to improve compliance with Title IX.[99] Examples include UH Manoa's appointment of a chief Title IX Coordinator to facilitate a unified institutional response to Title IX issues (with the assistance of multiple deputy Title IX Coordinators), the establishment of an Office of Institutional Equity for the UH System, and "substantial revisions" to sexual harassment grievance procedures for the UH System that resulted in a noticeable improvement in case processing.[100] Additionally, UH Manoa's desire to begin resolving issues before completion of the compliance review resulted in the OCR concluding its review in September 2017 and the subsequent negotiation of the December 2017 resolution agreement, discussed below.[101]

The OCR's compliance review found that UH Manoa had properly designated an employee to coordinate Title IX compliance.[102] However, the OCR also found that particular aspects of UH Manoa's grievance procedures and one particular response to a specific incident violated Title IX.[103] The OCR also expressed "concerns" regarding certain aspects of UH Manoa's general institutional response to complaints of sexual harassment and other offenses under Title IX.[104]

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[96] *See* the OCR Letters to Dr. Thomas Apple, Chancellor, UH Manoa, May 28, 2013, and June 11, 2013, *available at* https://www.clearinghouse.net/chDocs/not_public/ED-HI-0002-0001.pdf, and https://www.clearinghouse.net/chDocs/not_public/ED-HI-0002-0002.pdf, respectively.
[97] *See* the OCR Letter of Findings for UH, *supra* note 16, at 2.
[98] *See id.* at 6-13.
[99] *See id.* at 2.
[100] *See id*.
[101] *See id*. at 2-3.
[102] *See id.* at 6-7.
[103] *See id.* at 7-13.
[104] *See id.* at 8-13.

2. Title IX Violation: UH Manoa Grievance Procedure

The OCR found that Interim EP 1.204, while an improvement over the preceding three separate grievance procedures, did not comply with Title IX in two respects.[105] The first violation related to the timing of the grievance process itself. Interim EP 1.204 provides specific time frames for completion of the investigative process and sanctions (sixty days) and for the UH System to respond to appeals. However, Interim EP 1.204 does not provide a time frame for parties to *file* an appeal. Thus, the OCR found that a major stage of the grievance process was left open-ended, in violation of Title IX requirements.[106]

The second violation was that two provisions of Interim EP 1.204 did not provide for the equitable application of interim measures to all parties. The first non-compliant term provided that, whenever applicable, in situations where interim measures impact both parties, the University must minimize the burden on the reporting party.[107] The OCR found that seeking to minimize the burden to only one party was an inequitable application of the procedures and a violation of Title IX requirements. The second non-compliant provision required that "[r]equests for interim measures may be made by or on behalf of the reporting party to the Title IX Coordinator, or the EEO/AA Office."[108] The OCR determined that this statement implied that interim measures are only available to reporting parties, which also was an inequitable application of the policy in violation of Title IX.[109]

3. Title IX Violation: UH Manoa Hostile Environment

In one case, the OCR found that UH Manoa failed to effectively enforce interim measures in violation of Title IX and thus created a hostile environment.[110] The UH System has a Title IX obligation to determine whether a sexual harassment complaint creates a hostile environment for any impacted students and to eliminate that hostile environment if it exists. In this particular case, which involved a complaint of sexual assault, the OCR found that UH Manoa did not enforce an interim no-trespass ban and no-contact order against the respondent. The OCR determined that UH Manoa's inaction caused the reporting student to continue to be subjected to a hostile environment, in violation of Title IX.[111]

4. OCR "Concerns" About UH Manoa's Response to Reports of Sexual Harassment

In addition to the previously mentioned violations, the OCR compliance review documented five "concerns" regarding UH Manoa's handling of reports of sexual harassment. It

[105] *See id.* at 7-8.
[106] *See id.*
[107] *See id.* at 8.
[108] *See id.*
[109] *See id.*
[110] *See id.* at 10-11.
[111] *See id.*

should be noted that, absent further investigation, the OCR concerns do not rise to the level of Title IX violations.[112] The OCR was concerned that UH Manoa may not have:

(1) Completed its investigations in a reasonably prompt time frame;

(2) Fulfilled its obligation to investigate incidents when it knew, or should have known, about alleged sexual harassment;

(3) Provided equitable notice of investigation outcomes to parties;

(4) Taken proper steps to prevent or respond to allegations of retaliation; and

(5) Provided adequate notice of its grievance process to graduate students.[113]

5. The UH Manoa Voluntary Resolution Agreement

On December 28, 2017, the OCR and UH Manoa entered into a resolution agreement (UH Resolution Agreement) that addressed the violations and concerns identified by the OCR.[114] UH Manoa agreed to:

(1) Review, revise, and provide notice of its sexual harassment procedures (and review any related published material to ensure consistency);

(2) Provide training on the aforementioned revised policies and procedures;

(3) Conduct student climate surveys;[115]

(4) Submit documentation of its centralized system for tracking and recording conduct that may constitute sexual harassment or violence; and

(5) Contact the complainants and respondents who were involved in reports and complaints of sexual harassment and sexual violence from August 1, 2013, to October 1, 2017, in which a student was one of the parties, to provide the respective parties with the opportunity to request that UH Manoa review any specific concerns the parties may have about the processing of those reports or complaints.[116]

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[112] The OCR Letter of Findings for UH appears to indicate that, without conducting further investigation and review of individual cases, it is not possible to confirm that actual Title IX violations were committed. *See id.* at 12. *See also* the UH Resolution Agreement, *supra* note 19; and note 116, and accompanying text, *infra*.
[113] *See* OCR Letter of Findings for UH, *supra* note 16, at 6-13.
[114] *See generally* the UH Resolution Agreement, *supra* note 19.
[115] UH Campus Climate surveys measure students' current attitudes, behaviors, and standards with respect to addressing and preventing sexual harassment and gender-based violence. *See* Climate Survey Frequently Asked Questions, UH System Title IX and the Office of Institutional Equity website, *available at* https://www.hawaii.edu/titleix/survey/student-faqs/.
[116] *See generally* the UH Resolution Agreement, *supra* note 19.

6. UH System Title IX Response Actions and Timeline

The University of Hawaii News website published an article in Spring of 2018 detailing how UH Manoa is fulfilling its obligations under the resolution agreement and reporting on the steps that UH Manoa, and the UH System more broadly, are taking to comply with the UH Resolution Agreement.[117] According to the article, these actions included the following:

- As of December 2017, the UH System has provided online Title IX training to 2,798 employees from the UH Manoa campus and 5,606 employees system-wide.[118]

- On January 8, 2018, the UH System released its comprehensive system-wide student campus climate survey report on sexual harassment and gender-based violence (which it intends to update biennially).[119]

- The UH System has developed a custom-built centralized record keeping system and is implementing the system on all of the UH System's ten campuses.

- In Spring of 2018, UH Manoa planned outreach to parties who were involved in reports and complaints of sexual harassment and sexual violence from August 2013 to October 2017, to provide the parties with an opportunity to request that the University review any specific concerns. The University expected to complete the process by December 2018.[120] Although the Bureau was unable to locate an official, comprehensive update to the UH article, various UH Manoa and UH System documents from the past few years, including 2019, collectively indicate that compliance efforts are ongoing.[121]

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[117] *See* the UH Article, *supra* note 16.
[118] *Id.*
[119] Report on University of Hawaii Student Climate Survey on Sexual Harassment and Gender-Based Violence, September 11, 2017, summary report *available at* https://www.hawaii.edu/titleix/climate-survey/results/ (last visited October 18, 2018).
[120] *See* the UH Article, *supra* note 16.
[121] *See, e.g., University of Hawaii Strategic Directions, 2015-2021, Version 2.0, 2018 Update,* UH System (undated document that appears to have been uploaded in October 2018), *available at* http://blog.hawaii.edu/strategicdirections/files/2018/10/SD2.0_Revisions_2018_Update-2.pdf, at 12 (recognizing the importance of collaborating as a system to "understand and comply with Title IX and Violence Against Women Act (VAWA) guidance and apply best practices in promoting safety and response to incidents across the state"); *Report to the 2019 Legislature: Annual Report on Campus Safety and Accountability, HRS 304A-120,* UH System, January 2019, *available at* http://www.hawaii.edu/govrel/docs/reports/2019/hrs304a-120_2019_campus-safety_annual-report_508.pdf (showing the UH System's compliance with Act 208, Session Laws of Hawaii 2016, by providing the Legislature with information on the number of sexual assaults that occurred on a UH System campus within the past five years, a summary of the most recent campus climate survey results, and the University's recommendations and efforts to improve campus safety and accountability); *#BeHeardUH! Opportunity for Students to Address Sexual Harassment and Gender Violence,* University of Hawaii News, January 22, 2019, *available at* https://www.hawaii.edu/news/2019/01/22/opportunity-for-students-to-address-sexual-harassment-and-gender-violence/ (indicating that all UH students were urged to complete the 2019 campus climate survey being conducted online from January 22, 2019, through February 22, 2019); and Minutes of Board of Regents Committee on Intercollegiate Athletics Meeting, March 20, 2019, at IV, agenda item B, *available at* https://www.hawaii.edu/offices/bor/athletic/minute/201903200900.committee.pdf (providing a detailed update on

Part III. The Hawaii Department of Education

The OCR's compliance review of HDOE included a review of HDOE policies that prohibit harassment of students based on sex, race, color, national origin, and disability, as well as the corresponding grievance or complaint procedures for resolving complaints of harassment.[122] (Because the OCR monitors recipient institutions' compliance with additional federal anti-discrimination laws besides Title IX,[123] its compliance review of the HDOE also evaluated whether policies and procedures complied with those other laws as well. However, only those OCR findings related to compliance with Title IX are discussed in this chapter.) The OCR focused its investigation on twenty-nine HDOE schools "based on a review of reported incidents across HDOE schools and school quality surveys indicating higher than average levels of concern regarding bullying and harassment."[124]

The HDOE has taken significant steps toward increasing its compliance with Title IX, following its signing of a resolution agreement with the OCR in December 2017. Highlights of these steps include the establishment of fifteen new Equity Specialist positions (one for each school complex area), a comprehensive plan to revise HDOE grievance procedures so that they are compliant with Title IX, as well as other anti-discrimination laws, and the planned rollout of training programs related to the new policies and procedures for students and employees.

The remainder of this part discusses:

- The HDOE's current enforcement infrastructure for Title IX, Board of Education (BOE) policies and procedures, and Hawaii Administrative Rules (HAR) chapters that appear to be relevant to Title IX enforcement;

- The HDOE's Title IX compliance status as determined by the OCR, as well as the most current compliance actions undertaken (according to HDOE reports and other documents); and

- The HDOE's proposed HAR amendments that are intended to achieve greater compliance with Title IX and other anti-discrimination laws.

Title IX and gender equity in UH Manoa's athletics programs, including representations that "[i]mprovement has been made on participation and scholarship expenses for women compared to men" and that "[i]mprovements have also been made to a number of facilities, including investments in the Rainbow Wahine Softball Stadium and Duke Kahanamoku Aquatic Complex.").

[122] *See* the OCR Letter of Findings for HDOE, *supra* note 15, at 1-2.

[123] These other federal laws include Title VI of the Civil Rights Act of 1964 (race, color, and national origin discrimination), Section 504 of the Rehabilitation Act of 1973 (disability discrimination), and Title II of the Americans with Disabilities Act of 1990 (disability discrimination).

[124] OCR Letter of Findings for HDOE, *supra* note 15, at 2.

A. The HDOE Title IX Enforcement Infrastructure

1. Overview

The HDOE has approximately 180,000 students and is the tenth largest school district in the United States.[125] It comprises 256 public non-charter schools in fifteen complex areas across the State.[126] Complex areas contain two to four complexes, and each complex consists of a high school and its feeder elementary and middle school.[127] Each complex area has its own superintendent.

The HDOE has policies that respond to discrimination, harassment, and bullying complaints based on race, sex, disability, and other grounds. There are separate HDOE policies that respond to student-on-student complaints,[128] harassment complaints by students against employees,[129] and complaints made by employees and applicants for employment.[130] The enforcement responsibility for these multiple policies is divided between the HDOE Civil Rights Compliance Branch (CRCB) and the principals of each HDOE school, depending on the policy involved. Table 4.1 summarizes the relevant HDOE policies with respect to who is protected by the policy, whose behavior is restricted by the policy, and who may bring a complaint under the policy.

[125] *See* the HDOE Fact Sheet: Our Schools, *supra* note 3, and the OCR Letter of Findings for HDOE, *supra* note 15, at 2.
[126] *See* the HDOE Fact Sheet: Our Schools, *supra* note 3.
[127] *See id.*
[128] Title 8, Chapter 19, Hawaii Administrative Rules (HAR), "Student Misconduct, Discipline, School Searches and Seizures, Reporting Offenses, Police Interviews and Arrests, and Restitution for Vandalism" (Chapter 19). *See also* Title 8, Chapter 41, HAR, "Civil Rights Policy and Complaint Procedure" (Chapter 41). According to the OCR Letter of Findings for HDOE, *supra* note 15, at n.11, Chapter 41 has been in effect since 1986. However, OCR interviews of HDOE administrators, teachers, and staff in May 2013 "universally confirmed that schools do not use Chapter 41 to address harassment complaints."
[129] Hawaii Board of Education Policy 305-10, "Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees" (BOE Policy 305-10) prohibits discrimination based on protected classes.
[130] Hawaii Board of Education Policy 900-1, "Department of Education Applicant and Employee Non-Discrimination" (BOE Policy 900-1) also prohibits discrimination based on a person's membership in a protected class.

TABLE 4.1
KEY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION POLICIES AND ADMINISTRATIVE RULES

Entity	**Policy or Rule Chapter**	**Who the Policy Protects**	**Whose Conduct the Policy Prohibits**	**Who May Bring a Complaint**
Hawaii Board of Education (BOE)	Policy 305-10 Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) By Employees	Policy protects HDOE **students** from discrimination, including harassment, that is based on the student's race, color, national origin, sex, physical or mental disability, or religion. Policy also protects HDOE **students** from harassment and bullying that is based on the student's gender identity and expression, socio-economic status, physical appearance and characteristics, or sexual orientation.	HDOE **employees**.	Unspecified in the policy itself. However, the policy requires HDOE to develop regulations and procedures, including personnel action consequences for any employee who violates the policy.
Hawaii Department of Education (HDOE)	Title 8, Chapter 89, HAR (proposed to replace Chapter 41) Civil Rights Policy and Complaint Procedure for Student(s) Complaints Against Adult(s)	Chapter protects HDOE **students** from discrimination, harassment (including sexual harassment), and bullying that is based on the student's race, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, ancestry, disability, physical appearance and characteristics, or socio-economic status.	HDOE **employees, volunteers, or other third parties**.	Any student, parent or legal guardian of any student, or employee or volunteer who witnesses or who is otherwise aware of the prohibited conduct.
Hawaii Department of Education (HDOE)	Title 8, Chapter 19, HAR (proposed amendments) Student Misconduct, Discipline, School	Chapter protects HDOE **students and employees** from discrimination, harassment (including sexual harassment), and bullying that is perpetrated by students.	HDOE **students**.	(For complaints of discrimination, harassment (including sexual harassment), bullying, and retaliation only)

KEY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION POLICIES AND ADMINISTRATIVE RULES—Continued

Entity	**Policy or Rule Chapter**	**Who the Policy Protects**	**Whose Conduct the Policy Prohibits**	**Who May Bring a Complaint**
	Searches and Seizures, Reporting Offenses, Police Interviews and Arrests, Restitution for Vandalism, and Complaint Procedure and Investigation of Discrimination, Harassment (Including Sexual Harassment), Bullying, and/or Retaliation	Chapter also provides for disciplinary action against students who violate HDOE policies, rules, or regulations, or state or local laws (e.g., robbery, assault, vandalism, theft, gambling, cutting class, etc.).		Any student who experiences or witnesses the prohibited conduct, as well as any parent, legal guardian, educational representative, individual with a power of attorney, employee, staff, or volunteer who witnesses or knows about the prohibited conduct.
Hawaii Department of Education (HDOE)	Title 8, Chapter 41, HAR (proposed to be repealed) Civil Rights Policy and Complaint Procedure	Chapter protects HDOE **students, as well as persons who are eligible to receive the benefits of or to participate in an HDOE program, activity, or service**, from discrimination and harassment that is based on the student or person's race, color, religion, sex, age, national origin, ancestry, or disability.	HDOE **employees and students**.	A student (or group of students), parent (or group of parents), or person who is eligible to receive the benefits of or to participate in an HDOE program, activity, or service.

The CRCB oversees the HDOE's compliance with Title IX and other federal and state civil rights laws and policies. The CRCB is under the HDOE's Office of Talent Management and has employed a Title IX specialist since 2015.[131] The CRCB conducts internal investigations of complaints arising from alleged discrimination, harassment, and bullying involving employees, students, or parents that violate BOE policies.[132] Complaints involving student-on-student conduct are addressed by the principal at the respective school; however, the CRCB conducts administrative appeal hearings of decisions in student-on-student disciplinary proceedings.[133]

The CRCB also responds on behalf of the HDOE to complaints that have been filed by employees and/or parents with the United States Equal Employment Opportunity Commission (EEOC), the Hawaii Civil Rights Commission (HCRC), and the OCR.[134] Additionally, the CRCB provides follow-up for corrective action plans and compliance efforts when required by the OCR, EEOC, HCRC, USDOJ, or the Office of the State Director for Career and Technical Education.[135]

2. Key Board of Education Policies

A number of BOE policies appear to be relevant to the enforcement of Title IX, based on references therein to harassment and discrimination, gender equity, student well-being, student discipline, and due process. A summary of each such policy is provided below. Additionally, certain chapters of the Hawaii Administrative Rules that are relevant to some of these policies are discussed in a separate section below.

a. Student Code of Conduct (BOE Policy 101-1)

Among the expectations for students articulated in this code is "respect for self and others," which includes a provision that students shall not "harass others through any means."[136]

b. School Climate and Discipline (BOE Policy 101-7)

This policy requires that schools "create an environment where all members are respected, welcomed, supported, and feel safe in school: socially, emotionally, intellectually and

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[131] *See* the HDOE Civil Rights Compliance Branch (CRCB) website at: http://www.hawaiipublicschools.org/ConnectWithUs/Organization/OfficesAndBranches/Pages/CRCO.aspx (last visited November 8, 2018). The CRCB was previously known as the Civil Rights Compliance Office.
[132] *See id.*
[133] *See id.*
[134] *See id.*
[135] *See id.* The Office of the State Director for Career and Technical Education, also known as the Career and Technical Education Center (CTE), oversees a federally funded program that aims to align academic standards with technical knowledge and skills in order to prepare students for the State's workforce. The CTE is part of the State Board for Career and Technical Education, which is administered by the University of Hawaii. *See* CTE website, at https://www.hawaii.edu/cte/about.html.
[136] *See* Board of Education (BOE) Policy 101-1, *available at* http://boe.hawaii.gov/policies/Board%20Policies/Student%20Code%20of%20Conduct.pdf.

physically."[137] The policy indicates that promoting and maintaining a safe and secure educational environment is to be accomplished through Title 8, Chapter 19 of the HAR (Chapter 19), which pertains to the student disciplinary process.[138] Chapter 19 is explained in more detail below.[139]

c. Student Safety and Welfare (BOE Policy 305-1)

Under this policy, the HDOE is required to provide an environment that is conducive to the physical, mental, social, and emotional well-being of students. In particular, schools must provide "services to safeguard students from the deviant behavior of those who fail to conform to standards of conduct compatible with the best interests of all."[140]

d. Cooperation with Law Enforcement Agencies (BOE Policy 305-5)

This policy simply states that "[t]he public schools shall cooperate fully with the law enforcement agencies in the community."[141] The role of local law enforcement agencies in the Chapter 19 student disciplinary process is described below.[142]

e. Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees (BOE Policy 305-10)

The policy is a short statement that prohibits bullying of students and discrimination against students by employees.[143] It prohibits discrimination against a student based on the protected classes of race, color, national origin, sex, physical or mental disability, and/or religion.[144] It also prohibits harassment and bullying based on gender identity and expression, socio-economic status, physical appearance and characteristics, and sexual orientation.[145] The policy further states that a student "shall not be excluded from participation in, be denied the benefits of, or otherwise be subjected to harassment, bullying, or discrimination" under any program, service, or activity of the HDOE.[146] The policy also prohibits retaliation against

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[137] *See* BOE Policy 101-7, *available at* http://boe.hawaii.gov/policies/Board%20Policies/School%20Climate%20and%20Disclipline.pdf.
[138] *See id.*
[139] *See* notes 158 to 166, and accompanying text, *infra* (discussing current version of Chapter 19). *See also* notes 232 to 261, and accompanying text, *infra* (discussing version of Chapter 19 with proposed amendments).
[140] *See* BOE Policy 305-1, *available at* http://boe.hawaii.gov/policies/Board%20Policies/Student%20Safety%20and%20Welfare.pdf.
[141] *See* BOE Policy 305-5, *available at* http://boe.hawaii.gov/policies/Board%20Policies/Cooperation%20with%20Law%20Enforcement%20Agencies.pdf.
[142] *See* notes 165 to 166, and accompanying text, *infra*.
[143] *See* BOE Policy 305-10, *available at* http://boe.hawaii.gov/policies/Board%20Policies/Anti-Harassment,%20Anti-Bullying,%20and%20Anti-Discrimination%20Against%20student(s)%20by%20Employees.pdf.
[144] *See id.*
[145] *See id.*
[146] *See id.*

complainants.[147] The language of BOE Policy 305-10 indicates that the policy's protections are broader and more comprehensive than those of Title IX.[148]

f. Department of Education Applicant and Employee Non-Discrimination (BOE Policy 900-1)

This policy prohibits discrimination in any form, including harassment and retaliation, against employees and applicants for employment.[149] Protected classes under the policy encompass race, color, sex (including gender identity or expression), sexual orientation, pregnancy and breastfeeding status, religion, national origin, age, physical or mental disability, marital status, and any other classification protected by state or federal laws.[150] The policy provides that, "upon request, if needed and to the extent required by law[,]" the HDOE will provide "reasonable accommodations" to employees and applicants for employment with physical or mental disabilities, including pregnancy-related disabilities and other special circumstances.[151]

g. Gender Equity in Education (BOE Policy 900-4)

Similar to BOE Policy 305-10,[152] Policy 900-4 reinforces key language from Title IX, stating that "[n]o person, on the basis of sex, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by the [HDOE]."[153] The intent of the policy is to explicitly require the HDOE to comply with the Title IX statute and regulations.[154]

h. Student Rights and Due Process (BOE Policy 900-6)

Under the policy, students in HDOE schools "shall be accorded the rights of personal and academic freedom" as citizens of the State and country.[155] This policy may potentially be subject to greater scrutiny in light of concerns expressed by the USDOE that the current Title IX regulations, as well as the grievance procedures of many recipient institutions, do not afford

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[147] *See id.*
[148] *See id.*
[149] *See* BOE Policy 900-1, *available at* http://boe.hawaii.gov/policies/Board%20Policies/Department%20of%20Education%20Applicant%20and%20Employee%20Non-Discrimination.pdf.
[150] *See id*.
[151] *See id.* A "reasonable accommodation" is a modification or adjustment to a job, the working environment, or the manner in which things are usually done during the hiring process for the purpose of allowing a disabled individual to succeed to the same extent as a non-disabled individual. *See* United States Department of Labor, Office of Disability Employment Policy website, at https://www.dol.gov/odep/topics/accommodations.htm.
[152] *See* notes 143 to 148, and accompanying text, *supra*.
[153] *See* BOE Policy 900-4, *available at* http://boe.hawaii.gov/policies/Board%20Policies/Gender%20Equity%20in%20Education.pdf.
[154] *See id*.
[155] *See* BOE Policy 900-6, *available at* http://boe.hawaii.gov/policies/Board%20Policies/Student%20Rights%20and%20Due%20Process.pdf.

sufficient due process rights to students accused of violating a school conduct code or Title IX.[156] While the one-sentence policy does not elaborate on the extent of the due process to be provided, certain provisions in the Chapter 19 student disciplinary code, discussed below, expand on the due process requirements.[157]

3. Relevant Provisions of the Hawaii Administrative Rules (HAR)

a. Title 8, Chapter 19, HAR (Student Misconduct, Discipline, School Searches and Seizures, Reporting Offenses, Police Interviews and Arrests, and Restitution for Vandalism)

Referenced in BOE Policy 101-7 on School Climate and Discipline,[158] Chapter 19 governs disciplinary action that may be imposed on students for engaging in conduct that "violates established polices, rules, or regulations of the department, [or] state or local laws," including conduct that targets other students.[159] Chapter 19 sets out the various forms of prohibited conduct, which are categorized into different classes of offenses depending on severity. Class A offenses (e.g., assault, possession or use of firearms, robbery, and sexual offenses) are the most serious, and class D offenses (e.g., possession or use of contraband, minor problem behaviors, and other school rule violations) are the least serious.[160] Chapter 19 lists the

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[156] *See* Chapter 3, notes 196-197 and 226, and accompanying text, *supra*.
[157] *See* notes 158 to 166, and accompanying text, *infra* (discussing current version of Chapter 19). *See also* notes 232 to 261, and accompanying text, *infra* (discussing version of Chapter 19 with proposed amendments).
[158] *See* notes 137 to 138, and accompanying text, *supra*.
[159] *See* Chapter 19, HAR, at §8-19-1(c), *available at* http://boe.hawaii.gov/policies/AdminRules/Pages/AdminRule19.aspx.
[160] *See id*. at §8-19-6(a). Section 8-19-2, HAR, provides definitions for numerous offenses, including the following:

> "Bullying" means any written, verbal, graphic, or physical act that a student or group of students exhibits toward other particular student(s) and the behavior causes mental or physical harm to the other student(s); and is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student(s).
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> . . .
>
> "Harassment" means a student who is harassing, bullying, including cyberbullying, annoying, or alarming another person by engaging in the following conduct that includes but is not limited to:
>
> (1) Striking, shoving, kicking, or otherwise touching a person in an offensive manner or subjecting such person to offensive physical contact;
> (2) Insulting, taunting, or challenging another person in a manner likely to provoke a violent response;
> (3) Making verbal or non-verbal expressions that causes others to feel uncomfortable, pressured, threatened, or in danger because of reasons that include but are not limited to the person's race, color, national origin, ancestry, sex, including gender identity and expression, religion, disability, or sexual orientation that creates an intimidating, hostile, or offensive educational environment, or interferes with the education of a student, or otherwise adversely affects the educational opportunity of a student or students;

various forms of possible disciplinary actions to be taken in response to offenses.[161] Disciplinary actions include student conferences, crisis removal (immediate removal of the student based on a clear, immediate threat to physical safety of self or others, or an extreme disruption warranting immediate removal to preserve education rights of other students), in-school suspension, parent conferences, suspension of up to ten days, suspension of more than ten days, transfer to another school, dismissal, or restitution.[162]

Chapter 19 also identifies (but in a less detailed manner than Chapter 41, which is discussed in the next section) investigation procedures and due process requirements, including opportunities for appeal.[163] It also articulates HDOE's policy on school searches and seizures (e.g., student lockers are subject to being inspected at any time with or without cause, as long as the motive to search is not based on the student's race, color, national origin, sex, or other protected class).[164] Additionally, the chapter specifies the procedure for reporting class A and class B offenses (bullying and harassment are classified as class B offenses) to the school principal or the principal's designee, who, after investigating, must directly summon local law enforcement authorities if there is perceived danger and the principal or the principal's designee determines that the student's behavior "cannot be handled by the school staff."[165] Chapter 19

> (4) Name calling, making rude gestures, insulting, or teasing another person who feels humiliated, intimidated, threatened, or embarrassed;
> (5) Making a telephone call without purpose of legitimate communication;
> (6) Making repeated communications anonymously, or at extremely inconvenient hours, or in offensively coarse language on campus or, other department of education premises, on department of education transportation, or during a department of education sponsored activity or event on or off school property;
> (7) Causing fear as to prevent others from gaining legitimate access to or use of school buildings, facilities, services, or grounds such as, but is not limited to, restroom facilities; or
> (8) Physically harming, physically restraining, threatening, or stalking, or a combination of the foregoing.
>
> . . .
>
> "Sexual offense" or "sexual assault" means unwanted touching or grabbing of sexual parts, indecent exposure, using force to engage in intercourse, oral sex, or other sexual contact, engaging in intercourse, oral sex, or other sexual contact despite the other person's clearly expressed refusal or mental or physical inability to consent.

Under §8-19-6, sexual offenses are class A offenses, while bullying and harassment are class B offenses.

[161] *See id*. at §8-19-6(d).

[162] *See id.* at §§8-19-6(d) and 7.

[163] *See id*. at §§8-19-7.1, 8, and 9. Chapter 19 differs from Chapter 41 in purpose. Chapter 19 functions as a student disciplinary code and addresses a wide range of offenses that go beyond bullying and harassment. With the exception of §8-19-9, HAR, which articulates in great detail the HDOE's process for imposing "serious discipline" (such as suspension of a student that exceeds ten days) and the applicable time frames for each step of that process, Chapter 19's provisions regarding the reporting and investigation of alleged violations are not as detailed as those of Chapter 41. In contrast, Chapter 41 articulates a specific procedure for filing and resolving complaints involving alleged violations of federal and state anti-discrimination laws. *See also* notes 167 to 183, and accompanying text, *infra* (explaining the key provisions of Chapter 41) and notes 226 to 227, and accompanying text, *infra* (explaining that the HDOE has proposed a package of changes to the HAR, which will affect Chapters 19 and 41, in order to comply with the grievance procedure requirements of Title IX).

[164] *See id*. at §§8-19-14 through 18.

[165] *See id*. at §8-19-19. The procedure for reporting class A and class B offenses also specifies that:

further requires that, for school-related offenses, police officers obtain permission from the school principal or the principal's designee to interview a student at school, and that a school attempt to notify a student's parent of the parent's right to be present at the time of the interview.[166]

b. Title 8, Chapter 41, HAR (Civil Rights Policy and Complaint Procedure)

Title 8, Chapter 41, HAR (Chapter 41),[167] is the HDOE's current internal grievance procedure for addressing complaints of discrimination based on race, color, religion, sex, age, national origin, ancestry, or disability.[168] Complaints may allege discrimination that violates federal civil rights laws, including Title IX, or Hawaii civil rights laws.[169] Chapter 41 seeks to protect all students currently enrolled in the HDOE system and all persons eligible to receive the benefits of, or participate in, an HDOE program, activity, or service.[170] Accordingly, Chapter 41 allows complaints to be filed by students and other eligible persons who believe they have been subjected to harassment by HDOE employees or by other students.[171] However, complaints by

- HDOE employees must "promptly" report to the school principal or the principal's designee any class A and class B offense that they witnessed or have reasonable cause to believe has been or will be committed.
- The principal or the principal's designee, within five school days of the reported offense, must enter information about the incident into the HDOE's electronic database system.
- The principal or the principal's designee, within five school days after the incident is reported, must notify the reporting employee of any disciplinary action that was taken.
- The reporting employee may file a written appeal with the complex area superintendent if the reporting employee is dissatisfied with the disciplinary action taken, or if no disciplinary action was taken within ten school days after the incident was reported.
- The complex area superintendent or that person's designee, within five school days of receiving an appeal, must notify the appellant in writing of "the disciplinary action [ultimately] taken on the offense reported."

[166] *See id*. at §§8-19-22 and 23.

[167] Chapter 41, HAR, *available at* http://boe.hawaii.gov/policies/AdminRules/Pages/AdminRule41.aspx. *See also* notes 262 to 274, and accompanying text, *infra* (discussing the HDOE's proposed repeal of Chapter 41 and replacement with a new Chapter 89).

[168] *See id*. at §8-41-1.

[169] *See id*. at §8-41-2 (definition of "complaint"). Under the definition, the other laws that protect against discrimination are: Title VI of the Civil Rights Act of 1964, Public Law 88-352, which prohibits discrimination on the grounds of race, color, or national origin; section 504 of the Rehabilitation Act of 1973, Public Law 92-112, which prohibits discrimination against persons with disabilities; the Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination against persons with disabilities in programs, activities, and services; the Age Discrimination Act of 1975, Public Law 94-135; section 368-1.5, Hawaii Revised Statutes (HRS), which prohibits discrimination against persons with disabilities in any state program or activity; Article X, Section 1, of the Hawaii State Constitution, which prohibits discrimination in public educational institutions because of race, religion, sex or ancestry; and section 296-61, HRS, which prohibits discrimination on the basis of sex. The Bureau notes that Chapter 296, HRS, was repealed by section 19 of Act 89, Session Laws of Hawaii 1996, which recodified a number of HRS chapters related to education. The text of section 296-61, HRS, now appears in section 302A-1001, HRS, with only technical non-substantive changes. *See* Chapter 6, notes 106 to 109, and accompanying text, *infra,* for a further discussion of section 302A-1001, HRS.

[170] *See* Chapter 41, HAR, *supra* note 167, at §8-41-3(a).

[171] *See id.* at §8-41-3(c).

employees are handled under a separate HDOE personnel policy.[172] Complaints are heard by the respective district complaint board (board) for each school district.[173] Filing a complaint with the board does not curtail the complainant's right to seek other relief allowed by federal and state law.[174] Similarly, filing a discrimination complaint with a federal or state agency does not affect the complainant's ability to proceed at any time under Chapter 41.[175] The complainant has the right to be represented by counsel.[176] While the parties to a complaint have the right to access relevant information and records in the HDOE's possession, any confidential information must remain confidential.[177]

Under Chapter 41, a written complaint must be filed within twenty days of an alleged violation, except in cases where systemic discrimination is alleged.[178] The board is required to investigate all written complaints and provide the parties with a hearing.[179] Within ten days of concluding the hearing, the board must provide the parties with its decision in writing.[180] In cases where the board is unable to reach a decision, the Superintendent of Education (Superintendent) or the Superintendent's designee shall have the authority to review the complaint.[181] If the outcome of a complaint requires remedial action by the HDOE, the Superintendent has the responsibility to "promptly and equitably" determine and implement an appropriate remedy.[182] Once filed, a complaint may be withdrawn by the complainant at any time before the board concludes its hearing.[183]

B. HDOE Title IX Compliance Status

1. Initiation of Compliance Review and Overview of Issues Examined

The OCR's compliance review examined whether the HDOE complied with its obligations to enforce multiple federal civil rights laws. However, this section will discuss in detail the OCR findings relating only to Title IX.

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[172] *See id*. at §8-41-3(d). The policy that applies to complaints by employees is Policy 5513, Civil Rights Policy Regarding Certificated Employees, HDOE School Code, *available at* http://www.hawaiipublicschools.org/Standards%20of%20Practice/SP5000.pdf (last visited September 10, 2019). An HDOE employee may also file a grievance pursuant to the collective bargaining agreement that applies to the employee.
[173] *See* Chapter 41, HAR, *supra* note 167, at §8-41-4.
[174] *See id.* at §8-41-6.
[175] *See id*.
[176] *See id*. at §8-41-7.
[177] *See id*. at §§8-41-8 and 9.
[178] *See id*. at §8-41-11(a).
[179] *See id*. at §8-41-11(b). Chapter 41 does not appear to specify a time frame in which the hearing must occur.
[180] *See id*. at §8-41-11(d).
[181] *See id*. at §8-41-11(f).
[182] *See id*. at §8-41-13.
[183] *See id*. at §8-41-14.

The OCR initiated its compliance review in 2011[184] and completed the review as of January 2018.[185] The purpose of the compliance review was to determine whether the HDOE had, per the requirements of Title IX: (1) designated an employee to coordinate Title IX compliance; (2) developed and disseminated a notice of nondiscrimination; and (3) adopted and published grievance procedures that provided for the prompt and equitable investigations of reports of various types of harassment.[186] The OCR found that the HDOE was not in compliance with Title IX in all three aforementioned areas. The reasons for the OCR's determination of noncompliance are discussed below.

As part of its inquiry, the OCR examined the disciplinary records of twenty-nine schools, conducted two onsite visits, and conducted two hundred interviews with HDOE administrators and staff. The OCR also developed a student survey regarding harassment that occurs in HDOE schools on the basis of sex, race, color, national origin, and disability, and analyzed the survey results.[187]

a. Designated Employee for Title IX Compliance

The OCR's compliance review found that the HDOE failed to designate at least one employee to coordinate its Title IX responsibilities and, commensurately, failed to adequately give all students and employees the name and contact information of the designee.[188] The review found that many students who had indicated being harassed did not report the harassment because the students did not know to whom they should report harassment.[189] Accordingly, the OCR found that the HDOE's failure to designate a Title IX Coordinator "may have had a material impact on the capacity of HDOE students to seek assistance in response to being harassed on the basis of being a member of a protected class."[190]

b. Failure to Publish a Notice of Nondiscrimination

The OCR's review determined that the HDOE failed to "broadly and prominently" publish its notice of nondiscrimination and thus did not comply with Title IX.[191] The HDOE did not regularly publish its notice of nondiscrimination in prominent print materials, such as student handbooks.[192] Further, the HDOE mistakenly believed that posting the notice of

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[184] *See* the OCR Letter of Findings for HDOE, *supra* note 15.
[185] *See id.*
[186] *See id.* at 1-2.
[187] *See id.* at 2.
[188] *See id.* at 6-8. The OCR found that, while the Director of the CRCB was tasked with coordinating and carrying out the HDOE's Title IX responsibilities relating to complaints against employees, it was school principals (or their designees) that handled complaints made by students against other students, not the CRCB. Citing a lack of evidence that the HDOE had intended or designated school principals and principals' designees to act as Title IX Coordinators for student-on-student complaints, and the fact that these particular school personnel were not identified to others as Title IX Coordinators, the OCR concluded that the HDOE was not in compliance with this Title IX requirement.
[189] This fact was referenced in the results of an OCR survey administered by the HDOE. *See* notes 209 to 210, and accompanying text, *infra.*
[190] *See* the OCR Letter of Findings for HDOE, *supra* note 15, at 8.
[191] *See id.* at 10.
[192] *See id.* at 11.

nondiscrimination on each school website would satisfy the Title IX dissemination requirement.[193] Because of these failures, the OCR found that the notice of nondiscrimination was not "published prominently or in a manner necessary to inform students and others of their protections against discrimination," in violation of Title IX and other federal civil rights laws.[194]

c. Grievance Procedures

The OCR found that HDOE policies and procedures for responding to complaints of harassment based on race, sex, and disability did not meet the standards for grievance procedures required by Title IX and other federal civil rights laws. The OCR reviewed Chapter 19[195] and BOE Policy 305-10[196] and found that the policies and procedures therein did not comply with Title IX.[197]

More specifically, the OCR found that Chapter 19 functions as a discipline code but does not conform to Title IX grievance procedure standards.[198] For example, although Chapter 19 provides a disciplinary process for students who harass other students, it does not provide a complaint process for student victims, nor does it notify student victims of the office where they may file complaints.[199] The Chapter 19 disciplinary process does not designate time frames for major stages of the grievance process.[200] Victims are not required to be notified of the outcome of any disciplinary action taken against accused students, nor do they have an opportunity to present evidence during an appeal. Further, the OCR found that Chapter 19 does not adequately address retaliation against victims.[201] Chapter 19 also does not apply to complaints filed by students (or filed on their behalf) alleging harassment carried out by HDOE employees or third parties.[202]

Additionally, the OCR determined that BOE Policy 305-10 does not provide a Title IX - compliant grievance procedure. The OCR found that the policy, together with its implementing "standard of practice" document,[203] requires notice of investigation outcomes to parties and

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[193] *See id.* at 10-11, stating that, in November of 2015, HDOE required all principals to post the notice of nondiscrimination on each school's website. However, not all schools actually posted the notice.
[194] *Id.*
[195] *See* notes 158 to 166, and accompanying text, *supra* (discussing current version of Chapter 19). *See also* notes 232 to 261, and accompanying text, *infra* (discussing version of Chapter 19 with proposed amendments).
[196] *See* notes 143 to 148, and accompanying text, *supra*.
[197] *See* the OCR Letter of Findings for HDOE, *supra* note 15, at 17-19.
[198] *See id.* at 18.
[199] *See id.*
[200] *See id.*
[201] *See id.*
[202] *See id.* However, it should be noted that Chapter 41, HAR, applies to student complaints of harassment by HDOE employees. The HDOE's intent is to repeal Chapter 41 and replace it with a new HAR chapter that more comprehensively addresses student complaints of discrimination, harassment, and bullying by HDOE employees, school volunteers, or other third parties. *See* discussion on proposed new Chapter 89 under Title 8, HAR, notes 262 to 274, and accompanying text, *infra*.
[203] *See* the OCR Letter of Findings for HDOE, *supra* note 15, at 16 n.18. The OCR noted that an HDOE "Standard of Practice Document (SP) is an 'official guidance' document for HDOE employees." The HDOE's website, *available at* http://www.hawaiipublicschools.org/ConnectWithUs/Organization/SOP/Pages/default.aspx, additionally explains that SP documents "contain official policies, rules, regulations, and procedures, and are written in alignment with state and federal laws, regulations and rules, and Board of Education policies." Further, SP

prohibits retaliation,[204] but the OCR indicated that these documents did not provide enough specificity about the investigatory process to comply with Title IX requirements.[205] For example, the documents do not provide details about how investigations are conducted.[206] The OCR further found that there was insufficient notice of the complaint procedures because the documents were not widely distributed.[207] As such, BOE Policy 305-10 and the related standard of practice document failed to provide for "adequate, reliable, and impartial investigations of complaints" as required by Title IX.[208]

Beyond examining whether HDOE grievance procedures were Title IX-compliant, the OCR considered the effects of noncompliance. Citing evidence from the results of an OCR survey that was administered by the HDOE,[209] the OCR asserted the likelihood that the lack of proper grievance procedures for students has negatively impacted the educational environment by discouraging students from reporting bullying and harassment incidents to school officials.[210] Of the students who had personally experienced bullying or harassment (nearly a third, or more than 20,000 of the 69,905 students who responded) and had reported it to school officials (over half, or 10,744 of the more than 20,000 students), 14.6% of these students indicated that the school failed to take action.[211] Of the students who had been bullied or harassed but opted not to make a report to school officials (nearly half, or 9,128 of the 20,000-plus students), a total of 61.3% indicated that they did not report the bullying or harassment because they did not believe that the school would take action, or that reporting would worsen the situation, or both.[212]

Similarly, after reviewing the HDOE's disciplinary records from 2014-2016, the OCR found that "Chapter 19's deficiencies as a harassment grievance procedure may have had negative effects for HDOE students."[213] The review found that, in the majority of cases, the

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documents are "vetted by relevant unions and the state Attorney General's office." The Bureau obtained a copy of the SP document for BOE Policy 305-10 after contacting the CRCB to specifically request it, but the document itself does not appear to be viewable by the general public on the HDOE's website. *See also* note 223, and accompanying text, *infra*.

[204] *See* the OCR Letter of Findings for HDOE, *supra* note 15, at 19.

[205] *See id.*

[206] *See id.*

[207] *See id.*

[208] *See id.*

[209] *See id.* at 2-3. At the request of OCR, the HDOE administered the survey in November and December 2014 to all HDOE students in the 5th grade and above, with a 66.07% response rate (i.e., 69,905 of a possible 105,709 students responding). The survey results indicated several areas where significant percentages of HDOE students reported experiencing or witnessing bullying due to race, sex, and/or disability. Of the 31.5% of students who reported that they had been bullied or harassed at school, 61.7% reported that they believed it was because of their race, sex, and/or disability. More than half, or 52.7%, of students reported that they had witnessed another student being bullied or harassed, and of these, 75.2% answered that the harassment was because of the victim's race, sex, and/or disability. Almost 40% of students who responded to the survey indicated that having experienced or witnessed incidents of bullying or harassment made them feel unsafe at school.

[210] *See id.* at 19-20.

[211] *See id.* at 3, 19-20.

[212] *See id.*

[213] *Id*. at 20.

HDOE did not follow up with victims after complaints and did not document its attempts to prevent retaliation against victims.[214]

d. HDOE Resolution Agreement

On December 20, 2017, the HDOE entered into a resolution agreement (HDOE Resolution Agreement) that addressed the violations identified by OCR. The HDOE agreed to take measures designed to achieve compliance with Title IX. Among other things, these measures required the HDOE to:

(1) Ensure that Title IX Coordinators and other employees receive appropriate training to comply with the law;

(2) Ensure that the HDOE's notice of non-discrimination is properly disseminated;

(3) Create and disseminate Title IX-compliant grievance procedures in accordance with specific requirements identified by OCR, as well as review any applicable policies, procedures, and state laws or regulations to ensure consistency with the grievance procedures; and

(4) Develop a plan for monitoring future compliance with Title IX.[215]

e. HDOE Response and Timeline

The HDOE has published and periodically updated both a resolution agreement action plan[216] and a resolution agreement status report[217] that are available on the CRCB website. The action plan lists the action items required by the HDOE Resolution Agreement and provides the purpose, status, and anticipated completion date for each action item. The current August 2019 version of the action plan indicates that nearly all of the action items are expected to be completed by December 2019, or sooner.[218] A number of action items have already been completed, as discussed in several examples below.

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[214] *See id.* In 83.2% of the incidents that OCR reviewed, there was no indication that school officials followed up with victims or their families after a complaint. In 82.2% of records reviewed, there was no indication that school officials had attempted to prevent retaliation against victims.

[215] *See generally* the HDOE Resolution Agreement, *supra* note 19.

[216] HDOE Resolution Agreement Action Plan, Version 6, August 7, 2019 (HDOE Action Plan), *available at* http://www.hawaiipublicschools.org/DOE%20Forms/Civil%20Rights/OCR_RAActionPlan.pdf.

[217] HDOE Resolution Agreement Status Report, Version 6, August 7, 2019 (HDOE Status Report), *available at* http://www.hawaiipublicschools.org/DOE%20Forms/Civil%20Rights/OCR_RAstatus.pdf.

[218] *See* the HDOE Action Plan, *supra* note 216. The lone exception is one action item with an undetermined completion date. This action item involves providing updated training on the HDOE's anticipated revisions to Chapter 19, HAR. *See* notes 275 to 276, and accompanying text, *infra*. In its current form, Chapter 19 governs disciplinary action that HDOE schools may impose for student misconduct, including student-on-student misconduct. *See* notes 158 to 166, and accompanying text, *supra* (discussing current version of Chapter 19). *See also* notes 232 to 261, and accompanying text, *infra* (discussing version of Chapter 19 with proposed amendments).

The current August 2019 version of the status report provides additional detail on the status of the HDOE Resolution Agreement deliverables, including hiring of compliance coordinators, publication of notices of non-discrimination online and in a variety of print materials, revision of grievance procedures, and monitoring of ongoing compliance. More specifically, as of June 2019, the HDOE has filled all of the fifteen new "Equity Specialist" positions that were approved by the Hawaii State Legislature in July 2017, with each position assigned to a specific complex area.[219] Additionally, the HDOE received confirmation from the OCR that it is now in compliance with respect to publication of notices of non-discrimination.[220]

The status report also indicates that the HDOE has undertaken the following: revision of Chapter 19, repeal of Chapter 41, and replacement of Chapter 41 with a new HAR chapter (Chapter 89, Civil Rights Policy and Complaint Procedure).[221] Together, these changes aim to establish Title IX-compliant grievance procedures to address discriminatory conduct that targets HDOE students, whether the conduct is perpetrated by other students or by HDOE employees, HDOE volunteers, or other third parties.[222] Further, the status report indicates that after the new Chapter 89 is approved, the HDOE will revise the standard of practice document for BOE Policy 305-10 to reflect changes made by Chapter 89.[223]

Additionally, the status report indicates that on July 16, 2019, there was a public hearing on the HDOE's proposed changes to HAR chapters 19, 41, and 89, and that the process of obtaining final approval of these rules, implementing and disseminating them, and commencing employee and student training on the final rules will span the period from July 2019 through May 2020.[224] Finally, the status report states that, as of July 2018, the HDOE has developed a plan for monitoring ongoing compliance with Title IX and other applicable federal civil rights laws.[225]

C. Proposed Amendments to the HAR

In response to the OCR's concern about inadequate grievance procedures, the HDOE developed and proposed a package of changes to the HAR that would help the department move toward greater compliance.[226] More specifically, the HDOE's proposed rule changes will revise

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[219] *See* the HDOE Status Report, *supra* note 217, at 1. According to a job posting (no longer active) for an "Equity Specialist II" position on www.linkedin.com, on behalf of what appears to be the HDOE, the position includes acting as the Title IX Coordinator for the assigned school complex area, in addition to ensuring compliance with other federal civil rights laws. *See* https://www.linkedin.com/jobs/view/equity-specialist-ii-kau-keaau-pahoa-complex-area-at-hawaii-department-education-1076376456 (last visited June 18, 2019). *See also* note 123, and accompanying text, *supra* (examples of other federal civil rights laws with which the HDOE must comply).
[220] *See* the HDOE Status Report, *supra* note 217, at 2.
[221] *See id.* at 2-3.
[222] *See* notes 226 to 276, and accompanying text, *infra*.
[223] *See* the HDOE Status Report, *supra* note 217, at 3.
[224] *See id.* at 2-3.
[225] *See id.* at 3. Monitoring will be conducted by the HDOE's Civil Rights Compliance Advisory Committee, which was established in July 2018 and had its first meeting on March 13, 2019.
[226] The HDOE's process involved developing the rule language, presenting the proposed changes at a joint meeting of the BOE's Finance and Infrastructure Committee and Student Achievement Committee, considering public testimony and feedback from committee members, and revising the language accordingly. *See* Minutes of BOE

the Chapter 19 student disciplinary code (which includes procedures for handling student complaints about other students), repeal Chapter 41 (Civil Rights Policy and Complaint Procedure for complaints made by students against employees or other students), and replace Chapter 41 with a new Chapter 89 under Title 8, HAR (Civil Rights Policy and Complaint Procedure for student complaints against employees, volunteers, and third parties).[227] Going forward, Chapter 19 will address student misconduct, including student-on-student complaints, and Chapter 89 will address student complaints against non-students.

In October 2018, the BOE unanimously approved the HDOE's recommendation to send the proposed changes to public hearing.[228] In February 2019, the HDOE presented a revised version of its proposal to the BOE, in response to feedback it had received from principals, administrators, and members of the public at numerous community "engagement sessions" held across the State.[229] The BOE unanimously approved the revised proposal after making several substantive amendments.[230] On August 15, 2019, after the requisite public hearing had been held, the BOE approved the proposed amendments to the rules, and they now await the Governor's approval.[231]

1. Revisions to Title 8, Chapter 19, HAR

As noted previously, Chapter 19 is the HDOE's student discipline code that specifies various forms of student misconduct and the procedures that schools must use to address misconduct. The misconduct described in Chapter 19 includes situations in which a student engages in bullying, harassment, or sexual assault against another student.[232]

General Business Meeting, October 4, 2018, at VII, action item D, *available at* https://lilinote.k12.hi.us/STATE/BOE/Minutes.nsf/a15fa9df11029fd70a2565cb0065b6b7/7c8a78a071d306860a258324007a7d34?OpenDocument.

[227] *See* Letter to the Honorable Catherine Payne, BOE Chairperson, from Dr. Christina M. Kishimoto, HDOE Superintendent, and attachments A through D (October 4, 2018) (October 4, 2018 HDOE Letter), at 2, *available at* http://boe.hawaii.gov/Meetings/Notices/Meeting%20Material%20Library/GBM_10042018_Action%20on%20Chapter%2019.pdf.

[228] *See* Minutes of BOE General Business Meeting, October 4, 2018, *supra* note 226, at VII, action item D.

[229] *See* Minutes of BOE General Business Meeting, February 7, 2019, at VI, action items A and B, *available at* https://lilinote.k12.hi.us/STATE/BOE/Minutes.nsf/ebb43af14ca5cdb30a2565cb006622a8/77a298569da383df0a2583a2007d2de3?OpenDocument.

[230] *See id*. As stated in the meeting minutes, the amendments to the drafts of Chapter 89 and Chapter 19, HAR, contained in the HDOE's letters to the BOE dated February 7, 2019, were as follows:

> (1) Delet[ing] the sentence that states, "Bullying does not include isolated incidents of teasing, horseplay, argument, or peer conflict" from the definition of "bullying";
> (2) Delet[ing] all instances of the word "substantially" from the definition of "harassment"; and
> (3) Amend[ing] all instances of the phrase "as soon as possible" to state "as soon as possible but no later than 72 hours[.]"

(Bold emphasis in original removed; formatting changes made.)

[231] *See* Susan Essoyan, *Board of Education Passes New Rules for Discipline, Civil Rights,* Honolulu Star-Advertiser, August 17, 2019, *available at* https://www.staradvertiser.com/2019/08/17/hawaii-news/boe-passes-new-rules-for-discipline-civil-rights/. *See also* Notice of BOE General Business Meeting, August 15, 2019, *available at* http://boe.hawaii.gov/Meetings/Notices/Pages/August-15%2c-2019-General-Business-meeting.aspx.

[232] *See* note 160, and accompanying text, *supra*.

Proposed changes to Chapter 19 include:

- Specifying that "discrimination" means excluding a student from participation in or denying a student the benefits of the HDOE's educational programs and activities, or otherwise treating a student differently, based on the student's membership in a protected class of persons;[233]

- Addressing bullying by relaxing the threshold criteria for conduct to be considered bullying, and specifying that victims may include students with protected class statuses;[234]

- Replacing the current definition of harassment with substantially different language that references specific effects that the harassing conduct must produce;[235]

- Requiring the use of a single, uniform procedure to address complaints of discrimination, harassment (including sexual harassment), bullying, and retaliation,[236] and reclassifying certain offenses, including bullying and harassment, from class B to class A offenses for students in grades 9 through 12;[237]

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[233] *See* Letter to the Honorable Catherine Payne, BOE Chairperson, from Dr. Christina M. Kishimoto, HDOE Superintendent, regarding revision to Chapter 19 (February 7, 2019) (February 7, 2019 HDOE Letter on Chapter 19), at Attachment A, proposed §8-19-2, *available at* http://boe.hawaii.gov/Meetings/Notices/Meeting%20Material%20Library/GBM_02072019_Board%20Action%20on%20Approving%20for%20Public%20Hearing%20Draft%20Amendments%20to%20Hawaii%20Administrative%20Rules%2c%20Chapter%2019.pdf.

[234] *See id*. Under the current definition, "bullying" means "any written, verbal, graphic, or physical act that a student or group of students exhibits toward other particular student(s) and the behavior causes mental or physical harm to the other student(s); and is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student(s)." *See* note 160, *supra*. Under the proposed definition, the act need only hurt, harm, humiliate, or intimidate a student (including those who belong to a protected class of persons) and be "sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment."

[235] *See* February 7, 2019 HDOE Letter on Chapter 19, *supra* note 233, at Attachment A, proposed §8-19-2. The new definition of harassment reads as follows:

> "Harassment" means any threatening, insulting, or aggressive conduct, which can be written, verbal, or physical, and is directed against a student, including those with protected class status. Harassing conduct must have the effect of:
> (1) Placing a student in reasonable fear of harm to his or her person or property;
> (2) Interfering with a student's educational performance, opportunities, or benefits; or
> (3) Disrupting the orderly operation of a school.

See note 160, *supra*, for the current definition of harassment. The Bureau notes that certain types of conduct proposed to be deleted from Chapter 19's definition of "harassment" are also addressed in the State's penal code. *See* §711-1106, HRS.

[236] *See* February 7, 2019 HDOE Letter on Chapter 19, *supra* note 233, at Attachment A, proposed §§8-19-7.1 and 8-19-30.

[237] *See id*. at Attachment A, proposed §§8-19-6 and 8-19-13.

- Establishing sexual assault, sexual exploitation, sexual harassment, and stalking as new, separate offenses, and referencing the concept of affirmative consent;[238] and

- Defining "gender expression," "gender identity," and "sexual orientation."[239]

The proposed new procedure for addressing complaints of conduct perpetrated against students by other students arising under Chapter 19 includes the following:

- The HDOE "will take immediate and appropriate steps" to stop discrimination, harassment (including sexual harassment), and bullying against a student that violate the chapter.[240]

- A complaint for discrimination, harassment (including sexual harassment), bullying, or retaliation that allegedly occurred against a student in violation of the chapter may

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[238] *See id*. at Attachment A, proposed §§8-19-2, 8-19-6, and 8-19-13. Section 8-19-2 repeals the current definition of the phrase "'sexual offense' or sexual assault'" and replaces it with the following three separate terms:

> "Sexual assault" means the act of committing unwanted physical contact of a sexual nature on a person, whether by an acquaintance or by a stranger. Such contact is unwanted when it occurs without consent of the person, or when the person is incapacitated or otherwise incapable of giving consent. Consent means affirmative, conscious, and voluntary agreement to engage in agreed upon forms of sexual contact. If a student is a subject of sexual assault and is under the age of consent, it shall be deemed that no consent was given. Sexual assault is a form of sexual harassment.
>
> "Sexual exploitation" means the violation of the sexual privacy of another, or taking unjust or abusive sexual advantage of another without consent and when such behavior does not otherwise constitute sexual assault. Consent means affirmative, conscious, and voluntary agreement to engage in agreed upon forms of sexual contact. If a student is a subject of sexual exploitation and is under the age of consent, it shall be deemed that no consent was given. Sexual exploitation is a form of sexual harassment.
>
> "Sexual harassment" means any unwanted, unwelcome, or unsolicited verbal or physical act of a sexual nature directed at an individual because of his or her sex. Sexual harassment can include requests for sexual favors or sexual advances when submission to or rejection of the conduct is either an explicit or implicit term or condition of a student's education or participation in a department program, activity or service; or when submission to or rejection of the conduct is used as a basis in decisions affecting that student's education or participation in a department program, activity, or service. Sexual harassment also includes, but is not limited to, sexual misconduct, unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. It can include conduct such as touching of a sexual nature, making sexual comments, jokes or gestures, writing graffiti or displaying or distributing sexually explicit drawings, pictures or written materials, calling students sexually charged names, spreading sexual rumors, rating students on sexual activity, or circulating, showing, or creating e-mails or websites of a sexual nature. Sexual exploitation and sexual assault also fall under the definition of sexual harassment.

See note 160, *supra*, for the current definition of the phrase "'sexual offense' or 'sexual assault'".

[239] *See* February 7, 2019 HDOE Letter on Chapter 19, *supra* note 233, at Attachment A, proposed §8-19-2.

[240] *See id*. at Attachment A, proposed §8-19-30(a).

be filed at any time, by students, parents and legal guardians, or school employees or volunteers.[241]

- Complaints may be filed using a standardized form, but may also be made in writing or be relayed over the phone or in person.[242]

- Complaints may be submitted to a number of persons, including any teacher or staff, principal, vice-principal, complex area superintendent, or the CRCB.[243]

- A filed complaint may take either of two routes: it may be immediately investigated, or, if appropriate[244] and if the parties voluntarily agree, the complaint may be resolved informally. If one party wishes to end the informal resolution process at any time, the complaint must then be formally investigated.[245]

- Either party may request "immediate interventions," which are individualized services (offered "as soon as possible, but no later than seventy-two hours after receipt of the complaint") available to either a complainant or respondent, or both, before or during the pendency of an investigation before any outcome has been determined.[246] The purpose of these interventions is to "protect students from possible harassment or bullying" and "preserve the complainant's/victim's educational experience, ensure the safety of all parties and the broader department community, maintain the integrity of the investigative and/or resolution process, and deter retaliation."[247] Interventions may take various forms, including counseling, extra time to complete coursework, schedule adjustments, and restrictions on contact between the parties.[248]

- Complaints will be investigated by an impartial school-level investigator who is assigned by the principal or the principal's designee.[249] Based on information provided by the parties, such as names of witnesses, the investigator analyzes and documents the available evidence, evaluates the credibility of the parties and any witnesses, synthesizes all available evidence, and considers the unique circumstances of each case.[250] Subsequently, the investigator issues findings of fact and determines any action needed to end the conduct complained of (discrimination, harassment, bullying, or retaliation), prevent its recurrence, and remedy its effects on the complainant and the HDOE community.[251] (In other words, there is no "live" hearing

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[241] *See id*. at Attachment A, proposed §8-19-30(b).
[242] *See id*. at Attachment A, proposed §8-19-30(c) and (d).
[243] *See id.*
[244] *See id*. at Attachment A, proposed §8-19-30(f)(2). Examples of complaints deemed "not appropriate" for informal resolution include those involving criminal charges, the participation of Child Welfare Services, or an objective and obvious power imbalance between the parties.
[245] *See id*. at Attachment A, proposed §8-19-30(f).
[246] *See id*. at Attachment A, proposed §§8-19-2 and 8-19-30(g). *See also* note 230, and accompanying text, *supra*.
[247] *See* February 7, 2019 HDOE Letter on Chapter 19, *supra* note 233, at Attachment A, proposed §8-19-2.
[248] *See id.*
[249] *See id*. at Attachment A, proposed §8-19-31(a).
[250] *See id*. at Attachment A, proposed §8-19-31(a) and (b).
[251] *See id*. at Attachment A, proposed §8-19-31(b).

for the parties to attend.) Investigators will aim to complete their investigation within five school days of assignment.[252] However, more time is allowed, with written notice and an explanation to the parties.[253]

- Upon receipt of the investigator's findings, the principal or the principal's designee determines whether any prohibited student conduct (that is, specific offenses defined in the chapter) has occurred and any appropriate disciplinary action to be taken.[254]

- After the investigation is completed, the principal or the principal's designee, in consultation with the CRCB, will determine whether any individual involved in the investigation will receive any remedies.[255] Remedies are to be implemented by the principal or the principal's designee and, similar to immediate interventions, may include schedule and coursework adjustments and academic, medical, and psychological support services.[256]

- Complainants must be notified of the investigation outcome, including any actions taken by the HDOE that pertain directly to the complainant.[257] Likewise, respondents are to be notified of the investigation outcome, including any actions that pertain directly to the respondent.[258]

- Even if a formal complaint is never made, or is made but later withdrawn, the HDOE will investigate any allegation that Chapter 19 has been violated.[259]

- Complainants have the right to file a discrimination complaint with a federal or state agency,[260] including law enforcement agencies, regardless of whether or when they have filed a complaint under Chapter 19.[261]

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[252] *See id.* at Attachment A, proposed §8-19-31(d).
[253] *See id*.
[254] *See id*. at Attachment A, proposed §8-19-31(b).
[255] *See id*. at Attachment A, proposed §8-19-31(c).
[256] *See id*. at Attachment A, proposed §§8-19-2 and 8-19-31(c).
[257] *See id.* at Attachment A, proposed §8-19-31(c).
[258] *See id*.
[259] *See id*. at Attachment A, proposed §8-19-32.
[260] For example, complaints that allege sex-based discrimination in violation of Title IX may be filed with the OCR or with the Civil Rights Division of the USDOJ. *See* discussion in Chapter 3, part III, *supra*. Complaints that allege discrimination in violation of state laws (spanning employment, housing, public accommodations, and access to state and state-funded services) may be filed with the Hawaii Civil Rights Commission (HCRC). *See* the discussion on the HCRC and its complaint filing procedure in part IV, subpart B of this chapter, *infra*.
[261] *See* February 7, 2019 HDOE Letter on Chapter 19, *supra* note 233, at Attachment A, proposed §8-19-35.

2. Creation of New Chapter 89 in Title 8, HAR

The proposed new chapter under Title 8, HAR (Chapter 89) sets out a civil rights policy and complaint procedure exclusively for student complaints against non-student perpetrators. Chapter 89 will replace the procedure set out in Chapter 41.[262] Chapter 89 prohibits employees, volunteers, and third parties from engaging in discrimination, harassment (including sexual harassment), and bullying against students participating in any HDOE program, activity, or service, based on a student's membership in a protected class (such as race, sex, or disability).[263] Many of the terms defined in Chapter 89 have definitions that are identical or nearly identical to their counterparts in Chapter 19, such as bullying, harassment, sexual harassment, and stalking.[264] Additionally, Chapter 89's definitions of sexual assault and sexual exploitation are identical to those in Chapter 19, except for additional language that emphasizes the perpetrator's age. Under Chapter 89, if the perpetrator is an adult and an HDOE employee or volunteer it shall be deemed that no consent[265] to engage in sexual activity was given.[266] Further, the complaint and investigation procedure for these offenses is very similar to that of Chapter 19.[267]

There are some significant differences from Chapter 19, however. For example:

- The CRCB, on behalf of the HDOE, is responsible for coordinating implementation of the chapter, monitoring complaints and conducting investigations, and providing training as to rights and responsibilities under the chapter.[268]

- School staff and administrators (e.g., teacher, principal, vice-principal, complex area superintendent) are required to forward all complaints "as soon as possible" to the CRCB or risk disciplinary action for failing to do so.[269] The CRCB must "promptly assess" and investigate all complaints that fall under Chapter 89.[270]

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[262] *See* Letter to the Honorable Catherine Payne, BOE Chairperson, from Dr. Christina M. Kishimoto, HDOE Superintendent, regarding new Chapter 89 (February 7, 2019) (February 7, 2019 HDOE Letter on Chapter 89), at Attachment A, *available at* http://boe.hawaii.gov/Meetings/Notices/Meeting%20Material%20Library/GBM_02072019_Board%20Action%20on%20Approving%20for%20Public%20Hearing%20Repeal%20of%20Hawaii%20Administrative%20Rules%2c%20Chapter%2041%2c%20Civil%20Rights.pdf. *See also* previous discussion on Chapter 41, notes 167 to 183, and accompanying text, *supra*.

[263] *See* February 7, 2019 HDOE Letter on Chapter 89, *supra* note 262, at Attachment A, proposed §§8-89-1 and 8-89-2.

[264] *See id.* at Attachment A, proposed §8-89-2.

[265] For purposes of prosecuting criminal offenses under Hawaii's penal code, the age at which a person may legally consent to participation in sexual activity is sixteen. However, the age is lowered to fourteen if certain circumstances exist. *See* part V of Chapter 707, HRS.

[266] *See* February 7, 2019 HDOE Letter on Chapter 89, *supra* note 262, at Attachment A, proposed §8-89-2.

[267] *See id.* at Attachment A, proposed §§8-89-6 through 8-89-9.

[268] *See id.* at Attachment A, proposed §8-89-1(d). Further, it should be noted that in proposed §8-89-1(f) the HDOE must specifically comply with §§302A-461, 302A-1001, and 368D-1, HRS, when administering Chapter 89, HAR.

[269] *See* February 7, 2019 HDOE Letter on Chapter 89, *supra* note 262, at Attachment A, proposed §8-89-6(c).

[270] *See id.* at Attachment A, proposed §8-89-6(d).

- There is no option to use an informal resolution process like the one available under Chapter 19 to resolve a complaint, given the inherent power imbalance between students and adult perpetrators.[271]

- The investigator must complete the investigation within sixty calendar days of the filing of the complaint or the reporting of the suspected violation, unless the CRCB determines that more time is required.[272] In that event, the CRCB will provide the parties with a written notice and monthly status updates.[273]

- Charter schools are excluded from Chapter 89 and subject instead to "regulations promulgated by the Hawaii State Public Charter School Commission."[274]

As noted earlier in this chapter, the draft administrative rules were recently approved by the BOE and now await the Governor's signature.[275] Once approved by the Governor, the rules will have the force and effect of law.[276]

Part IV. Current Enforcement Mechanism for Civil Rights in Hawaii

A. Overview

Hawaii has several civil rights laws that potentially intersect with Title IX. These include prohibitions of discrimination,[277] including for reason of sex or gender identity, in employment,[278] housing,[279] public accommodations,[280] and access to state and state-funded services.[281] Further, no person, on the basis of sex, shall be excluded from participating in, be denied the benefits of, or be subjected to discrimination in athletics offered by a public high school.[282] The means to enforce Title IX and these related state laws include the Hawaii Civil Rights Commission (HCRC), the State Equal Employment Opportunity Office, and, in certain cases, private rights of action. Most recently, Act 110, Session Laws of Hawaii 2018 (House Bill No. 1489, H.D. 1, S.D. 2, C.D. 1 (2018)), established a state law corollary to Title IX, as codified

[271] *See id*. at Attachment A, proposed §8-89-6.
[272] *See id.* at Attachment A, proposed §8-89-6(i).
[273] *See id*.
[274] *See id*. at Attachment A, proposed §8-89-3(a).
[275] *See* note 231, and accompanying text, *supra*.
[276] *See* Minutes of BOE General Business Meeting, February 7, 2019, *supra* note 229, at VI, action items A and B. *See also* section 91-3, HRS (which sets out the procedure for adoption, amendment, or repeal of administrative rules), and section 91-4, HRS (which addresses the filing and taking effect of rules, but does not specify the time frame in which the Governor must approve the rules).
[277] Prohibited discrimination includes discrimination because of race, color, religion, age, sex including gender identity or expression, sexual orientation, marital status, ancestry, or disability. *See, e.g.,* Chapter 378, Part I, HRS.
[278] *See* Chapter 378, Part I, HRS.
[279] *See* Chapter 515, HRS.
[280] *See* Chapter 489, HRS.
[281] *See* §368-1, HRS.
[282] *See* §302A-461, HRS. However, this law expressly states that no private right of action at law shall arise under this section.

in Chapter 368D, Hawaii Revised Statutes (HRS).[283] The manner in which Chapter 368D, HRS, is to be enforced has yet to be determined.

B. Hawaii Civil Rights Commission

The Hawaii Civil Rights Commission (HCRC) was created to provide a uniform procedure for the enforcement of the State's discrimination laws.[284] The HCRC is tasked with enforcing state laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services.[285] Accordingly, the HCRC receives, investigates, and conciliates complaints alleging unlawful discrimination in violation of these laws.[286]

The HCRC consists of five members who are appointed by the Governor to staggered terms (with the consent of the Senate).[287] The commission appoints an executive director, deputy executive director, attorneys, and other staff.[288] The commission is required to submit an annual report to the Governor and Legislature describing its activities and recommendations.[289]

The HCRC has the authority to hold hearings, commence civil action in state circuit court to seek appropriate relief, including the enforcement of commission orders, agreements, or settlements,[290] and undertake compliance reviews to ensure compliance with agreements, settlements, and orders. The HCRC may also issue a notice of right to sue upon request of a complainant, which may be used to bring a private civil action within ninety days of issuance.[291] The HCRC may also intervene in civil actions if the case is of general importance.[292]

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[283] In 2019, Act 177, Session Laws of Hawaii 2019, was enacted, which, among other things, adds additional provisions to Chapter 368D, HRS.
[284] Section 368-1, HRS.
[285] HCRC website, at https://labor.hawaii.gov/hcrc/about-us/ (last visited June 18, 2019).
[286] *See* §368-3(1), HRS.
[287] *See* §368-2, HRS.
[288] *See* §368-3(8), HRS.
[289] *See* §368-3(7), HRS.
[290] *See* §368-3, HRS, and §368-15, HRS.
[291] *See* §368-12, HRS. It is a prerequisite that the complainant obtain a notice of right to sue from the HCRC before filing a private civil action in state court. As explained by the HCRC in its pre-complaint questionnaire information sheet:

> **Under Hawai'i law, you may not file an action in state court alleging discrimination unless a complaint is first filed with the HCRC and we issue a notice of right to sue.** You may request a right to sue letter at any time after filing a complaint. A right to sue letter allows you to file a discrimination complaint in state court without further HCRC involvement.

(Emphasis added.) The information sheet also explains that submitting a pre-complaint questionnaire is "the first step in filing a discrimination complaint" with the HCRC, followed by an intake interview and, where appropriate, assistance in filing a formal complaint with the HCRC. *See* HCRC Employment Pre-Complaint Questionnaire Information (revised September 2015), available at https://labor.hawaii.gov/hcrc/files/2012/12/PCQ_1.pdf. In addition to pre-complaint questionnaires for employment discrimination complaints, there are HCRC pre-complaint questionnaires for discrimination complaints involving public accommodations, real property transactions, and access to state and state-funded services. *See* the forms page of the HCRC website, at https://labor.hawaii.gov/hcrc/forms/ (last visited August 13, 2019).
[292] *See* §368-12, HRS.

1. Filing of HCRC Complaints

Under section 368-11, HRS, the basic parameters for the filing of complaints with the HCRC are as follows:

- An individual who is aggrieved by an alleged unlawful discriminatory practice, or the attorney general or the HCRC acting on its own initiative, may file a written complaint.[293]

- The Attorney General or the HCRC may file a complaint on behalf of a class, and the complaint, accordingly, may be investigated, conciliated, heard, and litigated on a class action basis.[294] However, it appears to be discretionary whether this occurs.

- The complaint must state the name and address of the person or party that allegedly committed the unlawful discriminatory practice, the particular details of the discriminatory incident, and other information that may be required by the HCRC.[295]

- The complaint must be filed within one hundred eighty days of the date that the alleged unlawful discriminatory practice occurred or of the date of the last occurrence in a pattern of ongoing discriminatory practice.[296]

2. Disposition of HCRC Complaints

a. Complaint Process

Generally, after a complaint is filed, the following steps take place:

(1) Investigation of the complaint;[297]

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[293] *See* §368-11(a), HRS.
[294] *See* §368-11(b), HRS.
[295] *See* §368-11(a), HRS.
[296] *See* §368-11(c), HRS.
[297] Section 368-13, HRS, provides that:

> **§368-13 Investigation and conciliation of complaint.** (a) After the filing of a complaint, or whenever it appears to the commission that an unlawful discriminatory practice may have been committed, the commission's executive director shall make an investigation in connection therewith. At any time after the filing of a complaint but prior to the issuance of a determination as to whether there is or is not reasonable cause to believe that part I of chapter 489, chapter 515, part I of chapter 378, or this chapter has been violated, the parties may agree to resolve the complaint through a predetermination settlement.
>
> (b) The executive director shall issue a determination of whether or not there is reasonable cause to believe that an unlawful discriminatory practice has occurred within one-hundred and eighty days from the date of filing a complaint unless the commission grants an extension of time to issue a determination.
>
> (c) If the executive director makes a determination that there is no reasonable cause to believe that an unlawful discriminatory practice has occurred in a complaint filed, the executive

(2) An attempt by the executive director to resolve the complaint informally;[298]

(3) A contested case hearing, to be conducted by a hearings examiner appointed by the HCRC, if the parties to the complaint were unable to reach an informal resolution;[299]

(4) Issuance of a final order by the HCRC following the hearing;[300] and

(5) A potential appeal to the circuit court.[301]

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director shall promptly notify the parties in writing. The notice to complainant shall indicate also that the complainant may bring a civil action as provided under section 368-12.

(d) When the executive director determines after the investigation that there is reasonable cause to believe that an unlawful discriminatory practice within the commission's jurisdiction has been committed, the executive director shall immediately endeavor to eliminate any alleged unlawful discriminatory practice by informal methods such as conference, conciliation, and persuasion.

(e) Where the executive director has determined that there is reasonable cause to believe that an unlawful discriminatory practice has occurred and has been unable to secure from the respondent a conciliation agreement acceptable to the commission within one-hundred and eighty days of the filing of the complaint unless the commission has granted an extension of time, the executive director shall demand that the respondent cease the unlawful discriminatory practice. The executive director's determination that a final conciliation demand is to be made shall be subject to reconsideration by the commission on its own initiative but shall not be subject to judicial review. The executive director may demand appropriate affirmative action as, in the judgment of the executive director, will effectuate the purpose of this chapter, and include a requirement for reporting on the manner of compliance.

[298] *See* §368-13(d), HRS.

[299] For contested case hearings on complaints, §368-14(a), HRS, provides that:

> If, fifteen days after service of the final conciliation demand, the commission finds that conciliation will not resolve the complaint, the commission shall appoint a hearings examiner and schedule a contested case hearing that shall be held in accordance with chapter 91. The case in support of the complaint shall be presented at the hearing by counsel provided by the commission. Following the completion of the contested case hearing, the hearings examiner shall issue a proposed decision containing a statement of reasons including a determination of each issue of fact or law necessary to the proposed decision which shall be served upon the parties. Any party adversely affected by the proposed decision may file exceptions and present argument to the commission which shall consider the whole record or such portions thereof as may be cited by the parties. If the commission finds that unlawful discrimination has occurred, the commission shall issue a decision and order in accordance with chapter 91 requiring the respondent to cease the unlawful practice and to take appropriate remedial action. If there is no finding of discrimination, the commission shall issue an order dismissing the case.

[300] *See id.*

[301] Section 368-16, HRS, provides as follows:

> **[§368-16] Appeals; de novo review; procedure.** (a) A complainant and a respondent shall have a right of appeal from a final order of the commission, including cease and desist orders and refusals to issue charges in the circuit court for the circuit in which the alleged violation occurred or where the person against whom the complaint is filed, resides, or has the person's principal place of business. An appeal before the circuit court shall be reviewed de novo. If an appeal is not taken within thirty days after the service of an appealable order of the commission, the commission may obtain an order for the enforcement of the order from the circuit court that has jurisdiction of the appeal.

b. Remedies

Remedies ordered by the HCRC or the circuit court under Chapter 368, HRS, may include compensatory and punitive damages and legal and equitable relief. Section 368-17, HRS, provides that these remedies include but are not limited to:

(1) Hiring, reinstating, or upgrading of employees with or without back pay;

(2) Admission or restoration of individuals to labor organization membership, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program, or other occupational training or retraining program, with the utilization of objective criteria in the admission of persons to those programs;

(3) Admission of persons to a public accommodation or an educational institution;

(4) Sale, exchange, lease, rental, assignment, or sublease of real property to a person;

(5) Extension to all persons of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the respondent;

(6) Reporting of the manner of compliance;[302]

(b) Where a respondent petitions for an appeal to the circuit court, the commission shall be a party to any proceeding as the appellee. The complainant shall have the right to intervene.

(c) A proceeding for review or enforcement of an appealable order is initiated by filing a petition in the circuit court. Copies of the petition shall be served upon the parties of record. Within thirty days after the service of the petition upon the commission or filing of the petition by the commission, or within further time as the court may allow, the commission shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including a transcript of the testimony, which need not be printed. By stipulation of the parties to the review proceeding, the record may be shortened. The court may grant temporary relief as it considers just, or enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the commission, or may remand the case to the commission for further proceedings. The commission's copy of the testimony shall be available at reasonable times to all parties for examination without cost.

(d) The final judgment or decree of the circuit court shall be subject to review by appeal in the same manner and form as other appeals from that court.

(e) A proceeding under this section shall be initiated not more than thirty days after a copy of the order of the commission is received, unless the commission is the petitioner or the petition is filed under subsection (d). If a proceeding is not so initiated, the commission may obtain a court order for enforcement of its order upon showing that a copy of the petition for enforcement was served on the respondent, that the respondent is subject to the jurisdiction of the court, that the order sought to be enforced is an order of the commission, regularly entered, and that the commission has jurisdiction over the subject matter and the respondent.

[302] Presumably, this remedy involves requiring the respondent to provide information on how the respondent is complying with the anti-discrimination law that was violated or with a specific condition that was imposed.

(7) Requiring the posting, in a conspicuous place, of notices that set forth requirements for compliance with civil rights law or other relevant information, as determined by the HCRC;

(8) Payment to the complainant of damages (including reasonable attorney's fees) for an injury or loss caused by a violation of Part I of Chapter 489,[303] Chapter 515,[304] Part I of Chapter 378 (the anti-discrimination laws over which the HCRC has jurisdiction),[305] or Chapter 368, HRS (governing HCRC proceedings);

(9) Payment to the complainant of all, or a portion of, the costs of maintaining the action before the HCRC, including reasonable attorney's fees and expert witness fees, when the HCRC determines the award to be appropriate; and

(10) Other relief the HCRC or the court[306] deems appropriate.[307]

C. Equal Employment Opportunity Office

The State's Equal Employment Opportunity Office (EEO Office) enforces federal and state non-discrimination laws for all applicants and employees of the state Executive Branch (excluding the HDOE and University of Hawaii Board of Regents).[308] The EEO Office develops nondiscrimination policy and oversees investigations. It also provides technical assistance and training to departments, including assistance and training relating to reasonable accommodation for people with disabilities.[309]

D. Private Right of Action

A private right of action is implied under Title IX for cases of intentional discrimination.[310] This private right of action includes injunctive relief and damages.[311] Title IX

[303] Part I of Chapter 489, HRS, contains general provisions with respect to discrimination in public accommodations.
[304] Chapter 515, HRS, describes discriminatory practices in real property transactions.
[305] Part I of Chapter 378, HRS, describes discriminatory practices in employment.
[306] Under §368-16, HRS, the Circuit Court may take jurisdiction over the complaint upon appeal. In such case, the court is authorized to grant temporary relief.
[307] *See* §368-17, HRS.
[308] *See* the State's Equal Employment Opportunity (EEO) Office website, http://dhrd.hawaii.gov/eeo/ (last visited October 12, 2018). The website instructs HDOE applicants or employees to contact the HDOE's Civil Rights Compliance Office (now known as the CRCB) directly. The University of Hawaii System has its own EEO offices. *See* note 30, and accompanying text, *supra*.
[309] *See* the State's EEO Office website, *supra* note 308.
[310] *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 65-66 (1992).
[311] *See Fitzgerald v. Barnstable School Committee,* 555 U.S. 246, 255-56 (2009). Punitive damages, however, are not available as a Title IX remedy. *See* Mercer v. Duke University, 171 Ed. Law Rep. 45 (4th Cir. 2002) (punitive damages not available for private actions under Title VI nor under Title IX).

actions may be brought against recipient institutions, but not individuals.[312] The deliberate indifference standard[313] must be met for a recipient institution to be liable for monetary damages under Title IX for student-on-student sexual harassment.[314]

The following two lawsuits involving the HDOE illustrate the use of private lawsuits to judicially enforce Title IX in this State.

1. Sexual Assault Case

Title IX was one of the laws cited in the 2011 civil class action case *Doe v. Hawaii.*[315] The plaintiffs, acting both individually and on behalf of a group of approximately thirty-five students at the state-run Hawaii Center for the Deaf and Blind, sued the State of Hawaii,[316] initially in state court. The plaintiffs alleged that a group of students "bullied, terrorized, assaulted, robbed, sodomized, raped, anally raped, gang raped, and/or sexually attacked students[,]" including the plaintiffs.[317] Specifically, the plaintiffs claimed, among other things, that the defendants (the State of Hawaii and school personnel) knew or should have known that the attacks were happening and that the defendants both concealed the attacks and failed to stop them.[318] Based on these allegations, the plaintiffs sought injunctive relief, monetary damages (general, special, and punitive), and attorneys' fees.[319]

The case was removed to federal court by the defendants in 2011.[320] The State filed a third party counterclaim that the individual student attackers should be held liable for all of the plaintiff's claims.[321] The Hawaii Office of the Public Guardian and four individuals intervened on behalf of the plaintiffs, and three additional individuals were added as plaintiffs-in-

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[312] *See Fitzgerald, supra* note 311, at 257 (stating that Title IX "has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals"). *See also* Chapter 2, notes 66 to 70, and accompanying text, *supra* (discussing the facts and ruling in the *Fitzgerald* case).

[313] *See* Chapter 2, notes 56 to 60, 63, and 80, and accompanying text, *supra.*

[314] *See Hunter ex rel. Hunter v. Barnstable School Committee*, 456 F. Supp. 2d 255, 262 (2006).

[315] *See* First Amended Complaint and Demand for Jury Trial, *Doe v. Hawaii*, No. 11CV00550, 2011 WL 10953408 (D. Haw. Sep. 13, 2011). The other laws cited in the amended complaint as grounds for the lawsuit include:

- Title II of the Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq.*;
- The Individuals with Disabilities Education Act, 20 U.S.C. §§1400 *et seq.*;
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq*;
- 42 U.S.C. §1983 (which allows a civil action to be brought for deprivation of rights secured by the federal Constitution);
- Article X, section 1 of the Hawaii Constitution (which prohibits discrimination in public educational institutions on the basis of race, religion, sex, or ancestry); and
- Section 302A-1001, HRS (which provides that "[n]o person in the State, on the basis of sex, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational or recreational program or activity receiving state or county financial assistance or utilizing state or county facilities.").

[316] *See id.*

[317] *Id.* at 3.

[318] *See id.* at 2-4.

[319] *See id.* at 7.

[320] *See* Notice of Removal by State of Hawaii, Case 1:11-CV-00550, September 13, 2011.

[321] *See* Motion for Leave to File Third Party Complaint by State of Hawaii, Case 1:11-CV-00550, September 13, 2011.

intervention.[322] The case was settled in 2013, when the court granted plaintiff's motion to certify the class action nature of the lawsuit and approved the notice of proposed settlement.[323] The terms of the settlement included an enforceable agreement by the State to undertake certain actions relating to the management and operation of the school, the establishment of a $5.75 million fund from which to pay monetary damages to plaintiffs, and the ability of the plaintiffs' attorneys to seek reimbursement of their fees and costs by the defendants.[324]

2. Athletic Equity Case

In December 2018, the American Civil Liberties Union of Hawaii (ACLU) filed a class action lawsuit against the HDOE and the Oahu Interscholastic Association (OIA) in federal court, alleging that the defendants violated Title IX by failing to provide equal athletic opportunities to female students.[325] More specifically, it was alleged that male teams received preferential treatment, more experienced and higher-paid coaches and trainers, desirable time slots for games that drew larger audiences, and more opportunities to travel for games and tournaments.[326] The inequality extended to physical facilities, with a boys' baseball team enjoying a "baseball house" with numerous lockers, showers, bathrooms, and other amenities, while a girls' softball team had no such facility or even bathrooms within close proximity to their practice field.[327] Furthermore, school administrators allegedly retaliated against female students who raised concerns about discrimination by threatening the students with the cancellation of their athletic program.[328] The OIA's liability stemmed from its alleged role in discriminating against girls' teams in interscholastic sports.

The suit's plaintiffs are seeking declaratory relief[329] and permanent injunctive relief barring the HDOE and the OIA from perpetuating the unlawful sex-based discrimination. The

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[322] *See* Order Granting Motion to Intervene, Case 1:11-CV-00550, April 11, 2012.
[323] *See* Order Granting Consolidated Plaintiffs' Joint Motion to Certify Class, Approve Notice of Proposed Settlement and to Set Hearing Date for Approval of Settlement, Case 1:11-CV-00550, February 19, 2013.
[324] *See* Class Action Settlement Agreement, No. 11CV00550, 2013 WL 4771740 (D. Haw. May 6, 2013), and Order Approving Settlement and Granting Motions for Attorneys' Fees and Costs, Case 1:11-CV-00550, April 22, 2013. It should be noted that the Class Action Settlement Agreement (agreement) explicitly stated that the agreement "does not and shall not be deemed to constitute an admission by the Defendants as to the validity or accuracy of any of the claims asserted in the First Amended Complaint, or as to Defendants' liability for any claim or of any wrongdoing whatsoever."

Of the $5.75 million award of damages to be paid by the defendants, $5 million was on behalf of the State of Hawaii, the HDOE, and the school's administrator (subject to legislative approval and funding), while the remaining $750,000 was on behalf of a counselor employed by the school. The payment of damages to victims (plaintiffs who had participated in the lawsuit as well as unknown plaintiffs to be prospectively identified) would be handled by a claims administrator, with the minimum payment to each victim classified into tiers ($20,000, $75,000, or $200,000), depending on the severity, duration, and impact upon the individual victim. The Court also approved the fees and costs requested by the plaintiffs' attorneys, which collectively amounted to $942,408 in fees and $4,365.40 in costs.
[325] *See* Suevon Lee, *Hawaii Public Schools Sued Over Unequal Treatment of Female Athletes*, Honolulu Civil Beat, December 6, 2018, *available at* https://www.civilbeat.org/2018/12/hawaii-public-schools-sued-over-unequal-treatment-of-female-athletes/.
[326] *See id.*
[327] *See id.*
[328] *See id.*
[329] A formal court ruling that the plaintiffs' rights were violated by the defendants.

outcome of the case is pending; meanwhile, the HDOE has established the Gender Equity in Athletics Committee, which is a working committee under the CRCB.[330] According to a news article, the committee "is a revival of a long-standing working group that convened between 2001 to 2013"[331] and its purpose is to make recommendations to the HDOE superintendent on how schools could comply with Title IX.[332] The Gender Equity in Athletics Committee has held two meetings thus far.[333] In February 2019, committee members met to discuss the committee's purpose and objectives, including the review of information obtained from the HDOE's 2018-

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[330] *See* message from Superintendent Kishimoto on HDOE website, *Fulfilling Our Promise of Equity for Public School Haumana,* April 15, 2019, *available at* http://www.hawaiipublicschools.org/VisionForSuccess/Newsletters/Supts-Corner/Pages/041519.aspx.

[331] Suevon Lee, *Following Lawsuit, DOE Revives Its Gender Equity Committee*, Honolulu Civil Beat, April 5, 2019, *available at* https://www.civilbeat.org/2019/04/following-lawsuit-doe-revives-its-gender-equity-committee/. According to the article, the working group's purpose was to make recommendations to the HDOE Superintendent on how schools could comply with Title IX. The article also explained that the working group "was an extension of a commission established in 2000 under the 'Gender Equity in Athletics Law [section 302A-461, HRS],' passed by the Hawaii Legislature in 1999 in response to troubling reports of gender disparities in high school athletics that were coming to light in the years since the enactment of Title IX in 1972." Additionally, the article cited the fact that the current HDOE Superintendent's list of priorities includes "a 10-year 'Title IX Athletics Plan' that includes schools coming up with athletic self-assessments that will begin in the 2020-21 school year on a three-year rotating basis." Also cited were "'plans' by the HDOE's Office of School Facilities and Support Services [(OSFSS)] and Office of Curriculum and Instructional Design to 'assess and propose options for the Department's athletic program going forward.'" A December 2018 HDOE report to the Legislature contains additional information on actions taken by the HDOE to promote gender equity in high school athletic programs, including the conducting of site visits in April 2018 to high school athletic programs and the submission of a request by the OSFSS for $45.51 million in the 2019-2020 fiscal biennium for gender equity projects. *See Relating to Title IX Report to the 2019 Legislature School Year 2017-2018 and School Year 2018-2019*, HDOE, December 2018 (December 2018 Title IX Compliance Report), *available at* http://www.hawaiipublicschools.org/Reports/LEG19_TitleIX.pdf.

[332] *See Following Lawsuit, DOE Revives Its Gender Equity Committee, supra* note 331.

[333] E-mail from Nicole Isa-Iijima, Title IX Specialist, CRCB, to author (September 20, 2019) (on file with the Bureau). Relevant information from the e-mail is reproduced in full below.

> February 26, 2019 meeting:
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> The [Gender Equity in Athletics Committee (GEAC)] met to discuss the purpose(s) of the committe [sic], which includes to recognize and understand Title IX compliance issues, as it pertains to school athletic programs and to consider possible solutions and priorities that advance gender equity in school athletic programs. Objectives include reviewing the results of the 2018-2019 School Year Athletic Self-Assessments and reviewing a summary of interviews with student athletes (statewide).
>
> August 26, 2019 meeting:
>
> The GEAC committee met to debrief on statewide training for athletic directors and school administrators that occurred in June/July 2019. The training was conducted by Valerie Bonettee of Good Sports, Inc., a national consultant on Title IX and school athletic programs. Athletic Directors, school administrators, the Civil Rights Compliance Branch, and other applicable state HIDOE offices attended the training. The GEAC also discussed the Self-Assessment school reviews that had been completed thus far, the direction of the Athletics Self-Assessment going forward, as well as the process for the student athlete interviews. The CRCB is working on a Student Interest Survey (as it pertains the school athletic participation) and discussed status of this with the GEAC as well.

2019 school year athletic self-assessment results and from student athlete interviews.[334] The committee met again in August 2019 to debrief on training that had been provided by a national consultant, in June and July of 2019, to athletic directors, school administrators, and staff from the CRCB and other HDOE offices.[335] At that meeting, committee members also discussed other issues, including the status of an upcoming student interest survey on participation in school athletics.[336]

[334] *See id*. *See also* December 2018 Title IX Compliance Report*, supra* note 331, at 6-7 (explaining that the purpose of the self-assessment is to obtain feedback on support provided to student athletes in high school athletic programs, and to identify possible disparities between male and female athletes).
[335] *See* e-mail from Nicole Isa-Iijima, *supra* note 333.
[336] *See id*. *See also* Chapter 3, notes 125 to 134, and accompanying text, *supra* (discussing the OCR's 2010 guidance on school athletics programs, including the use of student interest surveys in the context of the OCR's "Three-Part Test" for evaluating equal athletic opportunity).

Chapter 5

TITLE IX ENFORCEMENT AT THE STATE LEVEL: FOCUS ON SEXUAL VIOLENCE IN POST-SECONDARY EDUCATION

Part I. Overview

Title IX's prohibition on sex-based discrimination applies to a wide range of issues that arise in an educational context.[1] Title IX has brought greater parity to school athletics, and in recent years, there has been greater emphasis on Title IX's role in addressing and preventing sexual violence on college and university campuses.[2] Recent attention on incidents of sexual harassment, sexual assault, and other forms of sexual violence on campuses has raised concerns over the adequacy of policies and procedures used by recipient institutions to address these issues.[3] Consequently, the federal government, state governments, and recipient institutions seem to be treating the issue of sexual violence with more urgency than before.

Accordingly, this chapter highlights state governments' recent attempts to reduce and prevent campus sexual violence. It also examines the procedures used by certain post-secondary recipient institutions to adjudicate complaints of sexual violence and the extent of these institutions' compliance with Title IX and related federal law.[4]

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[1] *See* Chapter 2, part I, *supra*.

[2] *See, e.g.,* the Title IX guidance on sexual violence issued after 2010 by the Office for Civil Rights (OCR) of the United States Department of Education (USDOE), Chapter 3, notes 158 to 187, and accompanying text, *supra*, and the USDOE's November 2018 proposal to amend Title IX's implementing regulations (particularly with regard to requirements for recipient institutions' handling of complaints involving sexual harassment or other forms of sexual misconduct), Chapter 3, notes 216 to 243, and accompanying text, *supra*. *See also* comments made by the University of Hawaii System (UH System) Vice President for Administration Jan Gouveia (VP Gouveia), Minutes of UH Board of Regents Meeting, July 20, 2017, at VIII, discussion item D, *available at* https://www.hawaii.edu/offices/bor/regular/minute/201707200930.regular.pdf.

> "VP Gouveia gave an overview on the evolution of Title IX from its inception. She explained that . . . [h]istorically, the majority of the focus of Title IX has been on athletics . . . and only recently has [the] focus evolved to [include] campus safety and sexual violence . . . ."

(The statement by VP Gouveia was made in the context of what appears to have been a larger discussion on the UH System's past, present, and future efforts to comply with Title IX.)

[3] To be clear, Title IX does not directly prohibit acts of sexual violence. Rather, the discrimination that Title IX prohibits is "the differential treatment by a [recipient institution] of persons of a particular sex who are taking part or trying to take part in its educational program or activity but are suffering acts of sexual harassment or assault that undermine their educational experience." *Doe v. Brown University*, 896 F.3d 127, 132 (1st Cir. 2018).

[4] *See* discussion on the Clery Act's requirements, Chapter 2, notes 106 to 123, and accompanying text, *supra*.

Part II. Responses by State Governments

A. Examples of Legislative Responses

Despite efforts by individual states to address the problem of campus sexual violence, institutional procedures vary widely from state to state. In December 2015, the National Association of Student Personnel Administrators (NASPA) (now known as NASPA—Student Affairs Administrators in Higher Education)[5] and the Education Commission of the States[6] released a joint policy brief containing a retrospective analysis of state legislative activity that addressed campus sexual violence (retrospective analysis). The retrospective analysis involved legislation enacted during legislative sessions that took place from 2013 through 2015. Among these state legislative efforts, the retrospective analysis identified four "primary policy themes" generally related to protecting students and supporting survivors of sexual assault. These themes are as follows:

(1) Defining affirmative consent in statute or requiring that recipient institutions do so in their policies or procedures;

(2) Defining, clarifying, or expanding the role of local law enforcement in campus reporting and investigating processes that take place after a report of sexual assault has been made to a campus employee;

(3) Specifying the length of time that a serious conduct code violation must be notated on a student's transcript and procedures for removal of the notation; and

(4) Addressing the role of legal counsel in the campus adjudication process.[7]

Subsequently, in a separate interview published in 2017, one of the authors of the joint policy brief emphasized the "uneven legal and regulatory architecture at the state level" with regard to prevention of sexual violence, and thus called for "consistency and focus in legislative and regulatory approaches at the federal level" in order to properly address campus sexual violence.[8]

Each policy area identified in the analysis is discussed below, along with examples from specific states.

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[5] *See* https://www.naspa.org/about.
[6] *See* https://www.ecs.org/about-us/history/.
[7] Andrew Morse, Brian A. Sponsler, and Mary Fulton, *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety*, National Association of Student Personnel Administrators (NASPA) Research and Policy Institute and Education Commission of the States (December 2015), *available at* https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf. The report also identifies a number of issues in each policy area for potential consideration by campus and policy leaders.
[8] *See* Hayley Glatter, *How Do States Handle Sexual Assault on Campus?*, The Atlantic (January 29, 2017), *available at* https://www.theatlantic.com/education/archive/2017/01/how-do-states-handle-sexual-assault-on-campus/514811/ (interview with Andrew Morse).

1. Defining Affirmative Consent

The retrospective analysis highlighted California, Illinois, and New York, which passed legislation defining affirmative consent to engage in sexual activity.[9] The definitions codified by these states share the following common elements:

(1) A requirement that there be a voluntary or freely given agreement to engage in sexual activity;

(2) A provision that the absence of protest or resistance does not amount to consent; and

(3) Examples of scenarios in which a person cannot consent to sexual activity, including incapacitation due to drug or alcohol use, mental disability, or being asleep or unconscious.[10]

The retrospective analysis also specifically mentioned Hawaii for its legislative response to the issue of affirmative consent. In 2015, the Hawaii State Legislature statutorily established the Affirmative Consent Task Force to review and make recommendations on the University of Hawaii's executive policy on sexual harassment, sexual assault, domestic violence, dating violence, and stalking and to consider campus definitions of consent with respect to sexual assault policies.[11] Following this legislative initiative, the University of Hawaii System (UH System) established an Interim Executive Policy and Procedure on Sex Discrimination and

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[9] *See State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety*, *supra* note 7, at 7.
[10] *See id*.
[11] *See id*. *See also* Act 222, Session Laws of Hawaii 2015, effective July 1, 2015. The work of the task force was significant. Some of its preliminary recommendations were adopted in Act 208, Session Laws of Hawaii 2016, effective July 1, 2016 (Act 208). Act 208, codified in section 304A-120, Hawaii Revised Statutes (HRS), as amended by Act 12, Session Laws of Hawaii 2017, established a number of requirements for the University of Hawaii (UH) aimed at improving safety and accountability across the UH System, including the following: (1) providing all UH students and employees training (according to specified time frames) on Title IX and related laws and UH policies; (2) designating at each campus a confidential advocate with whom students can confidentially discuss incidents of, and obtain information on, sexual harassment, sexual assault, domestic violence, dating violence, stalking, and related issues; (3) publicizing the name, location, and contact information of the confidential advocate on each campus website; (4) making available to students and employees materials and training programs relating to Title IX and related laws and UH policies on sexual harassment, sexual assault, domestic violence, dating violence, and stalking; (5) informing victims of their right to make a formal police report with the county police department; (6) designating all UH faculty members as "responsible employees" who, pursuant to Title IX, must report any violations of UH policies on sexual harassment, sexual assault, domestic violence, dating violence, and stalking to the campus Title IX coordinator; (7) specifying that students and employees who do not complete the training required by the Act may be subject to fines, sanctions, or other discipline as deemed appropriate by UH; (8) administering a "campus climate survey" to students every two years and reporting annually to the Legislature the results of the most recent campus climate survey, the number of UH System campus sexual assaults from the past five years, and UH recommendations and efforts to increase campus safety and accountability; and (9) establishing policies and procedures that effectuate the purpose of section 304A-120, HRS. Act 208 also required UH to enter into memoranda of understanding with all county police departments to facilitate communications about, and reporting procedures for, campus sexual assaults, and it appropriated funds for new administrative and investigative positions across the UH System to carry out the purposes of the Act.

Gender-Based Violence (Interim Executive Policy (EP) 1.204),[12] which took effect in September 2015 and applies to all campuses in the UH System.[13]

In relation to the conduct that it prohibits, Interim EP 1.204 defines "consent" as follows:

- "Consent is affirmative, conscious, and voluntary agreement to engage in agreed upon forms of sexual contact."
- "A person cannot give Consent if the person is under the age of consent for sexual contact, the person is developmentally or intellectually disabled, or the person is mentally incapacitated or physically helpless."
- "Lack of protest or resistance cannot be interpreted as Consent. Silence cannot be interpreted as Consent. Consent must be ongoing throughout any sexual contact and can be revoked at any time."
- "The existence of a dating relationship, domestic partnership or marriage between the persons involved, or the existence of past sexual relations between the persons involved, is never by itself an indicator of Consent."[14]

By comparison, the UH System's definition of "consent" appears to include the same elements as the definition of affirmative consent found in the California, Illinois, and New York laws.

2. Role of Law Enforcement

The retrospective analysis noted California, Minnesota, New York, and Virginia as having enacted legislation addressing the reporting of campus sexual assaults to local law enforcement agencies.[15] California requires post-secondary institutions to have policies in place to ensure that information received by campus security officials about violent crimes, sexual assaults, and hate crimes is reported to local law enforcement officials "immediately, or as soon as practicably possible[.]"[16] Virginia requires employees of post-secondary institutions with information that sexual violence has been committed against a student to inform the Title IX

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[12] *See* Interim Executive Policy (EP) 1.204, Interim Policy and Procedure on Sex Discrimination and Gender-Based Violence, effective September 2015, *available at* https://www.hawaii.edu/policy/docs/temp/ep1.204.pdf. *See also* discussion of Interim EP 1.204 in Chapter 4, notes 37 to 72, and accompanying text, *supra*.

[13] *See* Interim EP 1.204, *supra* note 12, at 1. *See also Act 222 Affirmative Consent Task Force Report*, submitted to the Hawaii State Legislature, Regular Session of 2017, at 2, *available at* https://www.hawaii.edu/titleix/legislative-reports/ (explaining that the previous February 2015 version of UH Executive Policy 1.204 "left each of the ten campuses to develop its own procedures and practices, an approach yielding inconsistent responses to complaints, including those involving parties or incidents on multiple campuses." (internal footnote omitted)).

[14] *See* Interim EP 1.204, *supra* note 12, at 7-8. An internal footnote in the quoted passage referencing "age of consent for sexual contact" noted that under section 707-732, HRS, "the age of consent is sixteen (16) generally, or the age of consent is between fourteen (14) and fifteen (15) when either the other person is less than (5) years older or when the other person is legally married to the person between the ages of fourteen (14) and fifteen (15)." *See also* discussion on the UH System's definition of consent, Chapter 4, note 49, and accompanying text, *supra*.

[15] *See State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety*, *supra* note 7, at 10.

[16] *See id.* at 10-11 (citing California's Assembly Bill 1433 (2014)).

coordinator "as soon as practicable." The Title IX coordinator must forward the information to an internal review committee, where the law enforcement member of the committee plays a role in determining whether the incident should be forwarded to a law enforcement agency for investigation.[17] Minnesota requires that survivors of sexual assault at any state or private institution of higher learning that is eligible for state student financial aid be given the right to decide whether their case is forwarded to law enforcement authorities.[18] New York requires all of its higher education institutions to publicize the fact that, under the institution's student bill of rights, all students have the right to make a report to local law enforcement or state police, in addition to university police or campus security officials.[19]

3. Transcript Notation

The retrospective analysis indicated that, in 2015, New York and Virginia enacted laws that require post-secondary institutions to notate school conduct code violations on student grade transcripts. If a student seeks to transfer to another institution, that student's violation will be known to the other institution. New York law requires transcript notations when a student has been suspended or expelled for violating a post-secondary institution's code of conduct by committing a crime that must be reported under the Clery Act,[20] including sexual violence. Further, the student's transcript must be notated even if the student withdraws from the institution before the disciplinary process has been completed.[21] New York law also requires that institutions publish their policies on transcript notations and the procedure by which a student may appeal notations.[22] Similarly, Virginia law requires transcript notations when a student at a public post-secondary institution, or private post-secondary institution eligible to receive certain types of state funding, has been suspended or permanently dismissed, or has decided to withdraw while under investigation, for violating that institution's code of conduct. The post-secondary institution must notify the student of the transcript notation. If the student is later found to have not been in violation, or if the student completed suspension and is determined to be in good standing, the institution must remove the notation from the student's record.[23]

4. Role of Legal Counsel

The retrospective analysis examined laws that address the extent to which attorneys should participate in campus disciplinary proceedings related to campus sexual violence. Arkansas, North Carolina, and North Dakota have enacted laws that address, but do not clearly define, the role of legal counsel in these proceedings.[24] North Carolina's law gives students charged with violating an institution's disciplinary rules or code of conduct the right to representation by a licensed attorney (or non-attorney advocate) throughout the disciplinary

[17] *See id.* at 11-12 (citing Virginia's Senate Bill 721 (2015)).
[18] *See id.* at 11 (citing Minnesota's Senate File 5 (2015), which amended §135A.15 of the Laws of Minnesota).
[19] *See id.* (citing New York's Assembly Bill 8244 (2015)).
[20] *See* Chapter 2, notes 106 to 112, and accompanying text, *supra*.
[21] *See State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety*, *supra* note 7, at 13-14 (citing New York's Assembly Bill 8244 (2015)).
[22] *See id.*
[23] *See id.* at 14 (citing Virginia's Senate Bill 1193 (2015)).
[24] *See id.* at 15 (citing North Carolina's House Bill 843 (2013)). The retrospective analysis did not provide bill information for, or details of, the Arkansas and North Dakota laws.

process, unless the violation alleges academic dishonesty or requires adjudication by an all-student panel.[25]

B. Examples of Unsuccessful Legislative Proposals

The retrospective analysis of state legislative activity that was conducted by NASPA and the Education Commission of the States did not contain a detailed discussion of state bills that did not become law. However, in the course of researching issues related to this study, the Bureau identified the following examples of state legislation that were proposed but not enacted.

1. Requiring Use of a "Preponderance" Standard

In response to Education Secretary Betsy DeVos' (Secretary DeVos) announcement of the September 2017 interim guidance and rescission of the Office for Civil Rights' (OCR) 2011 and 2014 guidance,[26] California legislators moved quickly to codify in state law a number of the procedural requirements for sexual violence investigations required in the rescinded guidance, including mandating that recipient institutions use the "preponderance of the evidence" standard.[27] However, the legislation[28] was vetoed by the governor, who cited due process concerns.[29] The Governor also referenced "a shifting federal landscape" of Title IX regulations and stated: "We may need more statutory requirements than what this bill contemplates. We may need fewer. Or still yet, we may need simply to fine tune what we have."[30] Had California's legislature been successful, its effects likely would have been short-lived, given that the United States Department of Education (USDOE) has proposed amendments to Title IX regulations that, if adopted, would restrict the use of the preponderance of the evidence standard.[31]

2. Requiring Use of Procedures That Directly Contradict OCR Guidance

Georgia legislators attempted to resist the requirements of OCR guidance through state legislation. In its original form, the proposed legislation[32] would have required that any report of

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[25] *See id.* at 15-16 (citing North Carolina's House Bill 843 (2013)).
[26] *See* discussion in Chapter 3, notes 193 to 212, and accompanying text, *supra*.
[27] *See* Katherine Mangan, *What You Need to Know About the New Guidance on Title IX*, The Chronicle of Higher Education, September 22, 2017, https://www.chronicle.com/article/What-You-Need-to-Know-About/241277. *See also* Kathryn Joyce, *The Takedown of Title IX*, The New York Times Magazine, December 5, 2017, *available at* https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html.
[28] *See* Senate Bill No. 169, California Legislature, 2017-2018 regular session, *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB169.
[29] *See* Governor's Veto Message, California Legislature, 2017-2018 regular session, Senate Bill No. 169, *available at* https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180SB169.
[30] *See id.*
[31] *See* discussion in Chapter 3, note 237, and accompanying text, *supra*.
[32] *See* House Bill No. 51, Georgia General Assembly, 2017-2018 regular session, *available at* http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/51.

campus sexual assault made to school authorities be forwarded to local law enforcement, even if the complaining party refused to consent to the forwarding. It also would have prohibited schools from rendering any final disciplinary action for any offense that would also be considered a felony until the accused party was actually convicted of the felony offense in court.[33] In other words, the Georgia legislation proposed procedures that directly contradicted federal Title IX requirements in effect at the time. The legislator who was the primary introducer of the bill acknowledged that the bill's intent was to force a court challenge to the OCR's 2011 "Dear Colleague" Letter on sexual violence.[34]

C. Other State-Level Efforts

State attorneys general have also taken actions to reduce the incidence of sexual violence at post-secondary campuses. For example, in 2014, the attorney general of Maryland urged higher education institutions in that state to update their campus sexual assault policies by year's end.[35] Similarly, Virginia's attorney general mandated a review of policies on sexual violence across state campuses.[36] Kentucky's attorney general has brought lawsuits against several universities in that state for concealing records pertaining to allegations of sexual violence, reasoning that state leaders will need to be involved in monitoring Title IX investigations by post-secondary institutions, if the USDOE does not actively do so.[37] In July 2017, twenty members of the Democratic Attorneys General Association, including Hawaii's attorney general, sent a letter to Secretary DeVos urging that the prior 2011 and 2014 OCR guidance on sexual violence not be rescinded, particularly the portion that directed the use of the "preponderance of the evidence" standard in Title IX investigations.[38] Ultimately, this plea was unsuccessful.[39]

Part III. Practices and Procedures of Post-Secondary Institutions

Many post-secondary recipient institutions' processes for handling complaints of sexual violence share common features. This chapter discusses the results of separate surveys that

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[33] *See id.*
[34] *See The Takedown of Title IX, supra* note 27. *See also* discussion in Chapter 3, notes 161 to 184, and accompanying text, *supra*. For reasons explained in Chapter 3, notes 193 to 201, and accompanying text, *supra,* the 2011 and 2014 OCR guidance documents on sexual violence were rescinded by the USDOE in September 2017.
[35] Gabrielle Lucero, Emily Martin, and Jared McClain (contributors), *Steps Attorneys General Are Taking to Reduce Sexual Violence on College Campuses*, National Association of Attorneys General (NAAG), NAAGazette, volume 8, no. 10 (October 28, 2014), *available at* http://www.naag.org/publications/naagazette/volume-8-number-10/steps-attorneys-general-are-taking-to-reduce-sexual-violence-on-college-campuses.php.
[36] *See id.*
[37] *See The Takedown of Title IX, supra* note 27.
[38] Amy Rock, *20 Attorneys General Push to Preserve Title IX Protections,* Campus Safety, July 20, 2017*, available at* https://www.campussafetymagazine.com/clery/20-attorneys-general-preserve-title-ix-protections/. *See also* explanation of 2011 and 2014 OCR guidance on sexual violence, Chapter 3, notes 158 to 187, and accompanying text, *supra*.
[39] The USDOE not only rescinded the 2011 and 2014 OCR guidance but also proposed amending Title IX's implementing regulations to limit the circumstances in which recipient institutions may use the preponderance of the evidence standard in grievance proceedings involving sexual harassment complaints. *See* Chapter 3, notes 196 to 201, 225, and 237, and accompanying text, *supra*.

examined the sexual violence policies and practices of post-secondary recipient institutions. These surveys explored different facets of the issue of sexual violence from distinct perspectives. The first survey attempted to gauge the extent to which nationally ranked post-secondary recipient institutions protect the procedural due process rights of students accused of sexual assault. The second survey examined the degree to which a select group of post-secondary recipient institutions (already participating in a NASPA initiative titled "Culture of Respect"): (1) comply with Title IX and Clery Act requirements for responding to sexual violence; and (2) beyond the requirements of these federal laws, promote a campus culture in which sexual violence is not tolerated.

A. General Procedures

Across the country, Title IX investigations at post-secondary recipient institutions into sexual violence "typically" involve the following steps:[40]

(1) A student reports the incident to a "responsible employee" designated by the recipient institution;

(2) The "responsible employee" must relay the complaint to the institution's Title IX officer;

(3) The Title IX officer determines whether the complaint warrants a full investigation;

(4) If a full investigation is warranted, the matter is given to a trained Title IX investigator who will contact the parties, interview witnesses, and collect evidence;

(5) The complaining party will be asked to participate in the investigation, unless the institution has decided to proceed without that party because the claim poses a larger threat to campus safety;

(6) A report of factual findings and conclusions is produced that each party can comment on; and

(7) A hearing is held.[41]

B. Due Process Protections

A 2017 survey of administrators at thirty-six top-ranked post-secondary institutions compared the "fundamental" procedural protections (procedural due process) provided by post-

[40] *See The Takedown of Title IX*, *supra* note 27. This New York Times Magazine article was published in December 2017, several months after the USDOE's rescission of 2011 and 2014 OCR guidance.
[41] *See id.*

secondary recipient institutions to students accused of sexual assault.[42] The survey included questions[43] on the standard of proof used, right to an adjudicatory hearing, right to confront and cross-examine witnesses, right to counsel, right to remain silent, and right to appeal.[44] The survey's author noted a "major gap" in available information on current practices by colleges and universities with respect to their procedural due process for accused students.[45] Selected survey results[46] are summarized as follows:

- ***Standard of proof.*** Nearly all, or 94%, of the institutions surveyed used a "preponderance of the evidence" standard, while only 3% required proof "beyond a reasonable doubt" (as in criminal cases). The remaining 3% was undeterminable.[47]

- ***Right to an adjudicatory hearing.*** More than half of the institutions surveyed, 56%, used an adjudicatory model for determining whether a violation occurred (in which the institution would conduct an initial investigation, but the actual determination of whether a violation occurred would be made pursuant to a live hearing that the accused may attend). The other 44% used an investigatory model (in which the person or persons who investigated the complaint, or a third party, may be tasked with determining if a violation occurred, and in no event would the accused be entitled to attend a live hearing on the matter).[48]

- ***Right to confront and cross-examine witnesses.*** Only 6% of institutions allowed the accused to directly question the accuser, while 31% did not allow the accused to question the accuser at all. The remaining institutions allowed the accused to indirectly raise questions for the accuser, either through the investigator (8%) or the

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[42] *See* Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities are Adjudicating Sexual Assault*, 71 University of Miami Law Review 377 (Winter 2017), *available at* http://repository.law.miami.edu/cgi/viewcontent.cgi?article=4497&context=umlr. The author is a professor at the University of Miami School of Law whose primary research areas include campus sexual misconduct and the punishment and control of sex offenders. *See* faculty profile for Tamara Rice Lave, University of Miami School of Law website, at https://www.law.miami.edu/faculty/tamara-rice-lave (last visited August 23, 2019).

[43] *See A Critical Look at How Top Colleges and Universities are Adjudicating Sexual Assault*, *supra* note 42, at 391-92. All of the protections raised in the survey questions, except for the right to appeal, are found in the Bill of Rights. As the author notes, these rights have been "deemed to apply to the states" through the incorporation clause of the Fourteenth Amendment to the U.S. Constitution, which "prohibits states from depriving 'any person of life, liberty, or property, without due process of law.'"

[44] *See id.* The author reportedly surveyed "the highest-ranked twenty universities, the top ten liberal arts colleges, and the top five historically black colleges" as determined by U.S. News and World Report's 2014 higher education rankings. While this number adds up to thirty-five, the author's breakdown of the survey results indicated that a total of thirty-six institutions had been examined. No further explanation is given with respect to the number of institutions surveyed. Beyond an initial e-mail survey, the author obtained further information from telephone and e-mail conversations with the institutions' administrators and from relevant written policies of the institutions.

[45] *See id.* at 383-84.

[46] *See id.* at 392. The author explains that at least one of the institutions surveyed had subsequently changed its method of adjudication while the article was being written. Accordingly, the author amended the survey results to reflect this change, but cautioned readers that "other schools may have also changed their method of adjudication since the gathering of data for this Article." *See also id.* at 396-97, at n.110-112 (the author's explanation that due to rounding, there are some instances in which percentages do not add up to 100%).

[47] *See id.* at 393.

[48] *See id.* at 393-96.

members of the adjudicatory panel (50%), with no guarantee in either case that the questions would actually be posed. For the remaining 6% of institutions surveyed, the procedure used was undeterminable.[49]

- ***Right to counsel.*** The vast majority of institutions surveyed (91%) allowed the accused to be represented by an attorney, but the attorney's role was usually limited to that of an advisor allowed to be present, but not actively participating, in the proceeding. Another 6% of survey respondents did not provide accused students the right to an attorney, and the remaining 3% was undeterminable.[50]

- ***Right to remain silent.*** A little over half, or 56%, of institutions surveyed allowed the accused to remain silent, while 3% did not. For the remaining 42% of institutions, it was unclear what their policies allowed.[51]

- ***Right to appeal.*** All of the institutions surveyed allowed the result of a proceeding to be appealed, with most institutions limiting appeals to procedural grounds only, as opposed to allowing appeal of factual findings.[52]

C. Extent of Title IX and Clery Act Compliance

A more recent NASPA publication, released in September 2017 (2017 NASPA report), provides a detailed look at certain post-secondary recipient institutions' responses to sexual violence, and the extent to which these responses comply with Title IX and the Clery Act.[53] The 2017 NASPA report focused on the results of a self-assessment instrument (CORE Evaluation survey) that thirty-five recipient institutions completed. These thirty-five institutions belonged to a larger cohort of institutions participating in a program called "the Collective," which was part of a larger NASPA-led initiative titled "Culture of Respect."[54]

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[49] *See id.* at 396-97.
[50] *See id.* at 397.
[51] *See id.* at 397-98.
[52] *See id.*
[53] *See* Allison Tombros Korman, Sarice Greenstein, Alexis Wesaw, and Jessica Hopp, *Institutional Responses to Sexual Violence: What Data From a Culture of Respect Program Tells Us About the State of the Field*, NASPA, September 2017 (2017 NASPA report), *available at* https://www.naspa.org/images/uploads/main/CultureofRespectLandscapeReportFINAL.pdf.
[54] *See id*. at 4-6. A total of fifty-two institutions participated in the Collective. As explained in the 2017 NASPA report, the significance of the Collective is as follows:

> Culture of Respect's signature program, the Collective, guides institutions through a step-by-step strategic planning process that is shaped by a framework for addressing sexual violence . . . developed by public health and violence prevention professionals. Collective institutions begin the program by completing the CORE Evaluation, a self-assessment instrument developed by Culture of Respect that helps colleges and universities take inventory of their response to sexual violence . . . . These results guide stakeholders in creating an actionable plan to improve their campuses' efforts. The program also facilitates peer-led learning, offering an online space for crowdsourcing innovative practices and solutions to problems faced in the field . . . . By engaging a diverse cohort of institutions of higher education in a program that pushes them to think

The CORE Evaluation survey was conducted in the spring of 2017,[55] shortly after the thirty-five recipient institutions joined the Collective.[56] Subsequently, the survey results were used to create a strategic plan for improvement at each respective institution.[57] Following the implementation of these plans, the CORE Evaluation survey was administered a second time to document the progress made by these institutions.[58]

Below are selected results from the first survey, relating to compliance by the institutions with Title IX and Clery Act requirements.[59]

1. Basic Title IX Requirements

All thirty-five institutions reported compliance with the rudimentary requirements of publishing a notice of non-discrimination, defining prohibited behavior, and installing a Title IX coordinator or similarly titled person.[60] However, of these institutions, only 34% of institutions reported having a sufficiently staffed Title IX office; 51% were partially understaffed; and another 14% were understaffed.[61]

2. Title IX Reporting Requirements

A significant majority of the thirty-five institutions (77%) offered students all four of the reporting options mandated by the OCR's guidance: a formal report pursuing criminal charges with the institution's support; a formal report requesting adjudication solely by the institution; a formal report with a request for confidentiality; and a confidential disclosure not subject to a Title IX investigation.[62] However, even though 97% of institutions had policies explaining the

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holistically about the causes of and solutions to sexual violence while facilitating positive social pressure to act, the Collective has the potential to create large-scale change.

[55] At the time of this initial survey, the 2011 and 2014 OCR guidance documents on sexual violence were still in effect. *See* Chapter 3, notes 158 to 187, and accompanying text, *supra*.
[56] *See* the 2017 NASPA report, *supra* note 53, at 6 (figure 1), 9 (figure 4).
[57] *See id*. at 6 (figure 1).
[58] *See id*.
[59] *See id*. at 10. It should be noted that the basis for participation in the CORE Evaluation survey was very different compared to the 2015 survey on procedural due process protections discussed in the foregoing section. In the 2015 survey, participants were selected from a list of top-ranked institutions prepared by a third party and then contacted and asked to respond. In contrast, CORE Evaluation survey participants were a "convenience sample" of institutions that had consciously chosen to participate in a special program aimed at improving institutional responses to the problem of campus sexual violence. Accordingly, the 2017 NASPA report acknowledged that the thirty-five institutions surveyed were not a representative sample of post-secondary recipient institutions nationwide. In addition, the report includes a discussion of the limitations of working with such a sample as well as limitations of the survey instrument.
[60] *See id.* at 11.
[61] *See id.*
[62] *See id. See also* archived "Dear Colleague" Letter from Russlynn Ali, Assistant Secretary for Civil Rights, United States Department of Education Office for Civil Rights (April 4, 2011) (*Archived 2011 "Dear Colleague" Letter on Sexual Violence*), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf, at 5, 8, and 16 (referencing a complainant's various reporting options, depending on factors such as whether or not the complainant requests to keep the complainant's name or other identifiable information confidential).

process for filing a report with campus officials, over a third of the institutions believed there was a need for greater clarification of the policies.[63]

3. Title IX Disciplinary Proceeding Requirements

As required by the OCR's 2011 "Dear Colleague" letter on sexual violence,[64] which was rescinded in 2017,[65] all thirty-five institutions used the "preponderance of the evidence" standard in campus misconduct proceedings.[66] Further, 85% or more of the institutions, in compliance with OCR guidance, had written policies that explained the evidentiary standard that would be used, provided student support in the form of no-contact orders or on-campus protection, and explained the process for appealing the outcome of the proceeding.[67]

With respect to other aspects of the disciplinary proceedings, the survey found:

- At least 85% of institutions complied with OCR guidance by providing a written description of the investigation model employed, the anticipated investigation time frames, and an assurance of the highest possible level of student confidentiality in light of a corresponding Title IX obligation to maintain campus safety.[68]

- Institutions fell short in adjudication process areas such as prohibiting references to the complainant's sexual history with any person besides the accused party and making clear in written policies that alternative participation arrangements would be available during the adjudication process.[69]

- Fewer than 85% of institutions' policies explained the applicable sanctions for harassment and retaliation or specified possible remedies for the campus community.[70]

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[63] *See* the 2017 NASPA report, *supra* note 53, at 11.
[64] *See* discussion in Chapter 3, notes 161 to 184, and accompanying text, *supra.*
[65] For reasons explained in Chapter 3, notes 193 to 201, and accompanying text, *supra*, the 2011 and 2014 OCR guidance documents on sexual violence were rescinded by the USDOE in September 2017.
[66] *See* the 2017 NASPA report, *supra* note 53, at 12.
[67] *See id.*
[68] *See id.*
[69] *See id.* at 13. *See also* archived Questions and Answers on Title IX and Sexual Violence, Catherine E. Lhamon, Assistant Secretary for Civil Rights, United States Department of Education Office for Civil Rights (April 29, 2014) (*Archived 2014 Q&A*), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf, at 30. With respect to recipient institutions that use a hearing process to determine responsibility for acts of sexual violence, the *Archived 2014 Q&A* allowed each institution to decide whether the parties must attend the entire hearing. However, with respect to alternative arrangements for participating in a hearing, the *Archived 2014 Q&A* stated that a recipient institution "should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time" if requested, and suggested the use of "closed circuit television or other means" to accomplish this.
[70] *See* the 2017 NASPA report, *supra* note 53, at 12. The report summarized data in broad terms by indicating with an asterisk, where applicable, that "[a]t least 85% of institutions report this component is included in their policies[.]" There was no asterisk marking the components "Explanation of sanctions for harassment and retaliation" and "Possible remedies for the campus community[.]" *See also Archived 2014 Q&A, supra* note 69, at

4. Title IX Student Accommodation Requirements

Institutions were apparently more compliant with the mandate of the 2014 OCR guidance to accommodate student survivors of sexual violence.[71] For example, all thirty-five institutions extended the dates for examinations and assignments and allowed students to change class schedules, and thirty-four institutions offered relocation to a different campus housing facility.[72] Nearly all of the thirty-five institutions offered additional forms of accommodation, such as part-time enrollment or a reduced course load, moving off-campus, or attending class via distance learning.[73]

5. Clery Act Crime Reporting Requirements

All thirty-five institutions reported being in compliance with the basic Clery Act requirements[74] of crime reporting and publication of an annual security report.[75]

6. Clery Act Sexual Violence Prevention and Training Requirements

The Clery Act requires that a post-secondary recipient institution include in its annual security report a policy statement regarding the institution's programs to prevent domestic violence, dating violence, sexual assault, and stalking.[76] Further, the institution's actual policy on this subject must include "primary" prevention and awareness programs, directed at all incoming students and new employees, that address subjects including: the prohibited offenses of domestic violence, dating violence, sexual assault, and stalking; the applicable definition of "consent" in reference to sexual activity in that jurisdiction; recognition of the warning signs of abusive behavior; and how to avoid potential attacks.[77] Moreover, the Act requires the institution's policy to address "ongoing" prevention and awareness campaigns for both students and faculty that cover the same information as the prevention and awareness programs for incoming students and new employees.[78]

According to the 2017 NASPA report, the foregoing provisions of the Clery Act require recipient institutions to *offer* the prevention and awareness training to incoming students and new employees, but do not obligate the institutions to *require* these students and employees to

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35-36 (explaining that the many possible remedies for the broader student population include: "[d]eveloping materials on sexual violence, which should be distributed to all students"; "[c]onducting bystander intervention and sexual violence prevention programs with students"; and "[t]argeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team").

[71] *See Archived 2014 Q&A*, *supra* note 69, at 32-33. Accommodations for student survivors of sexual violence are referenced therein as "interim measures." For reasons explained in Chapter 3, notes 193 to 201, and accompanying text, *supra*, the *Archived 2014 Q&A* was rescinded by the USDOE in September 2017.

[72] *See* the 2017 NASPA report, *supra* note 53, at 13.

[73] *See id.*

[74] *See* discussion of Clery Act in Chapter 2, notes 106 to 112, and accompanying text, *supra*.

[75] *See* the 2017 NASPA report, *supra* note 53, at 14.

[76] *See* 20 United States Code (U.S.C.) §1092(f)(8). *See also* the broader discussion of Clery Act prevention training requirements in Chapter 2, notes 113 to 123, and accompanying text, *supra*.

[77] *See* 20 U.S.C. §1092(f)(8).

[78] *See id.*

undergo training.[79] The NASPA's Culture of Respect initiative sought to determine, through the CORE Evaluation survey, the extent to which institutions were *requiring* the prevention and awareness training for incoming students and new employees.[80] The percentage of institutions making the training *mandatory* was reported as follows: of the thirty-five institutions, 91% required training for new undergraduate students, 69% required training for incoming employees as well as for all employees annually; and only 44% required training for new graduate students.[81] Seventy-seven percent of the thirty-five institutions surveyed reported compliance with the requirement to conduct ongoing prevention and awareness campaigns.[82]

D. Implementation of NASPA "Culture of Respect" Recommendations

1. Overview of the NASPA CORE Blueprint "Pillars"

The 2017 NASPA report concerning the CORE Evaluation survey results provided insights on ways in which participating institutions are going beyond the requirements of Title IX and the Clery Act to "foster an environment in which violence is not tolerated[.]"[83] More specifically, the report focused on the following selected survey results in examining the extent to which the surveyed institutions had implemented recommendations made by the Culture of Respect initiative.[84] These recommendations, based upon the "six pillars" of the "CORE Blueprint," were already in place when the thirty-five surveyed institutions began their participation in the initiative's Collective program.[85] Each pillar of the CORE Blueprint is discussed below in the context of specific examples provided in the 2017 NASPA report.[86]

- **Survivor support.** This pillar references efforts by institutions to "provide robust support to student survivors."[87] This support may take several forms. In addition to the multiple options allowed for reporting complaints as required by Title IX,[88] 89% of the thirty-five institutions also allowed survivors to anonymously report an

[79] *See* the 2017 NASPA report, *supra* note 53, at 13.
[80] *See id.*
[81] *See id.*
[82] *See id.* at 14.
[83] *See id*. at 6.
[84] *See id*. at 14-18.
[85] *See id*. at 7-8. The CORE Blueprint involves the "six pillars" of:
(1) SURVIVOR SUPPORT with options on reporting;
(2) CLEAR POLICIES on misconduct investigations, adjudications, and sanctions;
(3) MULTITIERED EDUCATION for the entire campus;
(4) PUBLIC DISCLOSURE of statistics and information;
(5) SCHOOLWIDE MOBILIZATION with campus organizations and student leaders; and
(6) Ongoing SELF-ASSESSMENT.
(Capitalization in original.)
[86] The last bulleted point combines the two separate pillars of transparency (public disclosure) and self-assessment because the report discussed the CORE Evaluation survey results for these pillars together.
[87] *See id.* at 14-15. The report uses the term "survivor" to refer to victims of sexual violence.
[88] *See* note 62, and accompanying text, *supra.*

incident of sexual violence.[89] The Culture of Respect initiative specifically recommends that post-secondary recipient institutions establish memoranda of understanding (MOUs) with off-campus providers of support services, such as medical and mental health services.[90] The MOUs are intended to ensure that institutions "have a structured, agreed upon plan for referrals to facilitate seamless continuity of care" between on and off-campus support services.[91] The 2017 NASPA report noted that, while institutions are providing these support services either on or off-campus, there is a "notable gap" among institutions that have MOUs with off-campus service providers.[92] Furthermore, of the thirty-five institutions that completed the CORE Evaluation survey, only 51% utilized a sexual assault response team or coordinated community response team to facilitate a coordinated approach and response to reported sexual violence.[93]

- **Clear policies.** This pillar references the value of "clear, comprehensive policy statements that align with Culture of Respect recommendations."[94] The 2017 NASPA report noted that a significant percentage of students (74%), faculty (63%), and staff (66%) were generally informed whenever the thirty-five institutions made changes to their respective sexual misconduct policies.[95] In contrast, only about half of these institutions required new students and new employees to confirm that they understood the sexual misconduct policies.[96]

- **Tailored prevention with an intersectional lens (multitiered education).** This pillar refers to the need for post-secondary institutions to do more than provide students with basic education on sexual violence prevention.[97] Institutions are encouraged to target prevention and awareness programs to specific groups of persons, such as fraternity and sorority members, leaders of student groups, and student athletes.[98] Based on the survey responses, the 2017 NASPA report indicated that "responding institutions are not availing themselves of this opportunity to the extent that they could be . . . ."[99]

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[89] *See* the 2017 NASPA report, *supra* note 53, at 14-15.
[90] *See id*.
[91] *See id*. at 15.
[92] *See id.* No numbers or percentages were provided on this point.
[93] *See id.*
[94] *See id.*
[95] *See id.*
[96] *See id.*
[97] *See id.* at 16.
[98] *See id.* According to the 2017 NASPA report, prevention and awareness programs offer "an ideal environment to introduce and unpack the concepts of rape culture and intersectionality."
[99] *See id.* The survey responses indicated that more than half of the institutions surveyed required male and female athletes to participate in prevention and awareness programming that was targeted to their particular group (targeted programming), while a significant majority of the institutions surveyed required student dormitory resident assistants to participate in targeted programming. In contrast, fewer than half of the institutions surveyed required fraternity and sorority members, student group leaders, and international students to participate in targeted programming.

- **Schoolwide mobilization.** A "willingness to engage student voices and leadership" in the effort to address sexual violence is the basis for this pillar. The 2017 NASPA report stated that 57% of the institutions support peer education programs and 52% included a student on their Title IX working group during the past academic year.[100] Just under 70% of institutions indicated that faculty members have leadership roles in the institution's sexual violence response efforts, but only about 25% of the institutions encourage faculty members to incorporate information on sexual violence into curricula.[101]

- **Self-assessment and transparency.** With respect to the institutions' self-assessment of their sexual violence policies and procedures, 65% of the thirty-five institutions conducted a campus climate survey[102] during the current or previous academic year.[103] However, 37% of the responding institutions either did not have an official timeline for conducting the survey or had no intention of administering one.[104] The 2017 NASPA report found that a "significant transparency gap exists" around sexual violence investigations and adjudications. Although 86% of the thirty-five institutions collected data on investigations conducted and adjudication proceedings held at their respective institutions, none of the institutions made this information public.[105]

2. Next Steps

The remainder of the 2017 NASPA report identified three opportunities for post-secondary institutions to achieve a more coordinated response to sexual violence.[106] First, they should "ensure that *all stakeholders* are engaged in efforts to address violence, and that these contributions are valued."[107] Second, post-secondary institutions "should take every opportunity to understand the problem [of campus sexual violence] and its potential solutions."[108] To gain this understanding, institutions may "commit to *rigorous evaluation* of prevention programs, awareness campaigns, and the effectiveness of institutional processes and services so that professionals in the field can learn what is working, and what is not."[109] Third, the institutions should "[prioritize] *transparency*" by publicizing data about their sexual violence prevention and response efforts, so that students, their families, and the general public can "understand and learn from what campuses are doing to address violence."[110]

Finally, the report suggested that future topics worth exploring include how post-secondary institutions might prevent campus sexual violence, for example, by reaching out to

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[100] *See id.* at 17.
[101] *See id.*
[102] *See* explanation on campus climate surveys in Chapter 4, note 115, and accompanying text, *supra*.
[103] *See* the 2017 NASPA report, *supra* note 53, at 17.
[104] *See id.*
[105] *See id*. at 18.
[106] *See id*. at 6, 19-20.
[107] *See id*. at 20. (Emphasis in original.)
[108] *See id*.
[109] *See id*. (Emphasis in original.)
[110] *See id*. (Emphasis in original.)

certain individuals or groups and offering services or support to help prevent future perpetration. The 2017 NASPA report concluded with an observation that campus stakeholders "must continually reassess and recalibrate efforts to create a community free from sexual violence."[111]

[111] *See id.* at 21.

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Chapter 6

STATE LAW COROLLARIES TO TITLE IX

Part I. Overview

A. States Discussed in this Chapter

Educational institutions in every state that receive federal financial assistance must comply with the requirements of Title IX. However, a number of jurisdictions, including Hawaii, have enacted their own state laws that aim to promote sex or gender equity in education or prohibit sex or gender discrimination in education, sometimes by explicitly conditioning the receipt of state funds on compliance with the state law. This chapter examines a non-exhaustive selection of state laws of this nature, with a focus on enforcement and construction with other laws, in Hawaii and the following nine states: Alaska, California, Kentucky, Maine, Nebraska, New Hampshire, New York, Rhode Island, and Washington. For the purposes of this discussion, these state laws are loosely referred to as "state law corollaries to Title IX" or "state corollaries." This characterization by the Bureau is based on the apparent intent and purpose of these state laws to prohibit discrimination in education on the basis of sex, even if the language used therein does not closely resemble the language of the Title IX statute and implementing regulations.

The remainder of this part provides general observations and summarizes key provisions related to the state law corollaries to Title IX. Part II of this chapter furnishes a state-by-state discussion of each state's law or laws and, where relevant, the related implementing rules. For ease of comparison, tables describing the various state corollaries and laying out additional information are found at the end of this chapter. Table 1 details what each law covers, and Table 2 specifies provisions in the law related to standing and remedies. Further, Appendix D to this report summarizes information on the enforcement procedures for each state corollary, to the extent articulated in the state's statutes or rules.

B. General Observations on Varying Scope of State Corollaries

The Title IX corollaries of the ten states examined in this chapter vary in their scope.[1] Five of the states (Alaska, Kentucky, Maine, New Hampshire, and Rhode Island) have a single law addressing sex or gender equity in education. Of these five states with a single law, four (Alaska, Kentucky, Maine, and Rhode Island) cover both K-12 and post-secondary education, while the law of the fifth state (New Hampshire) covers only K-12 education.

[1] Information was requested from the legislative libraries of the states discussed in this chapter. The materials the Bureau received in response included copies of original legislation that enacted the state corollary, as well as any other legislative history (to the extent that these materials were available). The Bureau's review of the materials received did not yield any discernible policy reasons as to why a particular state may have decided upon a particular enforcement approach for its state corollary.

Each of the remaining five states have multiple laws addressing sex or gender equity in education. Nebraska and Washington each have two separate laws that address sex or gender equity in K-12 education and post-secondary education, respectively. California, Hawaii, and New York each have three separate laws. Specifically, California has two laws that separately address sex or gender equity in K-12 education and post-secondary education, respectively, and a third law (the "Discrimination Article") that addresses sex-based discrimination in any program or activity that receives state assistance, whether or not the program or activity is education-related. Hawaii's three laws include: a law that addresses gender equity in athletics in grades 9-12 (the "Gender Equity in Sports" law), a second law that prohibits sex-based discrimination in any educational or recreational program, at any level of education (preschool, K-12, or post-secondary), receiving state or county financial assistance or utilizing state or county facilities (the "Student Bias" law), and a third law that prohibits sex-based discrimination, including gender identity or expression, at any level of education (Chapter 368D). Finally, New York's three laws include its Human Rights Law, which covers sex equity in both K-12 and post-secondary education, a second law that addresses sex equity specifically in the area of post-secondary education admissions, and the "Enough is Enough" law, which provides for a unified approach to sexual assault on New York college and university campuses.

The state laws also vary in their coverage of private educational institutions. Of the eighteen state laws examined, seven of them (Hawaii's Gender Equity in Sports law, both Nebraska laws, New Hampshire, Rhode Island, and both Washington laws) apply to public (i.e., state-run) schools only. Eight state laws (Alaska, all three of California's laws, Hawaii's Student Bias and Chapter 368D laws, Kentucky, and Maine) apply to schools that receive state funds; that is, the provisions apply to public as well as potentially private schools. New York is unique among the nine states in that all three of its Title IX corollaries apply to both public and certain private schools,[2] regardless of whether the schools receive state funds.

Ten of the state laws (Alaska, Hawaii's Gender Equity in Athletics law, Hawaii's Student Bias law, Kentucky, both Nebraska laws, New York's Enough is Enough law, Rhode Island, and both Washington laws) specifically address sex-based discrimination, with New York's Enough is Enough law being narrowly tailored to address the issue of sexual assault in post-secondary education. Of note, while Rhode Island's law specifically prohibits sex-based discrimination, the state's Board of Education has adopted a rule pursuant to that statute also prohibiting discrimination based on sexual orientation and gender identity or gender expression. Hawaii's Chapter 368D law also addresses sex discrimination but defines the term more broadly to specifically include both gender identity or expression and sexual orientation. The remaining seven state laws (all three California laws, Maine, New Hampshire, New York's Human Rights Law, and New York's higher education admissions law) address sex-based discrimination as well as discrimination based on a variety of characteristics beyond sex, such as race or religion. Of these seven laws, two (California's Discrimination Article and New Hampshire's law) protect against discrimination based on sexual orientation, while four other laws (California's K-12 law, California's post-secondary law, New York's Human Rights Law, and New York's higher education admissions law) include protection against discrimination based on sexual orientation and gender identity or expression.

[2] *See* notes 180, 191, and 203 and accompanying text, *infra*.

Finally, five of the state laws examined (Alaska, California's Discrimination Article, California's K-12 law, Kentucky, and Washington's K-12 law) tie state funding to a recipient institution in exchange for the institution's commitment to enforce the corollary. If an institution does not enforce the law, it risks losing its state funding. California's post-secondary law includes a provision requiring an educational institution to provide an assurance to each agency administering state funds to the institution that each of its programs or activities will be conducted in compliance with the law. However, the law does not appear to specify a mechanism in its statute whereby a non-compliant institution could lose its funding. The remaining twelve laws (all three Hawaii's laws, Maine, both Nebraska laws, New Hampshire, all three New York laws, Rhode Island, and Washington's post-secondary law) do not appear to tie state funding to a commitment by a recipient institution to enforce the respective corollary.

C. General Observations on Varying Approaches to Enforcement of State Corollaries

1. Administrative Enforcement

Depending on the state law, enforcement responsibility generally rests with either:

(1) A local- or state-level board or executive officer within a school, school board, or state-level education system; or

(2) A human rights commission or division that is independent of the state's education system.

a. Enforcing Entities

A majority of the state laws examined follow the former approach, where enforcement authority is given to a local- or state-level board or executive officer within a school, school board, or state-level education system. State laws that follow this approach include Alaska, California's K-12 law, California's post-secondary law, Hawaii's Student Bias law, Nebraska's K-12 law, Nebraska's post-secondary education law, New Hampshire, New York's post-secondary education admissions law, New York's "Enough is Enough" law, Rhode Island, and Washington's K-12 law. While the exact enforcement process within these states differ depending on the language of the statutes or regulations, the state's education system is responsible for compliance oversight and complaint procedures.

Three other state corollary laws (Maine, New York's Human Rights law, and Washington's post-secondary law) are enforced wholly or partly through an independent agency. In these states, complaints of gender- or sex-based discrimination are filed with a human rights commission or human rights division that is independent from the agency that runs the respective educational institutions. Specifically, in Maine, enforcement is done through the Maine Human Rights Commission, a quasi-independent state agency, although the law allows its Commissioner of Education to participate in the Commission's predetermination resolution and conciliation

efforts. New York's Human Rights Law is similarly enforced through the New York Human Rights Division, which is a division of the New York Executive Department. Complaints under Washington's post-secondary education law are filed with and investigated by the Washington State Human Rights Commission. However, the Student Achievement Council, which is a state agency with jurisdiction over post-secondary education, is charged with monitoring the compliance of educational institutions with the law.

Kentucky is unique among the states in that enforcement of its corollary is given to the state departments and agencies that extend state financial assistance to an education program or activity. The California Discrimination Article is also unique in that it provides two separate means of enforcement. Generally, the law is enforced by the California Department of Fair Employment and Housing, which is an independent agency. However, if the alleged discrimination took place in a K-12 school, the law may also be enforced by, and complaints may be filed with, a local educational agency and the California Department of Education.

The statutes establishing Hawaii's Gender Equity in Sports and Chapter 368D laws are silent as to which entity is responsible for the administrative enforcement of these corollaries.[3]

b. Standing

The state law corollaries also differ as to who has standing to bring an administrative complaint.[4] Nine of the state laws examined (Alaska, Hawaii's Student Bias law, Maine, both Nebraska laws, all three New York laws, and Washington's post-secondary education law) appear to allow a person aggrieved by a violation of the corollary to file a complaint. Administrative rules related to Hawaii's Student Bias law specifically define "complainant" to mean students, parents, or persons who are eligible to receive benefits from or participate in Hawaii Department of Education programs and who file a complaint alleging discrimination. Four of those nine states (Maine, New York's Human Rights Law, New York's post-secondary admissions law, and Washington's post-secondary law) also authorize certain public entities or officials, such as a Commissioner of Education or Attorney General, to bring a complaint on the aggrieved person's behalf.

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[3] *But see* notes 96 to 104 and 113 and accompanying text, *infra* (discussing the general role of the Civil Rights Compliance Branch (CRCB) of the Hawaii Department of Education (HDOE) in enforcing anti-discrimination laws and proposed administrative rules that may impact future enforcement of these two laws). Potential considerations for establishing an enforcement mechanism for Chapter 368D, Hawaii Revised Statutes (HRS), are discussed in the Observations and Conclusions section in Chapter 7 of this report, part II, *infra*.

[4] Act 110, Session Laws of Hawaii 2018, directed the Legislative Reference Bureau to address "issues related to service and standing for bringing applicable complaints[.]" The Bureau interpreted "standing" as referring to both the administrative and judicial contexts in which complaints may be filed and, more specifically, the eligibility requirements for filing a complaint, including the fulfillment of any prerequisite, such as the exhaustion of administrative remedies prior to the filing of a legal complaint. *See also* discussions referencing standing issues, in Chapter 2, notes 76 to 86, and accompanying text, *supra*. With respect to "service," it was unclear whether this term was used to refer to something other than service of a legal complaint, which would typically be governed by the rules of the court jurisdiction in which the complaint was filed. In reviewing Title IX and state corollary enforcement practices and procedures for this report, the Bureau did not encounter any information that shed light on the intended meaning of "service" or the reason that service is an issue of concern.

Three other state laws appear to provide standing to a wider group of people. The administrative rules adopted under Washington's K-12 law authorize "anyone" to bring a complaint without an express requirement that the person be aggrieved. California's K-12 law authorizes any person alleging to have suffered discrimination to bring a complaint. In addition, the law also authorizes anyone who believes an individual or specific class of individuals has suffered from discrimination to bring a complaint on that individual's or specific class of individuals' behalf. Similarly, under Hawaii's Chapter 368D law, both a person, or an organization or association on behalf of a person, alleging a violation of the corollary may file a complaint.

Under California's Discrimination Article, which has two different administrative enforcement processes, standing differs depending upon the agency with which a complaint is filed. For complaints filed with the Department of Fair Employment and Housing, only a state department or agency extending state funds to a program or activity may file a complaint. For complaints filed with a local education agency and the state Department of Education, rules regarding standing are the same as complaints filed under California's K-12 law: any person who alleges that they have suffered discrimination has standing. In addition, anyone who believes an individual or specific class of individuals has suffered from discrimination is authorized to bring a complaint on that individual's or specific class of individuals' behalf.

Five laws (California's post-secondary law, Hawaii's Gender Equity in Sports law, Kentucky, New Hampshire, and Rhode Island) are silent on the issue of administrative standing.

c. Detailed Processes

Of the state laws examined, the California K-12 law and the New York Human Rights Law appear to contain the most detail with respect to the administrative enforcement process. California's K-12 law creates a detailed framework for the development of a grievance process, model policies, a student's bill of rights, state evaluation and oversight, and data and reporting requirements. New York's Human Rights Law is similarly detailed in prescribing a grievance process. Both California, through its K-12 and post-secondary laws, and New York, through its Enough is Enough law, require the development of data relating to gender discrimination and evaluation and reporting systems to track the performance of the laws.

2. Private Right of Action

Half of the state laws examined expressly authorize a person who has suffered from alleged discrimination to bring a private right of action in state court (Alaska, California's K-12 education law, California's post-secondary education law, Hawaii's Chapter 368D law, Maine, Nebraska's K-12 education law, Nebraska's post-secondary law, Washington's K-12 education law, and Washington's post-secondary education law). Maine's law also authorizes its Human Rights Commission to bring an action in court on behalf of an aggrieved person. The California Discrimination Article provides that it may be enforced by a private right of action, but the law does not specify who has standing to bring an action under the article. Hawaii's Gender Equity in Sports law and New York's Enough is Enough law expressly provide that they do not establish a private right of action. The remaining state laws examined are silent on a private right of

action (Hawaii's Student Bias law, Kentucky, New Hampshire, New York's Human Rights Law, New York's post-secondary education admissions law, and Rhode Island).

D. Other Key Features of the State Laws

Other key features found in most of the state corollaries examined include provisions that:

(1) Grant enforcement and rulemaking authority, and require that rules be promulgated;

(2) Require that specific anti-discrimination policies and enforcement procedures be implemented; and

(3) Provide for oversight and reporting.

Further, each of the state laws examined, except for those of Hawaii, Maine, New Hampshire, and Rhode Island, provide express language clarifying the intent of the law's construction with other laws.

Part II. State Laws Examined

A. Alaska

1. Alaska Statutes, Title 14, Chapter 18: Prohibition Against Discrimination Based on Sex or Race in Public Education

Alaska's state law corollary to Title IX, which applies to both K-12 and post-secondary education,[5] provides that a person in the state "may not" 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 or state financial assistance.[6] Because the law applies to any program or activity that receives federal or state financial assistance, its provisions apply to public schools as well as potentially private schools.[7]

The law requires the Alaska Board of Education and Early Development, Alaska Board of Regents, and each school board in the state to ensure that employment conditions are equal for

[5] *See* generally, Title 14, Chapter 18, Alaska Statutes (AS).
[6] Section 14.18.010, AS.
[7] *But see* Alaska Const. art. 7, §1 (providing that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution.") Note that because §14.18.010, AS, expressly applies to schools that receive federal as well as state funds, private schools that receive federal funds appear to be covered by this law.

males and females.[8] Specifically, the law prohibits discrimination in counseling and guidance services, recreational and athletic activities, course offerings, and instructional materials.[9] The Alaska law also directs the Alaska Board of Education and Early Development to develop procedures for affirmative action programs covering both equal employment and equal educational opportunities to be implemented in areas determined by the Board not to be in compliance with the law.[10]

a. Enforcement

The Alaska Board of Education and Early Development is tasked with adopting regulations to implement the law in the K-12 education system, while the Alaska Board of Regents is similarly required to adopt rules to implement the chapter within the University of Alaska system.[11]

A person who is aggrieved by a violation of the law at the K-12 level may file a grievance pursuant to a procedure adopted by the local school district.[12] If a person who has exhausted the local school district's procedure believes that a violation has not been remedied, the person may file a complaint with the Commissioner of the Department of Education and Early Development, who will conduct an investigation and appoint a hearing officer to conduct a hearing and recommend a decision to the Alaska Board of Education and Early Development.[13]

The Board of Education and Early Development has the ultimate responsibility for enforcing compliance with the law in the state's K-12 education system and is empowered, after the hearing is conducted, to make findings that a district or regional educational attendance area is not in compliance with the law.[14] The Alaska Board of Education and Early Development is also empowered to institute proceedings to abate violations.[15] If the Alaska Board of Education and Early Development finds that a district or regional educational attendance area is out of compliance with the law and that remedial measures have been ineffective, the board shall withhold state funds from the district or regional educational attendance area.[16]

The Alaska statute and the corresponding regulations in the Alaska Administrative Code do not contain a provision authorizing the withholding of state funds in post-secondary education programs, nor do they provide additional details on the enforcement of the law at the post-secondary level.

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[8] *See* §14.18.020, AS.
[9] *See* §§14.18.030 to 14-18.060, AS.
[10] *See* §14.18.070, AS.
[11] *See* §14.18.080, AS.
[12] *See* 4 Alaska Administrative Code (AAC) 06.560(a).
[13] *See* 4 AAC 06.560(c) to (f).
[14] *See* §14.18.090, AS.
[15] *See id*.
[16] *See id*.

A person aggrieved by a violation of the Alaska law as to K-12 or post-secondary education also has an independent right of action in superior court for civil damages and for such equitable relief as the court may determine.[17]

b. Construction with Other Laws

The Alaska law provides that it is supplementary to and does not supersede existing laws relating to unlawful discrimination based on sex or race.[18]

B. California

California has at least three separate laws that prohibit sex or gender discrimination. First, the California Government Code includes provisions that prohibit discrimination, including sex-based discrimination, in all programs or activities that receive state funding, including education programs and activities. In addition to this law, the California Education Code includes two separate laws that prohibit discrimination based on sex or gender that apply to K-12 education and post-secondary education, respectively. Each law is discussed below.

1. California Government Code, Title 2, Division 3, Part 1, Chapter 1, Article 9.5: Discrimination

The Discrimination Article of the California Government Code prohibits discrimination in any program or activity that receives state assistance, including K-12 and post-secondary education programs and activities. This provision runs parallel to the prohibitions on discrimination in education provided by the California Education Code.[19] Specifically, the law requires that "no person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state."[20]

a. Enforcement

If a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state has reasonable cause to believe that a contractor, grantee, or local agency has violated this law, the head of the state agency is required to notify the contractor, grantee, or local agency of the violation and must submit a complaint detailing the alleged violations to the California Department of Fair Employment and Housing for investigation and determination.[21] If the Department of Fair Employment and Housing

[17] *See* §14.18.100, AS.
[18] *See* §14.18.110, AS.
[19] *See* notes 27 to 93 and accompanying text, *infra*.
[20] California Government Code (Cal. Govt. Code) §11135(a).
[21] *See* Cal. Govt. Code §11136.

determines that the contractor, grantee, or local agency has violated the law, the state agency that administers the program or activity involved is required to "take action to curtail state funding in whole or in part" to the contractor, grantee, or local agency.[22]

Alternatively, complaints under this law may also be filed pursuant to the Uniform Complaint Procedure,[23] the same procedure by which California's K-12 Title IX corollary is enforced. Details on this procedure are discussed in a subsequent section of this chapter.[24]

In addition to these administrative enforcement procedures and remedies, the law may also be enforced by a civil action for equitable relief.[25] However, the law does not state who has standing to bring an action under the article.

b. Construction with Other Laws

The prohibitions and sanctions imposed by this law are "in addition to any other prohibitions and sanctions imposed by law."[26]

2. California Education Code, Title 1, Division 1, Part 1, Chapter 2: Educational Equity

California's K-12 educational equity statutes (the "California Educational Equity law") provide a legal framework to address discrimination in the educational process. The California Educational Equity law applies to any public or private preschool or K-12 educational institution[27] that receives or benefits from state financial assistance or enrolls students who receive state student financial aid.[28] The Legislature's intent in passing the law was to ensure "that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity."[29]

The California Educational Equity law's framework contains several articles that address discrimination and harassment in schools, including student suicide prevention, prohibition of discrimination, sex equity in education, single gender schools and classes, hate violence prevention, safe places to learn, and student protections relating to immigration and citizenship

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[22] *See* Cal. Govt. Code §11137.
[23] *See* 5 California Code of Regulations (CCR) §4610(c).
[24] *See* notes 43 to 52 and accompanying text, *infra*.
[25] *See* Cal. Govt. Code §11139.
[26] *Id*.
[27] California Education Code (Cal. Educ. Code) §210.3 (defining "educational institution" as a public or private preschool, elementary or secondary school or institution; the governing board of a school district; or any combination of school districts or counties recognized as the administrative agency for public elementary or secondary schools).
[28] Cal. Educ. Code §220.
[29] Cal. Educ. Code §201(f).

status.[30] The provisions that relate specifically to gender and educational equity are discussed below.

a. Article 3 (Prohibition of Discrimination)

Article 3 of the California Educational Equity law specifically prohibits an educational institution from subjecting a person to discrimination "on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation," or other characteristics associated with hate crimes, including immigration status.[31] There is an exemption for educational institutions controlled by a religious organization if the law's application would not be consistent with the religious tenets of that organization.[32] Exceptions also exist for certain organizations whose membership has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.[33]

b. Article 4 (Sex Equity in Education Act)

Article 4 of the California Educational Equity law, also called the Sex Equity in Education Act, further elaborates on the state's policy against discrimination in education and explicitly requires schools to support the dissemination of information about Title IX. The article provides that classes and career counseling be offered without regard to the sex of the student and requires that equal opportunity be provided in single-sex activities. It also allows students to participate in sex-segregated school programs and use facilities consistent with their gender identity.[34] The article further requires schools that are subject to Title IX to post the Title IX implementing regulations on their websites, including a description of how to file a complaint, an explanation of the statute of limitations, and links to the United States Department of Education Office for Civil Rights (OCR) website and the OCR Title IX complaint form.[35] In addition, the article requires each educational institution to have a written policy on sexual harassment.[36]

Article 4 also expressly states the California Legislature's finding that female students are not accorded equal opportunity in school sports programs and attempts to address this inequality by requiring school districts to provide equal opportunity for both participation in sports and the use of facilities.[37] The law also codifies a student bill of rights for athletics that is based on those rights provided in Title IX, including the right to equal facilities, provision of a gender equity

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[30] *See* Cal. Educ. Code Title 1, Division 1, Part 1, Chapter 2, Articles 2.5, 3, 4, 4.5, 5, 5.5, and 5.7.
[31] *See* Cal. Educ. Code §220. *See also* Cal. Penal Code §422.55 (establishing the characteristics associated with hate crimes).
[32] *See* Cal. Educ. Code §221.
[33] *See* Cal. Educ. Code §223. Examples of these organizations include the Boy Scouts of America or Girl Scouts of the United States of America and the Young Men's or Young Women's Christian Associations (YMCA or YWCA).
[34] *See* Cal. Educ. Code §221.5.
[35] *See* Cal. Educ. Code §221.61
[36] *See* Cal. Educ. Code §231.5.
[37] *See* Cal. Educ. Code §221.7. The statute provides that facilities and participation include but are not limited to equipment and supplies, scheduling of games and practice time, compensation for coaches, travel arrangements, per diem, locker rooms, and medical services.

coordinator, and right to file a complaint with OCR.[38] The California law requires schools to compile data about gender and athletics public at the end of every school year, including the number of students who participate in competitive athletics, classified by gender, and the number of teams classified by sport and by competition level.[39]

c. Article 5.5 (Safe Place to Learn Act)

Article 5.5 of the California Educational Equity law, also called the Safe Place to Learn Act, requires that the California Department of Education assess whether local educational agencies have adopted a policy that prohibits discrimination, harassment, intimidation, and bullying based on factors including disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, immigration status, or association with a person or group with one or more of these actual or perceived characteristics.[40] The California Department of Education must also assess whether educational agencies have adopted a process for receiving and investigating complaints of such discrimination and whether the process contains certain minimum requirements.[41]

d. Enforcement

The governing board of each school district has the primary responsibility for ensuring that the school district's programs are free from discrimination and in compliance with the California Educational Equity law.[42] California's Code of Regulations provides for a Uniform Complaint Procedure (UCP)[43] to address the filing, investigation, and resolution of complaints involving alleged violations of federal or state law or regulations that govern educational programs, including alleged violations of the California Educational Equity law.[44] As noted previously, the UCP may also be used to file complaints alleging unlawful discrimination, harassment, intimidation, or bullying against any protected group identified in the Discrimination Article of the California Government Code.[45] Further information on California's UCP is contained in the table on enforcement procedures in Appendix D. Additional insights may be gained by reading the California State Auditor's January 2017 report on the UCP.[46]

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[38] *See* Cal. Educ. Code §221.8.
[39] *See* Cal. Educ. Code §221.9.
[40] *See* Cal. Educ. Code §234.1.
[41] *See id.* The minimum requirements pertain to:
(1) Intervention by school personnel who witness a prohibited act taking place;
(2) A uniform investigation and resolution timeline to be followed by all schools constituting a school district;
(3) The ability of a complainant to appeal if dissatisfied with the outcome; and
(4) Translation into languages other than English of all forms developed for the complaint process if fifteen percent or more students in a public school speak a primary language other than English. S*ee* Cal. Educ. Code §48985(a).
[42] *See* Cal. Educ. Code §260.
[43] The Uniform Complaint Procedure (UCP) is contained in 5 CCR §§4600 through 4687. The stated purpose of the UCP is to "establish a uniform system of complaint processing for specified programs or activities that receive state or federal funding." *See* 5 CCR §4610(a).
[44] *See* 5 CCR §4610(a) and (c).
[45] *See* notes 20 to 26 and accompanying text, *supra*.
[46] See *Uniform Complaint Procedures: The California Department of Education's Inadequate Oversight Has Led to a Lack of Uniformity and Compliance in the Processing of Complaints and Appeals*, January 31, 2017, *available at*

Pursuant to the UCP, each local educational agency[47] is required to adopt policies and procedures to investigate complaints.[48] A person alleging unlawful discrimination, harassment, intimidation, or bullying may file a complaint using the local educational agency's procedure. The UCP also authorizes a person who "believes an individual or any specific class of individuals has been subjected to discrimination, harassment, intimidation, or bullying" to file a complaint on that individual's or class of individuals' behalf.[49] The local educational agency must investigate the complaint and prepare a written decision within sixty days.[50] The California Educational Equity law and UCP allow a complainant to appeal a local educational agency's decision to the California Department of Education.[51] If the Department of Education determines that a local educational agency violated the California Educational Equity law, the Department may effect compliance by withholding state or federal fiscal support, making future funding conditional on compliance, or seeking an appropriate order from a court.[52]

In addition to the administrative remedies, the California Educational Equity law also provides a private right of action to a "person who alleges that he or she is a victim of discrimination."[53] The law does not require an exhaustion of the administrative complaint process before civil law remedies may be pursued. However, complainants may not seek civil remedies until at least sixty days have elapsed from the filing of an appeal to the California Department of Education.[54] Educational institutions are required to inform complainants of any available remedies.[55] Civil law remedies include, but are not limited to, "injunctions, restraining orders, or other remedies and orders[.]"[56]

The California Educational Equity law also requires an educational institution to provide assurance to the agency administering funds that it is in compliance with state anti-discrimination law prior to receipt of any state financial assistance or aid.[57] School districts are

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https://www.bsa.ca.gov/pdfs/reports/2016-109.pdf. The California State Auditor's cover letter to the Governor and legislative leaders, which prefaces the body of the report, identifies several significant concerns, including the following:

(1) The California Department of Education's lack of a central office to receive UCP complaints and appeals resulted in delays in forwarding a number of complaints and appeals to their correct destination for processing; and
(2) The UCP's lack of a uniform time frame for completion of complaint investigations and of reviews of appeals resulted in the adoption of inconsistent practices.

These observations may be of interest to policy-makers and education stakeholders if a uniform complaint procedure is considered for enforcement of Hawaii's state corollary to Title IX.

[47] *See* 5 CCR §4600(p) (defining "local educational agency" to include "any public school district and county office of education or direct-funded charter school").
[48] 5 CCR §4621(a).
[49] 5 CCR §4630(b).
[50] 5 CCR §4631.
[51] *See* Cal. Educ. Code §262.3. *See also* 5 CCR §4632.
[52] *See* 5 CCR §4670.
[53] *See* Cal. Educ. Code §262.3.
[54] *See id.* This moratorium does not apply to injunctive relief.
[55] *See id*.
[56] *See id*.
[57] *See* Cal. Educ. Code §250.

also required to submit compliance reports to the California Department of Education.[58] The Superintendent of Public Instruction is required to review and revise practices to improve gender equity and make data related to gender equity available upon request.[59] The Superintendent of Public Instruction is also required to provide a Coordinated Compliance Review Manual to all school districts and to review twenty school districts annually for compliance with sex discrimination laws and regulations.[60]

e. Construction with Other Laws

It is the stated intent of the California Legislature that:

(1) The California Educational Equity law may be interpreted as consistent with California state law and federal civil rights law, including the Discrimination Article of the California Government Code,[61] Title VI,[62] Title IX, the Individuals with Disabilities Education Act,[63] the Rehabilitation Act,[64] and the Equal Educational Opportunities Act,[65] except where the Educational Equity chapter may grant more protections or impose additional obligations; and

(2) Any remedies provided under the California Educational Equity law or its regulations shall not be the exclusive remedies, but may be combined with remedies that may be provided by the aforementioned state and federal statutes.[66]

3. California Education Code, Title 3, Division 5, Part 40, Chapter 4.5: Equity in Higher Education Act

California has a third law that addresses equity in post-secondary education. Specifically, the Equity in Higher Education Act applies to any public or private post-secondary educational institution[67] that receives, or benefits from, state financial assistance, or enrolls students who receive state student financial aid.[68] Similar to the California Educational Equity law, the Legislature's intent in passing this law was to ensure "that each postsecondary educational institution undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of students to equal educational opportunity."[69] The law does

[58] *See* Cal. Educ. Code §251.
[59] *See* Cal. Educ. Code §252.
[60] *See* Cal. Educ. Code §253.
[61] *See* notes 20 to 26 and accompanying text, *supra*.
[62] 42 United States Code (U.S.C.) §2000d *et seq.*
[63] 20 U.S.C. §1400 *et seq.*
[64] 29 U.S.C. §794(a).
[65] 20 U.S.C. §1701 *et seq.*
[66] *See* Cal. Educ. Code §201.
[67] *See* Cal. Educ. Code §66261.5.
[68] *See* Cal. Educ. Code §66270.
[69] Cal. Educ. Code §66252(f).

not apply to educational institutions that are controlled by a religious organization if the application of the law "would not be consistent with the religious tenets of that organization."[70]

Like the California Educational Equity law, the Equity in Higher Education Act contains several articles that address discrimination and harassment in post-secondary schools, including articles regarding sexual orientation, gender identity equity, and sex equity.[71] Most significantly, article 3 of the Equity in Higher Education Act prohibits a post-secondary educational institution from subjecting a person to discrimination "on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed or defined in [the Discrimination Article] of the Government Code"[72] or other characteristics associated with hate crimes, including immigration status.[73]

Article 4 includes several specific requirements to ensure gender equity in post-secondary education.[74] For example, the article requires each post-secondary educational institution to have a written policy on sexual harassment, including information on the complaint process and its timeline.[75] The policy must be available online, and the institution must take certain steps to ensure students are aware of the policy, including posting notices in the school's main administrative building and distributing the policy to students at orientation programs.[76]

The article also prohibits institutions from discriminating against a person due to pregnancy. For example, the article prohibits a post-secondary educational institution from requiring a graduate student to withdraw or limit their studies due to pregnancy or pregnancy-related issues. Further, the article requires the institution to provide reasonable accommodations, including the option of taking a leave of absence, to such students so they may complete their courses of study and research.[77] The article also encourages the California Community Colleges and the California State University to provide reasonable accommodations for lactating students to express breast milk, breastfeed an infant child, or address other needs related to breastfeeding.[78] Article 4 also addresses equal opportunity in athletics by requiring schools to provide equivalent opportunities to both sexes for participation in sports and in the use of athletic facilities.[79]

Finally, Article 4 includes certain mandates that specifically address sex equity at California's community colleges. For example, the article requires "community college classes

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[70] *See* Cal. Educ. Code §66271.
[71] *See* Cal. Educ. Code Title 3, Division 5, Part 40, Chapter 4.5, Articles 3, 3.5, and 4.
[72] *See* notes 20 to 26 and accompanying text, *supra*.
[73] *See* Cal. Educ. Code §66270. *See also* Cal. Penal Code §422.55 (establishing the characteristics associated with hate crimes).
[74] Note that certain educational institutions are exempted from some or all of Article 4's provisions. For example, institutions whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine, are exempted from Article 4. *See* Cal. Educ. Code §66272.
[75] *See* Cal. Educ. Code §66281.5.
[76] *See id*.
[77] *See* Cal. Educ. Code §66281.7.
[78] *See* Cal. Educ. Code §66271.9(a). Note that while provisions relating to breastfeeding do not apply to the University of California system or satellite campuses of the California Community Colleges and California State University, the statute urges the University of California campuses to comply with the provisions of the statute.
[79] *See* Cal. Educ. Code §66271.8(b).

and courses, including nonacademic and elective classes and courses" to be conducted without regard of a student's sex. It also forbids community college districts from prohibiting or requiring students of one sex to enroll in a particular class or course.[80]

a. Enforcement

The Equity in Higher Education Act assigns primary responsibility for ensuring compliance with the law as follows:

(1) For each community college district, the governing board of that community college district;[81]

(2) For the California State University system, the Chancellor of the California State University and the president of each California State University campus;[82] and

(3) For the University of California system, the President of the University of California and the chancellor of each University of California campus.[83]

While specific complaint procedures and remedies may differ between institutions,[84] the Equity in Higher Education Act requires that any party to a written complaint of prohibited discrimination be allowed to appeal an action taken by the governing board of a community college district or president of a campus of the California State University to the Board of Governors of the California Community Colleges or the Chancellor of the California State University, respectively.[85]

The Equity in Higher Education Act also establishes a private right of action to pursue civil law remedies, including but not limited to injunctions, restraining orders, or other remedies or orders.[86] The law does not require an exhaustion of the administrative complaint process before civil law remedies may be pursued.[87]

Prior to receiving any state financial assistance or state student financial aid, the Equity in Higher Education Act requires each post-secondary educational institution to provide an assurance to the agency administering the funds that each of its programs or activities will be conducted in compliance with the Equity in Higher Education Act.[88]

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[80] Cal. Educ. Code §66271.7.
[81] *See* Cal. Educ. Code §66292.
[82] *See* Cal. Educ. Code §66292.1.
[83] *See* Cal. Educ. Code §66292.2.
[84] Each post-secondary educational institution is required to adopt its own written policy on sexual harassment. *See* Cal. Educ. Code §66281.5. *See also* notes 75 to 76 and accompanying text, *supra*.
[85] *See* Cal. Educ. Code §66292.3(a). The statute does not contain a similar provision addressing complaints within the University of California system.
[86] *See* Cal. Educ. Code §§66292.3 and 66292.4.
[87] *See* Cal. Educ. Code §66292.3(c).
[88] *See* Cal. Educ. Code §66290.

b. Construction with Other Laws

Similar to language in the California Educational Equity law, the California Legislature included a declaration explaining how it wanted the Equity in Higher Education Act to be interpreted:

> (1) The Act shall be interpreted as consistent with various other California laws and federal civil rights laws, including the Discrimination Article of the California Government Code,[89] Title VI,[90] Title IX, the Individuals with Disabilities Education Act,[91] and the Equal Educational Opportunities Act,[92] except where the Equity in Higher Education Act may grant more protections or impose additional obligations; and
>
> (2) Any remedies provided under the Equity in Higher Education Act shall not be the exclusive remedies, but may be combined with remedies that may be provided by the aforementioned state and federal statutes.[93]

C. Hawaii

Hawaii has three separate laws that prohibit sex discrimination in education. The Gender Equity in Athletics law (section 302A-461, HRS) specifically addresses sex-based discrimination in public secondary school (grades 9-12) athletics. Two other laws, section 302A-1001, HRS (Prohibition Against Student Bias), and section 368D-1, HRS (Prohibition on Discrimination in State Educational Programs and Activities), more generally prohibit sex discrimination in state educational programs or activities that receive government funds. Each law is discussed below.

1. Hawaii Revised Statutes, Section 302A-461: Gender Equity in Athletics

Hawaii's Gender Equity in Athletics Law provides that "[n]o person, on the basis of sex, shall be excluded from participating in, be denied the benefits of, or be subjected to discrimination in athletics offered by a public high school," pursuant to Title IX.[94] The law explicitly applies only to grades 9-12 of public high schools.[95]

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[89] *See* notes 20 to 26 and accompanying text, *supra*.
[90] 42 U.S.C. §2000d *et seq*.
[91] 20 U.S.C. §1400 *et seq*.
[92] 20 U.S.C. §1701 *et seq*.
[93] *See* Cal. Educ. Code §66252(g).
[94] *See* §302A-461(a), HRS.
[95] *See* §302A-461(b), HRS.

a. Enforcement

The law itself does not indicate how it is to be enforced, other than stating that "[no] private right of action at law shall arise under this section."[96] However, as a general matter, the Civil Rights Compliance Branch (CRCB) of the Hawaii Department of Education (HDOE) oversees compliance with federal and state anti-discrimination laws.[97] Further, the HDOE has proposed a package of changes to certain chapters of the Hawaii Administrative Rules (HAR) as part of its efforts to align HDOE anti-discrimination policies and enforcement procedures with the requirements of Title IX. The proposed enforcement provisions are detailed in Chapter 4.[98]

To provide a historical perspective, sections 302A-462, HRS, through 302A-465, HRS, prior to their repeal in 2010 and 2012,[99] provided some measure of enforcement support for section 302A-461, HRS, which included:

- Establishing a temporary Advisory Commission on Gender Equity in Sports (Advisory Commission);[100]

- Listing specific factors, to be considered by Advisory Commission and the Superintendent of Education, for assessing the equality of opportunity in school athletics for members of each sex;[101]

- Requiring that by July 1, 2001, the Superintendent of Education define "equity in athletics" for all public high schools, recommend rules for appropriate enforcement mechanisms to ensure equity, and develop a strategic plan to achieve equity;[102]

- Requiring the use of indicators and benchmarks to measure progress;[103] and

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[96] *See* §302A-461(c), HRS.
[97] *See* the CRCB website, at http://www.hawaiipublicschools.org/ConnectWithUs/Organization/OfficesAndBranches/Pages/CRCO.aspx. *See also* Chapter 4, notes 131 to 135, and accompanying text, *supra*.
[98] *See* Chapter 4, part III, subpart C, *supra* (discussing the HDOE's proposed amendments to the Hawaii Administrative Rules (HAR), which underwent a public hearing and currently await the Governor's approval).
[99] Sections 302A-462, 302A-464, and 302A-465, HRS, were repealed by Act 133, Session Laws of Hawaii 2012. Act 133's stated purpose was "to add clarity to or resolve conflicting or inconsistent language among different sections of law and to amend or repeal various sections of chapter 302A" of the HRS. According to the Act, the state's transition from an elected to an appointed Board of Education prompted a review of the HRS "to determine if amending or reducing statutory constraints and requirements might assist the board of education and department of education in creating a more effective educational delivery system." Section 302A-463, HRS, was repealed by Act 4, Session Laws of Hawaii 2010. The purpose of Act 4, according to its title, was to amend the Hawaii Revised Statutes and the Session Laws of Hawaii to correct errors and references, clarify language, and delete obsolete and unnecessary provisions.
[100] *See* §302A-463, HRS, *repealed by* Act 4, Session Laws of Hawaii 2010. *See also* Chapter 4, notes 325 to 336, and accompanying text, *supra* (discussion on the HDOE's recent efforts to better address gender equity subsequent to the filing of a lawsuit alleging violations of Title IX in HDOE athletic programs).
[101] *See* §302A-462, HRS, *repealed by* Act 133, Session Laws of Hawaii 2012.
[102] *See* §302A-464, HRS, *repealed by* Act 133, Session Laws of Hawaii 2012.
[103] *See id.*

- Requiring that by December 31, 2000, the Superintendent of Education report to the Legislature and Advisory Commission on compliance with Title IX, including "a compliance plan with timelines for every public high school, an analysis and assessment of current activities with respect to Title IX compliance, and itemized expenditures for athletics."[104]

b. Construction with Other Laws

Neither section 302A-461, HRS, nor any other provision within Chapter 302A, HRS (Relating to Education), appears to address this matter.[105]

2. Hawaii Revised Statutes, Section 302A-1001: Prohibition Against Student Bias

Section 302A-1001, HRS, provides that "[n]o person in the State, on the basis of sex, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational or recreational program or activity receiving state or county financial assistance or utilizing state or county facilities."[106]

a. Enforcement

The law itself does not specify how the prohibition against sex-based discrimination is to be enforced, nor does Part IV (Provisions Affecting System Structure), subpart B (Accountability), of Chapter 302A, HRS. Of note is that section 302A-1004, HRS, requires the HDOE to publish annual reports on its website as part of a comprehensive system of educational accountability, but the information to be reported does not explicitly reference enforcement of anti-discrimination laws.[107] Although, Chapter 41 of Title 8, HAR (Civil Rights Policy and Complaint Procedure), currently allows complaints to be filed by students, parents, or persons eligible to receive benefits from or participate in HDOE programs, the proposed new Chapter 89 of Title 8, HAR, which the HDOE has proposed to supersede Chapter 41 of Title 8, HAR, would

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[104] *See* §302A-465, HRS, *repealed by* Act 133, Session Laws of Hawaii 2012.
[105] *See generally* Chapter 302A, HRS.
[106] Section 302A-1001, HRS.
[107] *See* §302A-1004(b) and (c), HRS. *See also* State Reports webpage, HDOE website, at http://www.hawaiipublicschools.org/VisionForSuccess/SchoolDataAndReports/StateReports/Pages/home.aspx (last visited September 10, 2019). The State Reports webpage offers a variety of reports on the HDOE's strategic plan, finances, student readiness, school performance and quality, special education, compliance with legislative requests, and audits. With one exception, none of the most current versions of these reports, including the most recent report on educational accountability (named the "Strive HI Performance System") required by section 302A-1004, HRS, appear to reference enforcement of Title IX, civil rights, or anti-discrimination laws. The sole exception is a Title IX Compliance Report, dated December 2018 (December 2018 Title IX Compliance Report), that was submitted in response to House Concurrent Resolution No. 198, S.D. 1, Regular Session of 2018. The December 2018 Title IX Compliance Report, *available at* http://www.hawaiipublicschools.org/Reports/LEG19_TitleIX.pdf, addresses HDOE actions taken pursuant to the December 20, 2017, Resolution Agreement with the Office for Civil Rights (OCR) of the United States Department of Education (USDOE) and includes a focus on actions taken to improve compliance with Title IX requirements for all HDOE athletic facilities.

also authorize the filing of complaints. Complaints under this law would also presumably be allowed under the amended Chapter 19 of Title 8, HAR, as discussed previously.[108]

b. Construction with Other Laws

As noted above, Chapter 302A, HRS, appears to be silent on this matter.[109]

3. Hawaii Revised Statutes, Section 368D-1: Prohibition on Discrimination in State Educational Programs and Activities

Section 368D-1, HRS, was enacted by Act 110, Session Laws of Hawaii 2018, which is the genesis of this report. This section, intended to function as a state law corollary to Title IX, provides that "[n]o person in the State, on the basis of sex, including gender identity or expression as defined in section 489-2, or sexual orientation as defined in section 489-2, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination" under any "state educational program or activity[,]" including those of the University of Hawaii, Department of Education, or public charter schools, or any "educational program or activity that receives state financial assistance."[110]

Act 177, Session Laws of Hawaii 2019, amended section 368D-1, HRS, to clarify that certain activities are exempt from the law's prohibition on sex-based discrimination.[111]

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[108] *See* §8-41-2, HAR (authorizing complaints of alleged violations of "Section 296-61, Hawaii Revised Statutes," which was recodified as §302A-1001, HRS, in 1996. The same section defines "complainants" to mean "a student or a group of students, or a parent or a group of parents, or a person who meets the essential eligibility requirements to receive the benefits of or to participate in, a program, activity, or service of the public school system and who submits a complaint alleging a violation of a right to nondiscrimination in educations." The definition specifically excludes employees and applicants for employment. *See also* Chapter 4, notes 167 to 183 and accompanying text, *supra* (discussing the complaint procedure established by Title 8, Chapter 41, HAR). *See also* note 98 and accompanying text, *supra* (discussing the proposed amendments to Title 8, HAR, and their impact on the enforcement of the State's Title IX corollaries).

[109] *See generally* Chapter 302A, HRS.

[110] *See* §368D-1, HRS. Section 368D-1(g), HRS, as amended by Act 177, Session Laws of Hawaii 2019, defines the following terms:

> "Educational program or activity that receives state financial assistance" means any educational program or activity that receives state financial assistance, in any amount, for any purpose. The term does not exclude an educational program or activity that also receives federal funds.
>
> "State educational program or activity" means an educational program or activity of the University of Hawaii, the department of education, or public charter schools.

[111] The following activities are exempt under section 368D-1, HRS, as amended by Act 177, Session Laws of Hawaii 2019:

- Membership practices of social fraternities or sororities or voluntary youth service organizations.
- Maintenance of separate living facilities for different sexes by an educational institution receiving state funds.
- An educational institution's administration of a scholarship, fellowship, or other form of financial assistance pursuant to a will, trust, or similar instrument that requires awards be made to members of a particular sex

a. Enforcement

Section 368D-1, HRS, provides that nothing in Chapter 368D, HRS, "shall preclude a student participating in any educational program or activity who is aggrieved by a violation of this chapter from filing a civil action in a court of competent jurisdiction;" it further provides that a "person, or an organization or association on behalf of a person alleging a violation of this chapter may file a complaint pursuant to this chapter."[112] In addition, the HDOE's proposed amendments to the HAR would expressly authorize complaints of alleged violations of this law to be filed pursuant to the enforcement process established by the proposed Chapter 89 of Title 8, HAR; complaints under this law would also presumably be allowed under the amended Chapter 19 of Title 8, HAR, as discussed previously.[113]

b. Construction with Other Laws

Chapter 368D, HRS, is silent on this matter.[114]

D. Kentucky

1. Kentucky Revised Statutes, Sections 344.550-344.575: Sex Equity in Education

Kentucky's Sex Equity in Education law provides that "[n]o person 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 state financial assistance[.]"[115] The law applies to public or private preschools, elementary, and secondary schools, and "institution[s] of vocational, professional, or higher education" that receive state assistance.[116] With regard to admissions, the law only applies to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education[117] and does not apply to traditionally single sex undergraduate higher education institutions.[118] There are exemptions for certain religious organizations,

specified therein; provided that the overall effect of sex-restricted financial assistance shall not discriminate on the basis of sex.

[112] *See* §368D-1, HRS, as amended by Act 177, Session Laws of Hawaii 2019. Potential considerations related to establishing an enforcement mechanism for Chapter 368D, HRS, are discussed in the Observations and Conclusions section in Chapter 7 of this report, part II, *infra*.

[113] It should be noted that neither the current language in Title 8, Chapter 19, HAR, nor the proposed amendments specifically reference Chapter 368D, HRS. *See* note 98 and accompanying text, *supra* (discussing the proposed amendments to Title 8, HAR, and their impact on the enforcement of the State's Title IX corollaries).

[114] *See generally* Chapter 368D, HRS, as amended by Act 177, Session Laws of Hawaii 2019.

[115] Section 344.555(1), Kentucky Revised Statutes (KRS).

[116] *See* §344.550(1).

[117] *See* §344.555(1)(a), KRS.

[118] *See* §344.555(1)(d), KRS.

military training institutions, certain fraternities and sororities, and other traditionally single-sex organizations.[119]

a. Enforcement

Each state department and agency that is empowered to extend state financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is required to promulgate regulations to achieve the objectives of the Kentucky law.[120] However, this requirement only applies to state departments and agencies whose financial assistance represents at least two percent of the total state financial assistance received by the educational institution.[121]

Such departments and agencies, after the opportunity of a hearing and an express finding of a violation, may terminate or refuse to grant or continue assistance to the recipient in violation.[122] However, no action may be taken unless the department or agency has advised the person or persons of their failure to comply with regulations and has also determined that compliance cannot be secured by voluntary means.[123] The department or agency must then file a written report on the action with the committees of the House of Representatives and Senate having legislative jurisdiction over the program.[124] Further, no action may take effect until thirty days after the report has been filed.[125]

Any final action taken by a department or agency pursuant to the Kentucky law is subject to judicial review as may otherwise be provided by law for similar action taken by the department or agency on other grounds.[126] In the case of action not otherwise subject to judicial review, any aggrieved funding recipient may obtain judicial review of the action in the Franklin Circuit Court in Kentucky.[127]

b. Construction with Other Laws

The Kentucky law provides that "[n]othing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which state financial assistance is extended by way of a contract of insurance or guaranty."[128]

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[119] *See* §344.555(1)(b) through (e), KRS.
[120] *See* §344.560, KRS.
[121] *See id*.
[122] *See id.*
[123] *See id*.
[124] *See id*.
[125] *See id*.
[126] *See* §344.565, KRS.
[127] *See id*.
[128] Section 344.570, KRS.

E. Maine

1. Maine Revised Statutes, Title 5, Part 12, Chapter 337, Subchapter 5-B: Educational Opportunity

The Educational Opportunity subchapter of Maine's Human Rights Act law provides that all individuals at an educational institution must be able to participate in all educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs, without discrimination because of sex, sexual orientation, a physical or mental disability, national origin, or race.[129] The law applies to K-12 and post-secondary educational institutions, including public schools as well as private schools that receive public funds and admit both male and female students.[130]

More specifically, this law provides that it is unlawful, on the basis of sex, to:

(1) Exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination in any academic, extracurricular, research, occupational training, or other program or activity;

(2) Deny a person equal opportunity in athletic programs;

(3) Apply any rule concerning the actual or potential family or marital status of a person or to exclude any person from any program or activity because of pregnancy or related conditions;

(4) Deny admission to the institution or program or fail to provide equal access to and information about an institution or program through recruitment; or

(5) Deny financial assistance availability and opportunity.[131]

a. Enforcement

As with the rest of the Human Rights Act, Maine's Human Rights Commission (Commission)[132] has the primary responsibility to investigate all instances of discrimination under the Educational Opportunity subchapter.[133]

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[129] *See* §4601, Title 5, Administrative Procedures and Services, Maine Revised Statutes (MRS).
[130] *See* 5 MRS §4553(2-A) (defining "educational institution"); *see also* 05-071 Code of Maine Rules (CMR) ch. 4-A §02(D) (defining "approved for tuition purposes" to mean any school or educational program approved by the Commissioner of Education for the receipt of public funds).
[131] *See* 5 MRS §4602.
[132] The Maine Human Rights Commission is an independent commission consisting of no more than five members appointed by the Governor of Maine. *See* 5 MRS §4561.
[133] *See* 5 MRS §4566.

Any aggrieved person, or an employee of the Commission, may file a complaint with the Commission alleging a violation of the Educational Opportunity subchapter.[134] The Commission's complaint procedures require that parties to a complaint have the opportunity to resolve the matter before any preliminary investigation of the complaint is conducted.[135] Subsequently, a preliminary investigation, if necessary, is to be conducted for the purpose of determining whether there are "reasonable grounds" to believe that unlawful discrimination has occurred.[136]

If reasonable grounds are found to exist, the Commission may either:

(1) Endeavor to eliminate the discrimination using informal means such as conciliation, provided that no situation characterized as an "emergency" exists.[137] The Commission will find an emergency exists if the victim of the discrimination is "suffering or is in danger of suffering severe financial loss in relation to circumstances, severe hardship[,] or personal danger as a result of such discrimination[;]"[138] or

(2) File a civil action in the Maine Superior Court to seek appropriate relief, provided that conciliation efforts have failed or that the Commission believes the discrimination will cause "irreparable injury or great inconvenience" if the relief is not immediately granted.[139]

If the Commission decides to attempt to eliminate the discrimination using informal means such as conciliation, the Commissioner of Education[140] or the Commissioner of Education's designee is authorized by the law to participate in the process.[141] Further details of the Commission's procedure for enforcing the Educational Opportunity subchapter are contained in the summary table in Appendix D.

A complainant may request a right to sue letter from the Commission if the Commission has not filed a civil action, or entered into a conciliation agreement, within one hundred eighty days of the complaint being filed with the Commission.[142] The issuance of the letter results in the end of the Commission's investigation of the complaint.[143] Remedies available in a civil suit, regardless of whether the suit is filed by the Commission or an aggrieved person, include but are not limited to cease and desist orders and civil penal damages.[144] In certain circumstances, a court may also award attorney's fees.[145]

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[134] *See* 5 MRS §4611.
[135] *See* 5 MRS §4612(1)(A).
[136] *See* 5 MRS §4612(1)(B).
[137] *See* 5 MRS §4612(3).
[138] *See* 5 MRS §4612(4)(B).
[139] *See* 5 MRS §4612(4).
[140] The Commissioner of Education serves as the chief executive officer of Maine's Department of Education and is charged with, among other duties, enforcing regulatory requirements for the state's schools. *See* 20-A MRS §251-A.
[141] *See* 5 MRS §4604.
[142] *See* 5 MRS §4612(6).
[143] *See id*.
[144] *See* 5 MRS §4613(2)(B).
[145] *See* 5 MRS §4614.

An aggrieved person may also file a civil action without having gone through the Commission's complaint procedures.[146] However, a person who files a civil action without having gone through the Commission's complaint procedure is prohibited from recovering attorney's fees and civil penal damages.[147]

b. Construction with Other Laws

The Maine Human Rights Act appears to be silent on this matter.[148]

F. Nebraska

Nebraska has two separate but very similar Title IX corollaries. The Nebraska Equal Opportunity in Education Act applies to preschools and K-12 educational institutions, while the Nebraska Equal Opportunity in Postsecondary Education Act applies to post-secondary educational institutions. Each is discussed below.

1. Nebraska Revised Statutes, Chapter 79, Article 2(l): Nebraska Equal Opportunity in Education Act

The Nebraska Equal Opportunity in Education Act (EOEA) declares that it is an unfair or discriminatory practice for any educational institution to discriminate on the basis of sex in any program or activity.[149] The EOEA applies to public preschools, public elementary and secondary schools, educational service units,[150] and the Nebraska Department of Education.[151]

Discriminatory practices that are prohibited under the EOEA include the:

(1) Exclusion of a person or persons from participation in, denial of the benefits of, or subjection to discrimination in any academic, extracurricular, research, occupational training, or other program or activity, except athletic programs;

(2) Denial of comparable opportunity in intramural and interscholastic athletic programs;

(3) Discrimination among persons in employment and the conditions of such employment; and

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[146] *See* 5 MRS §4621.
[147] *See* 5 MRS §4622.
[148] *See generally* Title 5, Chapter 337, MRS.
[149] Section 79-2,116, Revised Statutes of Nebraska (Neb. Rev. St.). Note that the law does not prohibit any educational institution from maintaining separate toilet, locker room, or living facilities for different sexes. *See* §79-2,124, Neb. Rev. St.
[150] Educational service units are entities that provide educational services to member school districts. *See* §79-1204, Neb. Rev. St.
[151] *See* §79-2,115, Neb. Rev. St.

(4) Application of any rule that discriminates on the basis of whether a person is pregnant, the person's marital status, or whether the person is a parent.[152]

a. Enforcement

The EOEA establishes a framework for which governance, rules, and procedures are established. The governing boards of educational institutions,[153] with technical assistance from the Nebraska Department of Education, are responsible for formulating the rules, activities, and programs needed to carry out the law.[154]

An aggrieved person may file a complaint with the governing board of the educational institution committing the violation.[155] The governing board has the authority to take action to correct the violation, including but not limited to the termination of the discriminatory practice or policy and the award of compensatory money damages to the aggrieved person.[156] The governing board is required to dispose of complaints and notify claimants in writing of its findings. Claimants can accept written dispositions in writing within sixty days of receipt of the disposition and, at that time, the disposition is considered final.[157] A claimant's failure to notify the governing board of acceptance within the sixty-day period is deemed a rejection of the disposition.[158]

If the claimant does not accept the written disposition, the claimant, within one hundred eighty days after receipt of the disposition, may file an original action, in the district court of the judicial district where the educational institution is located, for equitable relief and compensatory money damages. If the action includes a claim for money damages, the claimant is entitled to a trial by jury as to the claim for damages, unless the claimant expressly waives in writing such trial by jury.[159]

If the governing board fails to dispose of any written complaint within one hundred eighty days after the date of filing, the complaint may be withdrawn by the claimant. The claimant may then file an original action in the district court of the judicial district where the educational institution is located; provided that the action must be filed within two years after the date of the filing of the complaint.[160] This complaint process must be followed before an original action can be filed in district court.[161]

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[152] Section 79-2,116, Neb. Rev. St.
[153] "Governing board" means the duly constituted board of any public school system of elementary or secondary schools. §79-2,115, Neb. Rev. St.
[154] *See* §79-2,117, Neb. Rev. St.
[155] The complaint must be made in writing, under oath, within one hundred eighty days after such alleged violation, and shall set forth the claimant's address and the facts of such alleged violation with sufficient particularity as to permit the governing board to understand and investigate the complained of conduct. *See* §79-2,118, Neb. Rev. St.
[156] *See* §79-2,118, Neb. Rev. St.
[157] *See* §79-2,119, Neb. Rev. St.
[158] *See id*.
[159] *See* §79-2,120, Neb. Rev. St.
[160] *See* §79-2,121, Neb. Rev. St.
[161] *See* §79-2,122, Neb. Rev. St.

b. Construction with Other Laws

The EOEA specifically provides that it does not prohibit the assertion of claims for discrimination pursuant to the Nebraska Fair Employment Practice Act (NFEP). However, filing a complaint pursuant to the EOEA constitutes a waiver of any right to seek relief pursuant to NFEP and, similarly, filing a complaint pursuant to NFEP constitutes a waiver of any right to seek relief pursuant to the EOEA.[162]

2. Nebraska Revised Statutes, Chapter 85, Article 9(l): Nebraska Equal Opportunity in Postsecondary Education Act

The Equal Opportunity in Postsecondary Education Act (EOPEA) is the higher education counterpart to the EOEA. The language of the two laws closely track with each other. The EOPEA specifically applies to the University of Nebraska, the Nebraska State College System, and the community colleges.[163]

Like the EOEA, the EOPEA declares that it is an unlawful or discriminatory practice for any educational institution to discriminate on the basis of sex in any program or activity.[164] The EOPEA prohibits the same discriminatory practices that are prohibited by the EOEA.[165]

a. Enforcement

The Regents of the University of Nebraska, the Trustees of the Nebraska State Colleges, and the board of governors of each community college (referred to by the law as the institution's respective governing board[166]) are responsible for adopting and formulating the rules, activities, and programs needed to carry out the EOPEA.[167]

The enforcement provisions of the EOPEA also are identical to the enforcement provisions of the EOEA described previously.[168] An aggrieved person may file a complaint with the educational institution's governing board, which has the authority to correct the violation and award compensatory money damages.[169] The provisions authorizing a private right of action are also identical to those of the EOEA; namely, a claimant may file a civil claim if the claimant does not accept the governing board's written disposition, or if the governing board fails to dispose of a written complaint within one hundred eighty days of the complaint's original filing.[170]

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[162] *See* §79-2,123, Neb. Rev. St.
[163] *See* §85-9,167, Neb. Rev. St.
[164] *See* §85-9,168, Neb. Rev. St.
[165] *See id. See also* note 152 and accompanying text, *supra*.
[166] *See* §85-9,167, Neb. Rev. St.
[167] *See* §85-9,169, Neb. Rev. St.
[168] *See* notes 155 to 161 and accompanying text, *supra*.
[169] *See* §85-9,170(1) and (2), Neb. Rev. St.
[170] *See* §§85-9,172 to 85-9,174, Neb. Rev. St.

b. Construction with Other Laws

Like the similar provision in the EOEA,[171] the EOPEA does not prohibit the assertion of claims for discrimination pursuant to the NFEP, but filing a complaint under one law will constitute a waiver to seek relief under the other law.[172]

G. New Hampshire

1. New Hampshire Revised Statutes, Section 186:11: Duties of the State Board of Education—Discrimination

New Hampshire law requires the State Board of Education, which has jurisdiction over the state's public elementary and secondary schools,[173] to ensure that:

(1) There is no unlawful discrimination in any public school against any person on the basis of sex, race, creed, color, marital status, or national origin in educational programs; and

(2) There is no denial to any person on the basis of sex, race, creed, color, marital status, national origin, or economic status of the benefits of educational programs or activities.[174]

a. Enforcement

It appears that there are no state statutes or administrative rules related to the foregoing requirement. However, an administrative rule pertaining to the substantive duties of school boards includes a requirement that *each school board* adopt a rule to ensure that there shall be no unlawful discrimination, on the basis of sex, race, age, creed, color, marital status, national origin, or disability, in educational programs or activities.[175]

b. Construction with Other Laws

The New Hampshire law appears to be silent on this matter.[176]

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[171] *See* note 162 and accompanying text, *supra*.
[172] *See* §85-9,175, Neb. Rev. St.
[173] The Department of Education, which the State Board of Education is responsible for overseeing pursuant to §21-N:11, New Hampshire Revised Statutes (N.H. Rev. Stat.), is responsible for "[p]roviding general supervision for elementary and secondary schools, teachers and administrators." *See* §21-N:2, N.H. Rev. Stat.
[174] *See* §186:11(XXXIII), N.H. Rev. Stat.
[175] *See* New Hampshire Code of Administrative Rules (N.H. Code Admin. R.), Board of Education (Ed), §303.01.
[176] *See generally* §186:11, N.H. Rev. Stat.

H. New York

New York has at least three laws that prohibit sex or gender discrimination in education. The New York Human Rights Law prohibits public and private K-12 and post-secondary educational institutions from denying the use of its facilities to any person because of the person's sex, or permitting the harassment of any student or applicant because of that student's or applicant's sex. In addition, the New York Education Law includes a separate prohibition against sex-based discrimination in post-secondary education admissions. Finally, New York's "Enough is Enough" law provides for a unified approach to addressing sexual assault in New York post-secondary educational institutions. Each of these laws is discussed below.

1. New York Executive Law, Article 15: Human Rights Law

New York's Human Rights Law prohibits discrimination due to age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability in a variety of contexts.[177] Among its provisions, the Human Rights Law establishes that the opportunity to obtain an education without discrimination because of sex is a civil right.[178] The law provides that it is an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person "otherwise qualified" by reason of the person's sex, or to permit the harassment of any student or applicant, by reason of the person's sex.[179] Until 2019, the law had been interpreted to apply only to private, non-sectarian educational institutions. However, the New York Legislature has clarified that the law applies to K-12 and post-secondary public schools, as well as any K-12 or post-secondary private school that holds itself out to the public to be non-sectarian.[180]

a. Enforcement

The Human Rights Law is enforced by the New York State Division of Human Rights (Human Rights Division).[181] Any person "claiming to be aggrieved by an unlawful discriminatory practice" under the Human Rights Law, or that person's attorney-at-law, may file a complaint with the Human Rights Division.[182] Certain other persons and entities are also authorized to initiate complaints, including the Attorney General and the Human Rights Division itself.[183]

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[177] *See* New York Executive Law (N.Y. Exec. Law), Article 15. *See also* N.Y. Exec. Law §291.
[178] *See* N.Y. Exec. Law §291.
[179] *See* N.Y. Exec. Law §296(4).
[180] *See* N.Y. Exec. Law §292(37) (defining "educational institution"). Prior to July 25, 2019, the Human Rights Law had been held to apply only to private, non-sectarian educational institutions by the New York Court of Appeals. *See Equal Educational Opportunity*, New York State Attorney General, https://ag.ny.gov/civil-rights/equal-educational-opportunity (last visited September 6, 2019); *see also In re N. Syracuse Cent. Sch. Dist. v. New York State Div. of Human Rights*, 19 N.Y.3d 481 (2012) (holding that the Human Rights Law applies only to private, non-sectarian educational institutions). The New York Legislature amended the law in 2019 to apply to both public and private schools. *See* 2019 N.Y. Sess. Laws Ch. 116 (McKinney).
[181] *See* N.Y. Exec. Law §295(6).
[182] *See* N.Y. Exec. Law §297(1).
[183] *See id*.

After a complaint is initiated, the Human Rights Division is required to make a "prompt and fair investigation" of the complaint[184] and make a determination of whether there is probable cause that an unlawful discrimination practice occurred.[185] After the determination is made, the Division must hold a public hearing before a hearing examiner, who thereafter shall prepare a proposed written order.[186] A final order is issued by the Human Rights Division's Commissioner and may include a variety of remedies, including a requirement that a respondent cease a practice or affirmatively take other action.[187] The Commissioner also has the authority to award compensatory damages, fines, and other payments.[188] Decisions of the Division are subject to judicial review.[189]

b. Construction with Other Laws

The Human Rights Law provides that:

> Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of race, creed, color or national origin; but, as to acts declared unlawful by [the Human Rights Law], the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this article, he or she may not subsequently resort to the procedure herein.[190]

2. New York Education Law, Section 313: Unfair Educational Practices

In addition to the Human Rights Law, New York's Education Law contains a more limited prohibition against sex-based discrimination in the admissions process of an educational program or course. Unlike the Human Rights Law, which applies to both K-12 and post-secondary institutions, the provisions of the Education Law apply only to post-secondary educational institutions, including both public and private degree-granting institutions.[191]

Specifically, section 313 of the New York Education Law ("section 313") declares that it is an unfair educational practice to exclude, limit, or discriminate against "any person or persons

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[184] 9 Compilation of Codes, Rules, and Regulations of the State of New York (NYCRR) 465.6(a).
[185] *See* N.Y. Exec. Law §297(2)(a).
[186] *See* N.Y. Exec. Law §297(4); *see also* 9 NYCRR 465.17(c)(1).
[187] *See* N.Y. Exec. Law §297(4)(c).
[188] *See id*.
[189] *See* N.Y. Exec. Law §298.
[190] *See* N.Y. Exec. Law §300.
[191] *See* N.Y. Educ. Law §313(2)(a). Specifically, the section applies to "any educational institution of post-secondary grade subject to the visitation, examination or inspection of the state board of regents or the state commissioner of education and any business or trade school in the state." The Commissioner of Education, through the New York Office of College and University Evaluation, has regulatory oversight over private degree-granting institutions within the State of New York. *See College and University Evaluation*, New York State Education Department, http://www.nysed.gov/college-university-evaluation (last visited September 15, 2019).

seeking admission as students to such institution or to any educational program or course" because of race, religion, creed, sex, color, marital status, age, sexual orientation, gender identity or expression, or national origin.[192] Notwithstanding this prohibition, the law does not "impair or abridge the right of an independent institution, which establishes or maintains a policy of educating persons of one sex exclusively, to admit students of only one sex."[193]

a. Enforcement

A person seeking admission as a student who claims to be aggrieved by an unfair educational practice under section 313, or the person's parent or guardian, may file a complaint with the Commissioner of Education.[194] If the Commissioner of Education has reason to believe a person has been discriminated against, the Commissioner may also file a complaint on that person's behalf.[195] After a complaint has been initiated, the Commissioner must conduct an investigation to determine if "probable cause exists for crediting the allegations of the petition[.]"[196] If the Commissioner finds probable cause, the Commissioner must attempt to eliminate the unfair educational practice by "informal methods of persuasion, conciliation or mediation[.]"[197]

If the informal methods fail to eliminate the practice, the Commissioner "shall have the power to refer the matter to the Board of Regents [of the University of the State of New York],"[198] which must then conduct a hearing.[199] If the Board of Regents determines that a respondent has engaged in an unfair educational practice, it shall issue "an order requiring the respondent to cease and desist from such unfair educational practice, or such other order as they deem just and proper."[200] The order is subject to judicial review.[201]

b. Construction with Other Laws

The New York Education Law does not appear to include any provisions that describe how section 313 should be construed in relationship with other laws.

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[192] *See* N.Y. Educ. Law §313(3)(a).
[193] *See id*.
[194] *See* New York Educ. Law §313(5)(a). The Commissioner of Education serves as the chief administrative officer of the New York State Education Department. *See* New York Educ. Law §101. The Education Department oversees both K-12 education and post-secondary education in New York. *See About the New York State Education Department*, New York State Education Department, http://www.nysed.gov/about (last visited September 9, 2019).
[195] *See* New York Educ. Law §313(5)(b).
[196] *See* New York Educ. Law §313(5)(a).
[197] *See id*.
[198] The Board of Regents of the University of the State of New York is the seventeen-member policy-making body that oversees the New York State Education Department. Among its duties is the appointment of the Commissioner of Education. *See* New York Educ. Law §101; *see also About the University of the State of New York*, New York State Education Department, http://www.nysed.gov/about/about-usny (last visited September 9, 2019); *see also* note 191, *supra* (explaining jurisdiction and officers of the New York State Education Department).
[199] *See* New York Educ. Law §313(5)(e).
[200] *See* New York Educ. Law §313(5)(i).
[201] *See* New York Educ. Law §313(6)(b).

3. New York Education Law, Article 129-B: Implementation by Colleges and Universities of Sexual Assault, Dating Violence, Domestic Violence and Stalking Prevention and Response Policies and Procedures ("Enough is Enough" Law)

The New York "Enough is Enough" law[202] applies to any college or university, whether public or private, that is either chartered by the Board of Regents of the University of the State of New York or incorporated by special act of the New York State Legislature and that maintains a campus in New York.[203] The law provides for a unified approach to universities' response to sexual assault, including, among other things:

(1) A statewide uniform "affirmative consent" standard;[204]

(2) A uniform Student's Bill of Rights, including rights in situations that involve sexual misconduct;[205]

(3) A statewide alcohol and/or drug use amnesty policy;[206]

(4) Mandatory transcript notation;[207]

(5) Mandatory campus climate assessments and reporting;[208]

(6) A requirement that schools employ a sexual assault nurse examiner;[209] and

(7) Extensive training for staff and students about sexual misconduct.[210]

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[202] N.Y. Educ. Law Article 129-B, codified at §6439 to §6449. Implementation by Colleges and Universities of Sexual Assault, Dating Violence, Domestic Violence and Stalking Prevention and Response Policies and Procedures.

[203] *See* N.Y. Educ. Law §6439(1). The Board of Regents of the University of the State of New York has the authority to charter private universities and colleges. *See* N.Y. Educ. Law §216. Only institutions with a degree-granting authority in their charter may confer degrees. *See* N.Y. Educ. Law §224; *see also Relationships of Board of Regents and State Education Department to Private Educational Institutions*, New York State Department of Education, http://www.counsel.nysed.gov/i-relationships-board-regents-and-state-education-department-private-educational-institutions (last visited September 16, 2019).

[204] *See* N.Y. Educ. Law §6441.

[205] *See* N.Y. Educ. Law §6443.

[206] *See* N.Y. Educ. Law §6442.

[207] *See* N.Y. Educ. Law §6444.

[208] *See* N.Y. Educ. Law §6445. The purpose of the campus climate assessments is to "ascertain general awareness and knowledge of the provisions of" campus policies and procedures relating to sexual assault, dating violence, and domestic violence and stalking prevention and response. Assessment results must be published on each school's website without revealing personally identifiable information or information that can reasonably lead to the identification of an individual who responded to the assessment.

[209] *See* N.Y. Educ. Law §6444.

[210] *See* N.Y. Educ. Law §6447.

Enough is Enough also established a Sexual Assault Victims Unit within the Division of State Police, which receives specialized training in responding to sexual assaults, including campus sexual assault and related crimes.[211]

a. Enforcement

The New York State Education Department is responsible for issuing regulations in consultation with educational institutions, collecting data, and producing reports to the governor and the legislature.[212] Educational institutions are required to submit an annual certificate of compliance with the Enough is Enough law to the department.[213] Institutions that fail to file a certificate of compliance are ineligible to receive state aid or assistance.[214] In addition, schools must provide the department with all written rules and policies every ten years[215] and provide an annual data report on domestic dating violence, stalking, and sexual assault to the department.[216]

The Enough is Enough law expressly states that it does not "create a new private right of action for any person."[217]

b. Construction with Other Laws

The law provides that it shall not be construed to "limit in any way the provisions of the penal law" that apply to a criminal action and that "[a]ction pursued through the criminal justice process shall be governed by the penal law and the criminal procedure law."[218]

I. Rhode Island

1. General Laws of Rhode Island, Section 16-38-1.1: Discrimination Because of Sex

Section 16-38-1.1 of the General Laws of Rhode Island prohibits sex-based discrimination in public K-12 and post-secondary schools.[219] The law prohibits both K-12 and post-secondary schools from discriminating on the basis of sex in admissions, curricular programs, extracurricular activities including athletics, counseling, and "any and all other school functions and activities."[220] In addition, K-12 schools are prohibited from sex-based discrimination in "employment practices" and must be free from discrimination based on sexual

[211] *See* §3 of Chapter 76, Laws of New York 2015.
[212] *See* N.Y. Educ. Law §6449.
[213] *See* N.Y. Educ. Law §6440.
[214] *See id.*
[215] *See id.*
[216] *See* N.Y. Educ. Law §6449.
[217] *See* N.Y. Educ. Law §6440(9).
[218] *See* N.Y. Educ. Law §6440(8).
[219] *See* General Laws of Rhode Island (R.I. Gen. Laws) §16-38-1.1.
[220] *See id*.

orientation and gender identity or gender expression, while post-secondary institutions are prohibited from sex-based discrimination in "employment, recruitment, and hiring practices," as well as employment benefits, financial aid, student medical, hospital, and accident or life insurance benefits, facilities, housing, rules and regulations, and research.[221]

The law provides that schools may make accommodations, including maintaining separate restrooms, dressing, and shower facilities for males and females.[222]

a. Enforcement

The Rhode Island law designates the Commissioner of Elementary and Secondary Education[223] as the official responsible for enforcing the law at the K-12 education level. The Commissioner is empowered to "promulgate rules and regulations to enforce" the law's provisions.[224] At the local level, the law requires each local education agency[225] to designate an

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[221] *See id.* Note that while R.I. Gen. Laws §16-38-1.1 does not specifically prohibit discrimination based on sexual orientation and gender identity or gender expression, the Rhode Island Board of Education adopted a rule pursuant to that statute prohibiting such discrimination. *See* 200 Rhode Island Administrative Code 30-10-1.3 (requiring local education agencies to "adopt a policy addressing the rights of transgender and gender non-conforming students to a safe, supportive and non-discriminatory school environment").

[222] Public K-12 schools may:

(1) Maintain separate restrooms, dressing, and shower facilities for males and females;
(2) Conduct separate human sexuality classes for male and female students;
(3) Prohibit female participation in all contact sports, provided that equal athletic opportunities that effectively accommodate the interests and abilities of both sexes are made available; and
(4) Provide extracurricular activities for students of one sex, including, but not limited to, father-daughter/mother-son activities, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; provided that school districts are required to allow and notify students that they may bring the adult of their parent's or guardian's choice to the event. *See* R.I. Gen. Laws §16-38-1.1(a)(2).

Public colleges and universities may:

(1) Maintain separate but comparable restrooms, dressing, and shower facilities for males and females, including reasonable use of staff of the same sex as the users of these facilities;
(2) Provide separate teams for contact sports or for sports where selection for teams is based on competitive skills, provided that equal athletic opportunities that effectively accommodate the interests and abilities of both sexes are made available;
(3) Maintain separate housing for men and women, provided that housing for students of both sexes is, as a whole, both proportionate in quantity to the number of students of that sex that apply for housing and comparable in quality and cost to the student; and
(4) Permit the establishment and operation of university based social fraternities and sororities. *See* R.I. Gen. Laws §16-38-1.1(b)(2).

[223] Both K-12 and post-secondary education in Rhode Island are governed by a seventeen-member Board of Education. *See* R.I. Gen. Laws §16-97-1(a) (establishing a Board of Education responsible for coordinating education "from pre-k through higher education"). The Board of Education has the responsibility to "approve the appointment of a commissioner of elementary and secondary education." R.I. Gen. Laws §16-97-1.2(f). The Commissioner of Elementary and Secondary Education serves as the chief administrative officer of the state's Department of Elementary and Secondary Education, and is responsible for carrying out the Board of Education's policies and programs in elementary and secondary education. *See* R.I. Gen. Laws §§16-60-6 and 16-1-5(1).

[224] *See* R.I. Gen. Laws §16-38-1.1(a)(5).

[225] Chapter 38 of title 16, R.I. Gen. Laws, does not define the term "local education agency." However, R.I. Gen. Laws §16-92-3 defines the term to mean "a public authority legally constituted by the state as an administrative agency to provide control and direction of kindergarten through twelfth grade public educational institutions."

equal opportunity officer to oversee compliance with the law within the agency's district.[226] Finally, the Board of Education[227] is required to designate an equal opportunity officer who is responsible for overseeing compliance with the law among all public elementary and secondary schools in the state.[228]

At the post-secondary level, the president of each public college, community college, university, and other public institution of higher learning in the state is responsible for enforcing this law within their respective institutions, and each official is empowered to promulgate rules and regulations to enforce its provisions. Each institution is also required to designate an equal opportunity officer or affirmative action officer who is responsible for overseeing compliance with the law within the educational institution.[229]

The statute does not establish an enforcement procedure for either the K-12 or post-secondary education level.

b. Construction with Other Laws

The Rhode Island law appears to be silent on this matter.[230]

J. Washington

Washington State has two separate Title IX corollaries. The first, the Sexual Equality law, applies solely to public K-12 schools, while the second, the Gender Equality in Higher Education law, applies solely to public post-secondary schools. Each law is discussed below.

1. Washington Revised Code, Title 28A, Chapter 640: Sexual Equality

Washington's Sexual Equality law prohibits "discrimination on the basis of sex for any student in grades K-12" in the state's public schools.[231] The law directs the Superintendent of Public Instruction to develop regulations and guidelines to eliminate sex discrimination.[232] This includes, with respect to school employment, that the following are maintained:

(1) Credential requirements on all personnel without regard to sex;

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[226] *See* R.I. Gen. Laws §16-38-1.1(a)(3).
[227] *See* note 223, *supra*.
[228] *See* R.I. Gen. Laws §16-38-1.1(a)(4). *See also* note 223 (describing jurisdiction of the Rhode Island Board of Education).
[229] *See* R.I. Gen. Laws §16-38-1.1(b)(3)-(4).
[230] *See generally* R.I. Gen. Laws §16-38-1.1.
[231] *See* Washington Revised Code (Wash. Rev. Code) §28A.640.010.
[232] The Superintendent of Public Instruction is required to develop regulations and guidelines to eliminate sex discrimination as it applies to public school employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and in textbooks and instructional materials used by students. *See* Wash. Rev. Code §28A.640.020.

(2) Equal pay scales and advancement opportunities between the sexes;

(3) Equal duty assignments between the sexes; and

(4) Equal hiring practices.

The law also requires that equal counseling and guidance services be given to all students equally, as well as requiring equality with respect to recreational and athletic activities for students.[233] The law further requires the Superintendent to develop a survey every three years, for distribution to each local district, to gauge student interest toward male or female participation in specific sports.[234]

At the local level, the law requires each school district to adopt and implement a written policy concerning sexual harassment, which must be reviewed by the Superintendent.[235] The policy is required to apply to all school district employees, volunteers, parents, and students, including conduct between students.[236]

a. Enforcement

The Office of the Superintendent of Public Instruction is responsible for ensuring that local school districts comply with the Sexual Equality law and is required to establish a compliance timetable and regulations for the law's enforcement. The office also must establish guidelines for affirmative action programs to be adopted by all school districts.[237]

Any person who alleges that unlawful discrimination based upon sex has occurred may file a complaint with the respective school district or public charter school.[238] Upon receiving a complaint, the school district or charter school must conduct a "prompt and thorough investigation" into the complaint and issue a decision within thirty calendar days of receiving the complaint.[239] Regulations require that a school district's or charter school's policy must "provide an option to appeal" this initial decision to a "party or board that was not involved in the initial complaint or investigation."[240] A decision on the appeal must be issued within thirty calendar days.[241]

A decision may be further appealed to the Office of Superintendent of Public Instruction, who may initiate a new investigation, including an investigation into "additional issues related to

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[233] *See id.*
[234] *See id.*
[235] *See* Wash. Rev. Code §28A.640.020(2)(b) and (c).
[236] *See* Wash. Rev. Code §28A.640.020(2)(b).
[237] *See* Wash. Rev. Code §28A.640.030.
[238] *See* Washington Administrative Code (Wash. Admin. Code) §392-190-065(1). Although Wash. Rev. Code §28A.640.020(2)(b) requires each school district to establish a policy on *sexual harassment*, Washington administrative rules authorize a person to file a complaint based on sex-based discrimination more broadly (i.e., a person may file a complaint based on sex-based discrimination that does not meet the definition of sexual harassment).
[239] *See* Wash. Admin. Code §392-190-065(4) to (6).
[240] *See* Wash. Admin. Code §392-190-070(1)
[241] *See* Wash. Admin. Code §392-190-070(3).

the complaint that were not included in the initial complaint or appeal[.]"[242] The Office of Superintendent of Public Instruction will then make an "independent determination as to whether the school district or public charter school has failed to comply" with the law and issue a written decision that includes "corrective actions deemed necessary to correct any noncompliance[.]"[243] Sanctions or corrective measures may include:

(1) Termination of all or part of state apportionment or categorical moneys to the offending school district;

(2) The termination of specified programs in which violations may be flagrant within the offending school district;

(3) The institution of a mandatory affirmative action program within the offending school district; and

(4) The placement of the offending school district on probation with appropriate sanctions until compliance is achieved.[244]

A decision by the Office of Superintendent of Public Instruction may be further appealed to the Superintendent of Public Instruction. In such an appeal, the Superintendent of Public Instruction must conduct a formal administrative hearing.[245]

In addition to the administrative process set forth by the Washington Administrative Code, a person aggrieved by a violation of the law or its regulations or guidelines also has a right of action in superior court for civil damages and equitable relief.[246]

b. Construction with Other Laws

The Washington Sexual Equality law provides that it shall be "supplementary to, and shall not supersede, existing law and procedures and future amendments thereto relating to unlawful discrimination based on sex."[247]

2. Washington Revised Code, Title 28B, Chapter 110: Gender Equality in Higher Education

While the Sexual Equality law prohibits discrimination based on sex at Washington's K-12 public schools, the state's Gender Equality in Higher Education law prohibits discrimination against students on the basis of gender at public post-secondary schools.[248] The

[242] *See* Wash. Admin. Code §392-190-075.
[243] *See id*.
[244] *See* Wash. Admin. Code §392-190-080. *See also* Wash. Rev. Code §28A.640.050.
[245] *See* Wash. Admin. Code §392-190-079.
[246] *See* Wash. Rev. Code §28A.640.040.
[247] *See* Wash. Rev. Code §28A.640.900.
[248] *See* Wash. Rev. Code §28B.110.010.

law applies specifically to "institutions of higher education," which is defined to mean state universities, regional universities, The Evergreen State College, and community colleges.[249]

In addition to the general prohibition against gender-based discrimination, the Gender Equality in Higher Education law also specifically requires institutions to ensure, without regard to gender:

(1) Equal pay scales and advancement opportunities, equal duty assignments, and equal conditions of employment;

(2) Equal admission standards for and access to academic programs;

(3) Availability of counseling and guidance services, including an emphasis on equal access to all career and vocational opportunities;

(4) Provision of recreational activities that meet the interests of students;

(5) Equitable award of financial aid; and

(6) Opportunities to participate in intercollegiate athletics, and related benefits and services, if offered by the institution.[250]

Post-secondary institutions are also required to develop and distribute policies and procedures for addressing sexual harassment and sexual violence complaints.[251]

a. Enforcement

The Student Achievement Council[252] is tasked with developing rules and guidelines in furtherance of the Gender Equality in Higher Education law, in consultation with the affected institutions.[253] The Student Achievement Council's Executive Director is responsible for

[249] *See* Wash. Rev. Code §28B.110.020. While the terms "state universities" and "regional universities" are not defined by the Gender Equality in Higher Education law, Wash. Rev. Code Chapter 28B.10, which establishes general provisions relating to the state's colleges and universities, defines the terms as follows:

(1) "State universities" means the University of Washington and Washington State University; and
(2) "Regional universities" means Western Washington University at Bellingham, Central Washington University at Ellensburg, and Eastern Washington University at Cheney.

The Chapter does not define "community colleges." *See* Wash. Rev. Code §28B.10.016.

[250] *See* Wash. Rev. Code §28B.110.030.

[251] *See id*.

[252] *See* Wash. Rev. Code §28B.77.001. Formerly known as the Council for Higher Education, the Student Achievement Council was created to "provide the focus and propose the goals for increasing educational attainment including improving student transitions from secondary to postsecondary education and training and between and among postsecondary institutions." Under Wash. Rev. Code §28B.77.060, it is also the designated state agency for purposes of receiving funding under Title IX and ensuring compliance with that law and any related federal directives.

[253] *See* Wash. Rev. Code §28B.110.030.

monitoring the respective institutions' compliance with the law, while the Council itself is responsible for establishing compliance timetables and guidelines.[254]

Although the Gender Equality in Higher Education law assigns the responsibility of compliance monitoring to the Student Achievement Council, the law provides for persons alleging violations under the law to file their complaints with the Washington State Human Rights Commission.[255] Specifically, a violation of any provision of the Gender Equality in Higher Education law constitutes an "unfair practice" under Washington Revised Code Title 49, Chapter 49.60, known as the "Law against Discrimination," which is enforced by the Human Rights Commission.[256] Any violation is addressable using the rights and remedies provided under Chapter 49.60.[257]

Chapter 49.60 allows any person who claims to be aggrieved by an unfair practice, or that person's attorney, to initiate a complaint with the Commission.[258] Commissioners, or the Executive Director of the Commission, may also initiate a complaint.[259] Once filed, the complaint must be investigated by Commission staff.[260] If the staff finds probable cause that an unfair practice has been or is being committed, the staff "shall immediately endeavor to eliminate the unfair practice by conference, conciliation, and persuasion".[261] If the conference, conciliation, and persuasion is unsuccessful, the Chairperson of the Commission must then appoint an administrative law judge to conduct a hearing.[262] After the hearing, the administrative law judge has the authority to issue an order to cease and desist from an unfair practice and order other remedies that will "effectuate the purposes of the law against discrimination[.]"[263] Any such order is subject to judicial review.[264]

Any person "deeming himself or herself injured" by an unfair practice also has a civil right of action.[265] A person may petition a court for injunctive relief or for the recovery of "actual damages sustained by the person," or both.[266]

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[254] *See* Wash. Rev. Code §28B.110.040.
[255] The Washington State Human Rights Commission is an independent commission made up of five members appointed by the Governor of Washington, with the advice and consent of the state senate. *See* Wash. Rev. Code §49.60.050.
[256] *See* Wash. Rev. Code §28B.110.050.
[257] *See id*.
[258] *See* Wash. Admin. Code §162-08-071.
[259] *See* Wash. Admin. Code §162-08-072.
[260] *See* Wash. Admin. Code §162-08-093.
[261] *See* Wash. Rev. Code §49.60.240.
[262] *See* Wash. Rev. Code §49.60.250.
[263] *See* Wash. Admin Code §162-08-298(1) to (4).
[264] *See* Wash. Rev. Code §49.60.270.
[265] *See* Wash. Rev. Code §49.60.030(2). *See also* Wash. Rev. Code §28B.110.050 (extending the right to bring a civil action under Chapter 49.60 to persons injured under the Gender Equality in Higher Education law).
[266] *See* Wash. Rev. Code §49.60.030(2).

b. Construction with Other Laws

Similar to its K-12 counterpart, the Gender Equality in Higher Education law states it "shall supplement, and shall not supersede, existing law and procedures relating to unlawful discrimination based on gender."[267]

[267] Wash. Rev. Code §28B.110.060.

TABLE 6.1
STATE COROLLARIES TO TITLE IX—WHAT THE LAWS COVER

State Law	**Does Law Expressly Condition State Funds on a Commitment to Comply?**	**State Law Covers What Level(s) of Education?** (i.e., K-12, post-secondary, or both)	**What Schools Does State Law Cover?** (i.e., state-run (public) schools, private schools, both, or any school that receives state funds)	**Who Does the Law Protect?**
Alaska Chapter 14-18, Alaska Statutes (AS): Prohibition Against Discrimination Based on Sex or Race in Public Education	Yes.	K-12 and post-secondary.	Any school that receives federal or state funds.[268]	Students and school employees/staff.
Stat/rule citation	AS §14.18.090 (authorizing the withholding of state funds).	AS §§14.18.020 and 14.18.080.	AS §14.18.010.	AS §14.18.010.
California California Government Code (Cal. Govt. Code), Title 2, Division 3, Part 1, Chapter 1, Article 9.5: Discrimination	Yes.	K-12 and post-secondary.[269]	Any school that receives federal or state funds.	Persons.

[268] Note, however, that section 7.1 of Alaska's state constitution prohibits the use of public funds "for the direct benefit of any religious or private educational institution." Despite this provision, however, AS 14.18.010 provides that the chapter applies to private schools that receive federal funds.
[269] The California Discrimination Article covers *any* program or activity that receives state assistance, which includes but is not limited to K-12 and post-secondary education programs and activities.

STATE COROLLARIES TO TITLE IX—WHAT THE LAWS COVER—Continued

State Law	**Does Law Expressly Condition State Funds on a Commitment to Comply?**	**State Law Covers What Level(s) of Education?** (i.e., K-12, post-secondary, or both)	**What Schools Does State Law Cover?** (i.e., state-run (public) schools, private schools, both, or any school that receives state funds)	**Who Does the Law Protect?**
Stat/rule citation	Cal. Govt. Code §11137.	*See* Cal. Govt. Code §11135(a) (providing that law applies to "any program or activity" conducted or funded by the state).	Cal. Govt. Code §11135(a) (providing that law applies to "any program or activity" conducted or funded by the state).	Cal. Govt. Code §11135(a).
California California Education Code (Cal. Educ. Code), Part 1, Chapter 2: Educational Equity	Yes.	K-12.	Any school that receives state funds.	Persons.
Stat/rule citation	5 California Code of Regulations (CCR) §4670.	Cal. Educ. Code §210.3.	Cal. Educ. Code. §210.3 and §220.	Cal. Educ. Code §220.
California Cal. Educ. Code, Part 40, Chapter 4.5: Equity in Higher Education Act	Law requires educational institution to provide an assurance to the agency administering funds to the institution's program that each of its programs or activities will be conducted in compliance with the law.	Post-secondary.	Any school that receives state funds.	Persons.
Stat/rule citation	Cal. Educ. Code §66290.	Cal. Educ. Code §66270; *see also* Cal. Educ. Code §66261.5.	Cal. Educ. Code §66270; *see also* Cal. Educ. Code §66261.5.	Cal. Educ. Code §66270.

STATE COROLLARIES TO TITLE IX—WHAT THE LAWS COVER—Continued

State Law	**Does Law Expressly Condition State Funds on a Commitment to Comply?**	**State Law Covers What Level(s) of Education?** (i.e., K-12, post-secondary, or both)	**What Schools Does State Law Cover?** (i.e., state-run (public) schools, private schools, both, or any school that receives state funds)	**Who Does the Law Protect?**
Hawaii Hawaii Revised Statutes (HRS) §302A-461: Gender Equity in Athletics	No. Law does not condition state financial assistance on compliance.	Grades 9-12 only.	State-run schools only.	Persons.
Stat/rule citation	N/A	HRS §302A-461(b).	HRS §302A-461(b).	HRS §302A-461(a).
Hawaii HRS §302A-1001: Prohibition Against Student Bias	No. Law does not condition state financial assistance on compliance.	K-12 and post-secondary.	Any school that receives state funds.	Persons.
Stat/rule citation	N/A	HRS §302A-1001.	HRS §302A-1001.	HRS §302A-1001.
Hawaii HRS §368D-1: Prohibition on Discrimination in State Educational Programs and Activities	No. Law does not condition state financial assistance on compliance.	K-12 and post-secondary.	Any school that receives state funds.	Persons.
Stat/rule citation	N/A	HRS §368D-1.	HRS §368D-1.	HRS §368D-1(a).

STATE COROLLARIES TO TITLE IX—WHAT THE LAWS COVER—Continued

State Law	**Does Law Expressly Condition State Funds on a Commitment to Comply?**	**State Law Covers What Level(s) of Education?** (i.e., K-12, post-secondary, or both)	**What Schools Does State Law Cover?** (i.e., state-run (public) schools, private schools, both, or any school that receives state funds)	**Who Does the Law Protect?**
Kentucky Kentucky Revised Statutes §§344.550-344.575: Sex Equity in Education	Yes.	K-12 and post-secondary.	Any school that receives state funds.	Persons.
Stat/rule citation	KRS §344.560.	KRS §344.550(1).	KRS §344.555(1); *see also* KRS §344.550.	KRS §344.555(1).
Maine Maine Revised Statutes, Chapter 337, Subchapter 5-B: Educational Opportunity	No. Law does not condition state financial assistance on compliance.	K-12 and post-secondary.	Any school that receives state funds.	Law prohibits discrimination against any "person", which is broadly defined to include individuals and a variety of public and private entities.
Stat/rule citation	N/A	5 MRS §4553(2-A).	5 MRS §4553(2-A); *see also* 05-071 CMR ch. 4-A §02(D) (defining "approved for tuition purposes").	5 MRS §4602; *see also* §4553(7) (defining "person").

STATE COROLLARIES TO TITLE IX—WHAT THE LAWS COVER—Continued

State Law	**Does Law Expressly Condition State Funds on a Commitment to Comply?**	**State Law Covers What Level(s) of Education?** (i.e., K-12, post-secondary, or both)	**What Schools Does State Law Cover?** (i.e., state-run (public) schools, private schools, both, or any school that receives state funds)	**Who Does the Law Protect?**
Nebraska Nebraska Revised Statutes (Neb. Rev. St.), Chapter 79, Article 2(l): Nebraska Equal Opportunity in Education Act	No. Law does not condition state financial assistance on compliance.	K-12.	State-run schools only.	Persons.
Stat/rule citation	N/A	Neb. Rev. St. §79-2,115.	Neb. Rev. St. §79-2,115.	Neb. Rev. St. §79-2,116.
Nebraska Nebraska Revised Statutes (Neb. Rev. St.), Chapter 85, Article 9(l): Nebraska Equal Opportunity in Postsecondary Education Act	No. Law does not condition state financial assistance on compliance.	Post-secondary.	State-run schools only.	Persons (term undefined by law).
Stat/rule citation	N/A	Neb. Rev. St. §85-9-167(1).	Neb. Rev. St. §85-9-167(1).	Neb. Rev. St. §85-9-168.
New Hampshire New Hampshire Revised Statutes (N.H. Rev. St.) §186:11: Duties of the State Board of Education—Discrimination	No. Law does not condition state financial assistance on compliance.	K-12.	State-run schools only.	Persons.

STATE COROLLARIES TO TITLE IX—WHAT THE LAWS COVER—Continued

State Law	**Does Law Expressly Condition State Funds on a Commitment to Comply?**	**State Law Covers What Level(s) of Education?** (i.e., K-12, post-secondary, or both)	**What Schools Does State Law Cover?** (i.e., state-run (public) schools, private schools, both, or any school that receives state funds)	**Who Does the Law Protect?**
Stat/rule citation	N/A	*See* NH Rev. St. §§21-N:2 and 21-N:11[270].	NH Rev. St. §186:11(XXXIII).	NH Rev. St. §186:11(XXXIII).
New York New York Executive Law (N.Y. Exec. Law), Article 15: Human Rights Law	No. Law does not condition state financial assistance on compliance.	K-12 and post-secondary.	Law covers state-run and private schools (no requirement that the institution receive state funds).	An institution must prohibit the "harassment of any *student or applicant*". It must also not deny the use of its facilities to any *person*.
Stat/rule citation	N/A	N.Y. Exec. Law §292(37).	N.Y. Exec. Law §292(37).	N.Y. Exec. Law §296(4).
New York New York Education Law (N.Y. Educ. Law) §313: Unfair Educational Practices	No. Law does not condition state financial assistance on compliance.	Post-secondary.	Law covers state-run and private schools (no requirement that the institution receive state funds).	Law protects "persons seeking admission as students to [an educational] institution or . . . educational program or course operated or provided by such institution[.]"
Stat/rule citation	N/A	N.Y. Educ. Law §313(2)(a).	N.Y. Educ. Law §313(2)(a).	N.Y. Educ. Law §313(3)(a).

[270] N.H. Rev. St. §21-N:2 provides that the Department of Education has oversight over K-12 education in the State. The Board of Education, which administers the corollary, sets policy for the Department of Education.

STATE COROLLARIES TO TITLE IX—WHAT THE LAWS COVER—Continued

State Law	**Does Law Expressly Condition State Funds on a Commitment to Comply?**	**State Law Covers What Level(s) of Education?** (i.e., K-12, post-secondary, or both)	**What Schools Does State Law Cover?** (i.e., state-run (public) schools, private schools, both, or any school that receives state funds)	**Who Does the Law Protect?**
New York N.Y. Educ. Law, Article 129-B: "Enough is Enough"	No. Law does not condition state financial assistance on compliance.	Post-secondary.	Law covers state-run and private schools (no requirement that the institution receive state funds).	Statute does not expressly state who is protected, but most provisions appear to be intended to protect students.
Stat/rule citation	N/A	N.Y. Educ. Law §6439(1) (defining "institution").	N.Y. Educ. Law §6439(1) (defining "institution"); *see also* N.Y. Educ. Law §216 (authority of the Board of Regents' to charter private universities and colleges.).	*See, e.g.* N.Y. Educ. Law §6443 ("Students' Bill of Rights").
Rhode Island General Laws of Rhode Island (R.I. Gen. Laws), Section 16-38-1.1: Discrimination Because of Sex	No. Law does not condition state financial assistance on compliance.	K-12 and post-secondary.	State-run schools only.	Law provides a blanket prohibition on discrimination, but specifically covers curricular and extracurricular activities and employment practices.
Stat/rule citation	N/A	R.I. Gen. Laws §16-38-1.1.	R.I. Gen. Laws §16-38-1.1(a)(1) and (b)(1).	R.I. Gen. Laws §16-38-1.1(a)(1) and (b)(1).

STATE COROLLARIES TO TITLE IX—WHAT THE LAWS COVER—Continued

State Law	**Does Law Expressly Condition State Funds on a Commitment to Comply?**	**State Law Covers What Level(s) of Education?** (i.e., K-12, post-secondary, or both)	**What Schools Does State Law Cover?** (i.e., state-run (public) schools, private schools, both, or any school that receives state funds)	**Who Does the Law Protect?**
Washington Washington Revised Code (Wash. Rev. Code) Title 28A, Chapter 640: Sexual Equality	Yes.	K-12.	State-run schools only.	Students and school employees/staff.
Stat/rule citation	Wash. Rev. Code §28A.640.050 (authorizing the Superintendent to terminate moneys to an offending school district).	Wash. Rev. Code §28A.640.020(1) (providing the law applies to public schools); *see also* Wash. Rev. Code §§28A.150.010 and 28A.150.020. [271]	Wash. Rev. Code §28A.640.020(1) (providing that the law applies to public schools).	Wash. Rev. Code §28A.640.020(1).
Washington Wash. Rev. Code Title 28B, Chapter 110: Gender Equality in Higher Education	No. Law does not condition state financial assistance on compliance.	Post-secondary.	State-run schools only.	Students.
Stat/rule citation	N/A	Wash. Rev. Code §28B.110.020.	Wash. Rev. Code §28B.110.020; *see also* Wash. Rev. Code §28B.10.016.	Wash. Rev. Code §§28B.110.010 and 28B.110.030.

[271] Wash. Rev. Code §28A.150.010 defines public schools to include "common schools, charter schools, and other schools with curriculum below the college or university level." *See also* Wash. Rev. Code §28A.150.020 (defining "common schools" as schools maintained at public expense in each school district and carrying on a program from kindergarten through the twelfth grade).

TABLE 6.2
STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
Alaska Prohibition Against Discrimination Based on Sex or Race in Public Education	K-12 only: [272] (1) An "aggrieved person". (2) Statute/rules silent. Post-secondary enforcement is per University of Alaska policies and is not described in statute/rules.	K-12 only:[273] Remedies include an assurance of voluntary compliance (which must include an agreement not to recommit a violation and may include a plan of compliance). The state Board of Education and Early Development may withhold state funds due to non-compliance.	(1) "A person aggrieved by the chapter or a regulation or procedure adopted" under the chapter. (2) Statute silent.	Civil damages and "such equitable relief as the court may determine."
Stat/rule citation	4 Alaska Admin. Code (AAC) 06.560(c).	4 AAC 06.570 and 06.580.	AS §14.18.100.	AS §14.18.100.
California Discrimination Article	If complaint is filed with Dept. of Fair Employment and Housing: (1) The head of the state agency that funds or provides financial assistance to a program or activity. (2) Statute silent.	Curtailment of state funding, in whole or in part, to the contractor, grantee, or local agency.	Statute expressly creates a private right of action but does not state who has standing to bring such an action.	Equitable relief.

[272] The provisions here apply only to K-12 education. The Alaska Statutes and Alaska Administrative Code (AAC) do not contain details on the enforcement of the law at the post-secondary level, but AS §14.18.070 requires the Board of Regents of Alaska to adopt its own rules to implement the law within the University of Alaska.
[273] *See id*.

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
	If complaint is filed with a local education agency or Dept. of Education pursuant to Uniform Complaint Procedure: (1) Any person who alleges they have personally suffered discrimination or other acts prohibited by the law, or anyone who believes an individual or specific class of individuals has suffered from discrimination or other acts. (2) Statute/rules silent.			
Stat/rule citation	Cal. Govt. Code §11136; 5 CCR §4630(b)(1).	Cal. Govt. Code §11137.	Cal. Govt. Code §11139.	Cal. Govt. Code §11139.
California Educational Equity	(1) Any person who alleges they have personally suffered discrimination or other acts prohibited by the law, or anyone who believes an individual or specific class of	Remedies include the institution of corrective actions and the curtailment of the local agency's state or federal funding.	(1) Persons who allege they are a victim of discrimination. (2) Statute silent.	Remedies include "injunctions, restraining orders, or other remedies and orders."

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
	individuals has suffered from discrimination or other acts.[274] (2) Statute/rules silent.			
Stat/rule citation	5 CCR §4630(b)(1).	5 CCR §§4631(e)(5), 4664(a), and 4670.	Cal. Educ. Code §262.3	Cal. Educ. Code §262.3.
California Equity in Higher Education Act	Statute silent. Enforcement is per each educational institution's policy, so these may vary by institution.	Statute silent. Enforcement is per each educational institution's policy, and these may vary by institution.	(1) Persons who allege they are a victim of discrimination. (2) Statute silent.	Remedies include "injunctions, restraining orders, or other remedies and orders."
Stat/rule citation	Cal. Educ. Code §§66281.5.	Cal. Educ. Code §§66281.5.	Cal. Educ. Code §66292.3.	Cal. Educ. Code §66292.3.
Hawaii Gender Equity in Athletics	Statute silent.[275]	Statute silent.	No private right of action available.	No private right of action available.
Stat/rule citation	N/A	N/A	HRS §302A-461(c).	HRS §302A-461(c).

[274] Statute language specifically provides standing to "[O]ne who alleges that he or she has personally suffered unlawful discrimination, harassment, intimidation, or bullying, or by one who believes an individual or any specific class of individuals has been subjected to discrimination, harassment, intimidation or bullying prohibited by this part."

[275] *But see* notes 96 to 104 and accompanying text, *supra* (discussing historical enforcement provisions and possible future enforcement procedures being considered by the Hawaii Department of Education (HDOE).

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
Hawaii Prohibition Against Student Bias	(1) Administrative rules define complainant as students, parents, or persons who are eligible to receive benefits from or participate in Hawaii Department of Education programs and who file a complaint alleging discrimination. (2) Statute silent.[276]	Statute/rules silent.	Statute silent.	Statute silent.
Stat/rule citation	Hawaii Administrative Rules (HAR) §8-41-2.	N/A	N/A	N/A
Hawaii Prohibition on Discrimination in State Educational Programs and Activities	(1) A person or organization or association may file. (2) An organization or association may file on behalf of a person alleging a violation of the law.[277]	Statute silent.	(1) A "student participating in any educational program or activity who is aggrieved by a violation" of the law may file. (2) Statute silent.	Statute silent.
Stat/rule citation	HRS §368D-1(c).	HRS §368D-1.	HRS §368D-1.	HRS §368D-1.

[276] *See* notes 107 to 108 and accompanying text, *supra* (discussing current enforcement provisions as well as possible future enforcement procedures being considered by the HDOE).

[277] *But see* notes 112 to 113 and accompanying text, *supra* (discussing possible future enforcement procedures being considered by the HDOE). Potential considerations related to establishing an enforcement mechanism for this law are also discussed in the Observations and Conclusions section in Chapter 7 of this report, part II, *infra*.

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
Kentucky Sex Equity in Education	Statute is silent on both issues. Because each agency that provides funding to an educational institution must adopt its own rules to "effectuate" the law, rules on standing may vary by agency.	An agency may: (1) terminate or refuse to grant or continue assistance to a program if, after opportunity of a hearing and an express finding of a violation, a finding is made that the department or agency is not in compliance; or (2) enforce compliance using any other means authorized by law.	Statute silent	Statute silent
Stat/rule citation	KRS §344.560.	KRS §344.560.	N/A	N/A
Maine Educational Opportunity	(1) Any aggrieved person (defined to include "any person who claims to have been subject to unlawful discrimination"), as well as any employee of the Maine Human Rights Commission, may file a complaint. (2) The Maine Human Rights Commission may bring a case on behalf of an aggrieved person.	The Commission, through conciliation, "shall attempt to achieve a just resolution and to obtain assurances that the respondent will eliminate the unlawful educational discrimination," including any "appropriate corrective action."	(1) The Maine Human Rights Commission or an aggrieved person may file a complaint (note, however, that a person who files a complaint without first using the administrative process may not sue for attorney's fees pursuant to 5 M.R.S. §4622). (2) The Maine Human Rights Commission may bring a case on	Remedies include but are not limited to cease and desist orders and "civil penal damages."

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
	If a complainant is a minor or legally incompetent person, a parent, legal guardian, or an adult with whom the person resides and exercises parental responsibilities shall file the complaint on the person's behalf.		behalf of an aggrieved person.	
Stat/rule citation	5 MRS §4611; 5 MRS §4553(1-D) (defining "aggrieved person"); and 05-071 CMR ch. 4-A, §03.	05-071 CMR ch. 4-A, §10(A) and (D).	5 MRS §§4612(4) and 4621.	5 MRS §4613(2)(B).
Nebraska Nebraska Equal Opportunity in Education	(1) Any person aggrieved by a violation of the law. (2) Statute silent.	Remedies include the termination of the discriminatory practice or policy and the award of compensatory money damages to the aggrieved person "as the particular facts and circumstances may warrant."	(1) An aggrieved person who (a) has gone through the administrative process, or (b) has filed an administrative complaint but where the responding governing board has failed to dispose of the complaint. (2) Statute silent.	Equitable relief and compensatory money damages.
Stat/rule citation	Neb. Rev. St. §79-2,118(1)	Neb. Rev. St. §79-2,118(2)	Neb. Rev. St. §§79-2,120 and 79-2,121	Neb. Rev. St. §§79-2,120

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
Nebraska Nebraska Equal Opportunity in Postsecondary Education	(1) Any person aggrieved by a violation of the law. (2) Statute silent.	Remedies include the termination of the discriminatory practice or policy and the award of compensatory money damages to the aggrieved person "as the particular facts and circumstances may warrant."	(1) An aggrieved person who (a) has gone through the administrative process, or (b) has filed an administrative complaint but where the responding governing board has failed to dispose of the complaint. (2) Statute silent.	Equitable relief and compensatory money damages.
Stat/rule citation	Neb. Rev. St. §85-9,170(1)	Neb. Rev. St. §85-9,170(2)	Neb. Rev. St. §§85-9,172 and 85-9,173	Neb. Rev. St. §85-9,172
New Hampshire Duties of the State Board of Education - Discrimination	Statute/rules silent. Each school board is responsible for establishing its own policies, so these may vary by jurisdiction.	Statute/rules silent. Each school board is responsible for establishing its own policies, so these may vary by jurisdiction.	Statute silent.	Statute silent.
Stat/rule citation	*See* NH Code Admin. R. Ed 303.01(j)	*See* NH Code Admin. R. Ed 303.01(j)	N/A	N/A
New York Human Rights Law	(1) Any "person claiming to be aggrieved by an unlawful discriminatory practice," or that person's attorney-at-law, may file a complaint. If a person lacks mental	Remedies include requiring the respondent to cease the unlawful practice, requiring the respondent to take affirmative action, compensatory damages to the	Statute silent.	Statute silent.

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
	capacity, "a person with a substantial interest in the welfare of the complainant" may file on the person's behalf. Regulations also authorize an "organization claiming to be aggrieved" to file a complaint. Other parties authorized to file include the Commissioner of Labor, the Attorney General, Chair of the Commission on Quality of Care for the Mentally Disabled, or the Human Rights Division. (2) The state entities in (1) may file an action on behalf of a person or class of persons claiming to be aggrieved.	aggrieved person, requiring payment to the state of profits obtained by the respondent due to the unlawful discriminatory practice, civil fines and penalties, and a report of the manner of compliance.		
Stat/rule citation	N.Y. Exec. Law §297(1); 9 NYCRR 465.3(a).	N.Y. Exec. Law §297(4)(c).	N/A	N/A

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
New York Unfair Educational Practices	(1) "Any person seeking admission as a student who claims to be aggrieved by an alleged unfair educational practice," the person's parent or guardian, or the Commissioner of Education may file a complaint. (2) If the Commissioner of Education "has reason to believe that an applicant or applicants have been discriminated against," the Commissioner may file a complaint on behalf of the person.	The Board of Regents may require the respondent to cease and desist from the unfair educational practice, or issue "such other order as they deem just and proper."	Statute silent.	Statute silent.
Stat/rule citation	N.Y. Educ. Law §313(5)(a) and (b).	N.Y. Educ. Law §313(5)(i).	N/A	N/A
New York "Enough is Enough"	Law does not establish an independent administrative complaint procedure. However, it establishes minimum requirements that institutions must	Statute silent.	No private right of action.	No private right of action.

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
	include in its existing policies and procedures. The law includes a requirement that persons "be advised of their right to file a report of sexual assault, domestic violence, dating violence, and/or stalking."			
Stat/rule citation	*See, e.g.* N.Y. Educ. Law §6444(1)(f).	N/A	N.Y. Educ. Law §6440(9).	N.Y. Educ. Law §6440(9).
Rhode Island Discrimination Because of Sex	Statute silent.	Statute silent.	Statute silent.	Statute silent.
Stat/rule citation	N/A	N/A	N/A	N/A
Washington Sexual Equality	(1) "Anyone" may file a complaint. (2) Statute/rules silent.	Remedy at local level: Corrective actions to correct any non-compliance with the law. If appealed to the Superintendent of Public Instruction, the Superintendent may terminate all or part of funding to the offending school district or public charter school, terminate programs where violations are found to be	(1) "Any person aggrieved" by a violation of the law or a regulation or guideline adopted under the law. (2) Statute silent.	Civil damages and such equitable relief as the court shall determine.

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
		"flagrant in nature," institute a mandatory affirmative action program, or place the offending school district or charter school on probation with "appropriate sanctions" until compliance is achieved or assured.		
Stat/rule citation	Wash. Admin. Code §392.190-065(1).	Wash. Admin. Code §§392-190-075(3) and 392-190-080.	Wash. Rev. Code §28A.640.040.	Wash. Rev. Code §28A.640.040.

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
Washington Gender Equality in Higher Education	(1) If filed with the Human Rights Commission,[278] a complaint can be initiated by a person claiming to be aggrieved by an unfair practice (or the person's attorney). If the Human Rights Commission has reason to believe a person has engaged or is engaging in an unfair practice, the Commission may also file a complaint. (2) The Commission may file a complaint on behalf of a person, pursuant to paragraph (1) above.	If a complaint goes before a hearing at the Human Rights Commission, an administrative law judge may issue an order to cease and desist from an unfair practice and take affirmative actions, including but not limited to hiring, reinstatement or upgrading of employees, with or without back pay,[279] an admission or restoration to full membership rights in any respondent organization, or to take such other action as will effectuate the purposes of Chapter 49.60, Wash. Rev. Code (Discrimination—Human Rights Commission).	(1) "Any person deeming himself or herself injured by any act in violation of this chapter". (2) Statute silent.	Remedies include enjoinder of further violations, recovery of actual damages sustained by the person, reasonable attorneys fees, or any other appropriate remedy authorized by Chapter 49.60, Wash. Rev. Code (Discrimination—Human Rights Commission),the U.S. Civil Rights Act of 1964, or the Federal Housing Amendments Act of 1988 (42 U.S.C. §§3601, *et seq*.).

[278] Washington State's Gender Equality in Higher Education requires each educational institution covered by the law to develop its own procedures for handling complaints (Wash. Rev. Code §28B.110.030(8)), but also authorizes the filing of complaints with the state's Human Rights Commission.

[279] Given that the Gender Equality in Higher Education Law's protections apply to students (*see* Wash. Rev. Code §§28B.110.010 and 28B.110.030), these employment-related remedies would likely apply in cases where a student alleges an unfair practice with respect to student employment, pursuant to Wash. Rev. Code §28B.110.030(1).

STATE COROLLARIES TO TITLE IX—STANDING AND REMEDIES—Continued

State Law	**Administrative Complaint Standing** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Administrative Complaint Process** (if specified)	**Private Right of Action/Lawsuit Standing -** (1) Who may file? (2) Does law allow an entity to file on behalf of an individual?	**Remedy/Relief Available Via Private Right of Action/Lawsuit** (if specified)
Stat/rule citation	Wash. Rev. Code §49.60.230; Wash. Admin. Code §§162-08-071 and 162-08-072.	Wash Rev. Code §49.60.250(5).	Wash. Rev. Code §28B.110.050 (authorizing private right of action under Chapter 49.60, Wash. Rev. Code); *see also* Wash. Rev. Code §49.60.030(2) (private right of action under Chapter 49.60, Wash. Rev. Code.)	Wash. Rev. Code §49.60.030(2).

Chapter 7

REVIEW OF SALIENT POINTS AND CONCLUSIONS

Act 110, Session Laws of Hawaii 2018, required the Legislative Reference Bureau to submit a report to the Legislature on existing Title IX enforcement practices and procedures on the federal level and in other jurisdictions.

This concluding chapter reiterates salient points from earlier chapters and makes several observations and conclusions about the timing and framing of an enforcement mechanism for Hawaii's state law corollary to Title IX (Title IX corollary); varying approaches to enforcing a Title IX corollary, based on the state laws discussed in Chapter 6; and other considerations relevant to establishing an enforcement mechanism for Hawaii's Title IX corollary.

Part I. Salient Points

A. Depending Upon the Agency With Which a Complaint is Filed or the Stage of the Complaint's Life Cycle, Title IX is Enforced by Different Entities

- Recipient institutions that must comply with Title IX are responsible for enforcing Title IX at the school level.[1] In exchange for receiving federal aid, these recipient institutions agreed to comply with Title IX.[2] Thus, a complaint may be filed at the individual school/campus level or with any employee within the respective education system charged with the responsibility to enforce federal Title IX requirements. Beyond the school level, a complaint alleging a Title IX violation may be made at the federal level with either or both the Office for Civil Rights (OCR) of the United States Department of Education (USDOE) or the Civil Rights Division (CRD) of the United States Department of Justice (USDOJ).[3] The OCR conducts the majority of federal enforcement efforts while the CRD is more selective of its involvement in cases.[4] A third avenue of enforcement is filing a legal complaint in federal court.[5]

- At the school level, a recipient institution's responsibility for enforcing Title IX includes the following:[6]

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[1] *See* Chapter 3, part II, subparts A and B, *supra*.
[2] *See* Chapter 3, notes 8 to 11, and accompanying text, *supra*.
[3] *See* Chapter 3, part III, *supra*.
[4] *See* Chapter 3, notes 41 to 53, and 103 to 114, and accompanying text, *supra*.
[5] *See* Chapter 2, notes 32 to 37, and accompanying text, *supra*. *See also* Chapter 3, notes 64 and 74, and accompanying text, *supra*; Chapter 4, part IV, subpart D, *supra*.
[6] *See* Chapter 3, part II, subpart B, *supra*.

- Informing the general public of the institution's anti-discrimination policy and ensuring that any publications aimed at potential students or employees contain a statement of the non-discrimination policy;[7]

- Having the necessary personnel, including specifically a Title IX coordinator, to implement compliance efforts, and publicizing the coordinator's name and contact information to students and employees;[8]

- Adopting and publishing an internal grievance procedure that provides for the "prompt and equitable resolution" of complaints, including an assurance that the institution will take steps to prevent recurrence of the conduct that gave rise to the complaint and to correct its discriminatory effects on the complainant and others, if appropriate;[9] and

- Undertaking any action that is necessary to eliminate existing sex discrimination or to eliminate the effects of past discrimination.[10]

- At the federal agency level, the OCR and CRD have joint enforcement responsibility but different approaches to enforcing Title IX.

  - Pursuant to Title IX regulations, the OCR is required to promptly investigate a recipient institution's alleged non-compliance with the law, seek the institution's cooperation in achieving voluntary compliance with Title IX, and assist and guide the institution during this process.[11] The OCR uses a "preponderance of the evidence" standard to determine whether a recipient institution failed to comply with Title IX.[12]

  - In contrast to the OCR, the CRD is authorized to bring suits in federal court and has the discretion to decide which cases will be investigated or litigated.[13] The CRD's enforcement activities focus on conducting investigations, negotiating out-of-court settlements, litigating cases in federal court, and collaborating with the OCR and other agencies.[14]

- Federal courts, when presented with a claim for monetary damages based upon an alleged violation of Title IX, consider:

  (1) Whether the recipient institution had "actual knowledge" of the alleged violation, meaning that the incident was brought to the attention of an official at

[7] *See* Chapter 3, notes 12 to 13, and accompanying text, *supra*.
[8] *See* Chapter 3, notes 14 to 15, and accompanying text, *supra*.
[9] *See* Chapter 3, notes 16 to 40, and accompanying text, *supra*.
[10] *See* Chapter 3, notes 8 to 11, and accompanying text, *supra*.
[11] *See* Chapter 3, notes 47 to 48, and 52, and accompanying text, *supra*.
[12] *See* Chapter 3, notes 67 to 68, and accompanying text, *supra*.
[13] *See* Chapter 3, notes 104 to 105, and accompanying text, *supra*.
[14] *See id.*

the institution who was authorized to take corrective action in response to the reported incident; and

(2) Despite having actual knowledge, whether the institution displayed "deliberate indifference" to the reported incident.[15]

B. Title IX Enforcement is Complex and Shifting; An Overarching Consideration

- Federal Title IX enforcement has shifted in recent years, depending upon the priorities of the federal administration in power. For example, the Obama administration emphasized the importance of support by post-secondary recipient institutions for victims of sexual violence.[16] In contrast, the current federal administration views Title IX compliance requirements as unduly burdensome for recipient institutions, especially requirements pertaining to the investigation and adjudication of sexual harassment and sexual assault complaints. Consequently, the Trump administration is seeking to alleviate the burden on recipient institutions.[17]

- The change in presidential administrations and how the current administration views Title IX enforcement has significantly impacted OCR policy guidance documents (OCR guidance), particularly guidance concerning campus sexual harassment and sexual assault. The OCR guidance is intended to facilitate recipient institutions' compliance with Title IX by clarifying the law's requirements and the institutions' responsibilities.[18] Guidance is also used to disseminate important information quickly, without undergoing the public comment process required in formal agency rulemaking.[19]

    - In September 2017, the USDOE rescinded prior OCR guidance issued in 2011 and 2014 under the Obama administration that, in part, required recipient institutions to do more to support victims of sexual violence throughout the campus-based complaint, investigation, and adjudication processes.[20]

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[15] *See* Chapter 2, notes 48 to 60, and accompanying text, *supra*. *But cf.* Chapter 3, notes 76 to 77, and accompanying text, *supra* (explaining that the factors considered by federal courts are not relevant to the administrative enforcement process used by federal agencies such as the OCR). *See also* note 22, *infra* (referencing the USDOE's intent that under its proposed changes to the Title IX regulations, a recipient institution need only respond to incidents of sexual harassment of which it had actual knowledge, consistent with court opinions interpreting Title IX).

[16] *See* Chapter 3, notes 171 to 179, and 184, and accompanying text, *supra*.

[17] *See* Chapter 3, notes 191 to 195, and accompanying text, *supra*. *See also* Chapter 3, part V, subparts A through C, *supra*.

[18] *See* Chapter 3, part IV, subpart A, *supra*.

[19] *See id.*

[20] *See* Chapter 3, notes 158 to 187, and 196 to 201, and accompanying text, *supra*.

- In place of the rescinded guidance, the USDOE issued interim guidance until new Title IX regulations, which were proposed in November 2018, are finalized and adopted.[21]

- According to the USDOE, the proposed Title IX regulations would provide clarity for schools, support for survivors, and due process protections for all parties, while also clarifying the scope of "sexual misconduct" that recipient institutions must address under Title IX.[22]

- Recipient institutions could be significantly impacted if and when the proposed Title IX regulations take effect. While it has been reported that the regulations should be finalized sometime in Fall 2019,[23] there presently is much uncertainty over when these new regulations will take effect, the final substance of the regulations, and what the new regulations will entail for recipient institutions. In light of these uncertainties, many recipient institutions have chosen to maintain the "status quo" by retaining policies and grievance procedures that complied with the 2011 and 2014 OCR guidance.[24]

- Federal judicial treatment of Title IX has broadened the law's reach since its enactment in 1972. For example, the United States Supreme Court (Court) held in 1979 that there is an implied private right of action under Title IX, meaning that an aggrieved private party may sue for enforcement of the law by filing a civil lawsuit.[25] In 1992, the Court recognized that sexual harassment and sexual assault are forms of prohibited sex discrimination under Title IX, and that monetary damages to a plaintiff may be warranted under certain circumstances.[26] While the Court has not issued a significant opinion focusing on Title IX since 2005, recent conflicting rulings among federal appellate circuits may prompt the Court to review certain Title IX enforcement issues, including the applicability of Title IX to prospective students of a recipient institution as well as current students.[27]

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[21] *See* Chapter 3, notes 202 to 212, and accompanying text, *supra*.

[22] *See* Chapter 3, notes 216, and 228 to 234, and accompanying text, *supra*. *See also* Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (NPRM document), 83 Fed. Reg. 61462 (proposed November 29, 2018) (to be codified at 34 C.F.R. Part 106), at 61464-61465, *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-11-29/pdf/2018-25314.pdf. Background information in the NPRM document cited "overly broad definitions of sexual harassment" and other problems with Title IX's current enforcement by post-secondary recipient institutions. In contrast, the proposed regulations are said to "set forth clear standards that trigger a recipient's obligation to respond to sexual harassment, including defining the conduct that rises to the level of Title IX as conduct serious enough to jeopardize a person's equal access to the recipient's education program or activity[.]" Furthermore, the NPRM document characterizes the proposed regulations as "confining a recipient's Title IX obligations to sexual harassment of which it has actual knowledge[,]" in alignment with relevant case law. *See also* Chapter 2, notes 48 to 65, and accompanying text, *supra* (discussion of United States Supreme Court cases referenced in the NPRM document).

[23] *See* Chapter 3, note 224, and accompanying text, *supra*.

[24] *See* Chapter 3, notes 213 to 215, and accompanying text, *supra*.

[25] *See* Chapter 2, notes 33 to 37, and accompanying text, *supra*.

[26] *See* Chapter 2, notes 39 to 42, and accompanying text, *supra*.

[27] *See* Chapter 2, notes 76 to 86, and accompanying text, *supra*.

C. Hawaii's Public Education Systems Recently Made Changes to Improve Title IX Compliance; However, Reforms are Ongoing

- The OCR conducted separate, years-long compliance reviews of the Hawaii Department of Education (HDOE) and the University of Hawaii at Manoa (UH Manoa).[28] In December 2017, both the HDOE and UH Manoa signed voluntary resolution agreements with the OCR.[29] The resolution agreements specified the steps that these institutions would take to improve their compliance with Title IX.[30]

- The Hawaii Department of Education (HDOE) put forth a detailed proposal to:

  - Amend Title 8, Chapter 19, Hawaii Administrative Rules (HAR), which governs disciplinary action that HDOE schools may impose for student misconduct, including student-on-student misconduct;

  - Repeal Title 8, Chapter 41, HAR (Chapter 41), the HDOE's current internal grievance procedure for addressing complaints of discrimination based on race, color, religion, sex, age, national origin, ancestry, or disability; and

  - Replace Chapter 41 with a new chapter to Title 8, HAR (Chapter 89), which is intended to establish a Title IX-compliant civil rights policy and an internal grievance procedure.[31]

- In August 2019, the HDOE's proposed rule changes were approved by the Hawaii Board of Education (BOE) and now await the Governor's approval.[32] If approved, the proposed rule changes would have the effect of establishing two separate but analogous processes for addressing violations of Title IX and related anti-discrimination laws, in a manner that conforms to Title IX requirements. Title 8, Chapter 19, HAR, would govern student-against-student complaints,[33] while Chapter 89 would apply to complaints by students against adult perpetrators (e.g., employees, volunteers, third parties).[34]

- Other significant changes intended to facilitate the HDOE's Title IX compliance efforts include the installation of fifteen new Equity Specialists, resulting in one

[28] *See* Chapter 4, notes 15 to 18, and accompanying text, *supra*.
[29] *See* Chapter 4, note 19, and accompanying text, *supra*.
[30] *See* Chapter 4, notes 114 to 121 (discussion of UH Resolution Agreement and actions taken), and notes 215 to 225 (discussion of HDOE Resolution Agreement and actions taken), and accompanying text, *supra*.
[31] *See* Chapter 4, part III, subpart C, *supra*.
[32] *See* Chapter 4, note 231, and accompanying text, *supra*.
[33] *See* Chapter 4, notes 232 to 261, and accompanying text, *supra*. *See also* Chapter 4, table 4.1, *supra*.
[34] *See* Chapter 4, notes 262 to 274, and accompanying text, *supra*. *See also* Chapter 4, table 4.1, *supra*.

specialist for each HDOE complex area,[35] and the establishment of a Gender Equity in Athletics Committee.[36]

- The University of Hawaii System (UH System) has implemented a more coordinated response to Title IX complaints, having moved away from a campus-centric model to a more uniform and integrated model.[37]

    - For example, an Office of Institutional Equity (OIE), established in 2015, now oversees Title IX compliance, and each UH System campus now has its own Title IX Coordinator and at least one Deputy Coordinator, who are responsible for implementing compliance efforts for students and employees, with the support of the OIE.[38]

    - Comprehensive and detailed information about Title IX is now readily available through UH websites, including relevant policies and procedures, a directory of available resources such as victim support services, an online training course, and an online report form that allows anonymous reporting of complaints.[39]

    - Additional compliance efforts include using a centralized record keeping system to track Title IX complaints and their progression through the internal grievance process,[40] providing Title IX training and making this training available online for students and employees,[41] and conducting biennial "campus climate surveys" on sexual harassment and gender-based violence.[42]

- While efforts to improve compliance with Title IX are ongoing, it appears that substantial efforts have been and continue to be made by both the UH System and HDOE to fulfill their obligations under their respective resolution agreements and to implement measures designed to achieve compliance with Title IX.

D. In Recent Years, Discussions of Title IX Have Evolved to Focus on the Problem of Sexual Violence, Especially Incidents Occurring at Post-Secondary Institutions

- Historically, much of the focus on Title IX involved athletics, and only recently has the focus evolved to include campus safety and sexual violence.[43]

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[35] *See* Chapter 4, note 219, and accompanying text, *supra*.
[36] *See* Chapter 4, notes 330 to 336, and accompanying text, *supra*.
[37] *See* Chapter 4, notes 31, and 36 to 72, and accompanying text, *supra*.
[38] *See* Chapter 4, notes 24 to 31, and accompanying text, *supra*.
[39] *See* Chapter 4, note 22, and accompanying text, *supra*.
[40] *See* Chapter 4, notes 117 to 121, and accompanying text, *supra*.
[41] *See id*.
[42] *See id.*
[43] *See* Chapter 5, note 2, and accompanying text, *supra.*

- Recent attention on incidents of sexual harassment, sexual assault, and other forms of sexual violence on campuses has raised concerns over the adequacy of the policies and procedures used by recipient institutions to address these issues.[44]

- Both state legislatures and state attorneys general have attempted to take actions that affect Title IX enforcement where sexual violence is concerned. The results of those efforts included the passage of legislation by certain states. It has been observed that these laws fall into four broad policy areas:

    - Defining affirmative consent to engage in sexual activity;

    - Clarifying the role of law enforcement authorities in campus processes relating to sexual assault;

    - Notation of student transcripts for serious violations of institutional codes of conduct; and

    - Clarifying the role of legal counsel in campus adjudication processes.[45]

- Recent research efforts into the policies and practices of post-secondary recipient institutions with respect to sexual violence highlight different facets of the issue from distinct perspectives.

    - A 2017 law review article examined the extent to which the country's top-ranked post-secondary institutions' policies and procedures provide procedural due process protections to students accused of sexual assault.[46] These procedural protections include the right of an accused to attend a live adjudicatory hearing, confront and cross-examine witnesses, be represented by an attorney, remain silent in response to the accusation, and appeal an unfavorable decision.[47]

    - A 2017 report by the National Association of Student Personnel Administrators published the results of a self-assessment by a group of post-secondary institutions participating in an initiative titled "Culture of Respect."[48] The self-assessment measured the degree to which the participating institutions' responses to sexual violence complied with Title IX and Clery Act requirements.[49] The self-assessment also provided insights into the efforts of participating institutions to foster a campus environment in which sexual violence is not tolerated.[50] These efforts, which surpass legal requirements for compliance, relate to: support for

[44] *See* Chapter 5, note 3, and accompanying text, *supra.*
[45] *See* Chapter 5, part II, subpart A, *supra.*
[46] *See* Chapter 5, part III, subpart B, *supra*.
[47] *See id*.
[48] *See* Chapter 5, part III, subparts C and D, *supra*.
[49] *See id*.
[50] *See id*.

student survivors; clear policies on misconduct investigations, adjudications, and sanctions; multiple tiers of prevention and awareness education aimed at specific campus constituencies; public disclosure of statistics and information on the incidence of campus sexual violence; schoolwide mobilization with campus organizations and student leaders; and ongoing self-assessment of institutional policies and procedures.[51]

Part II. Observations and Conclusions

Based upon our findings of the present fluid nature of federal Title IX guidance, the ongoing nature of the reforms being made within Hawaii's public education systems to comply with Title IX and whether these reforms will meet the current federal administration's proposed Title IX requirements, and the existence of varied state Title IX corollary enforcement models, the Bureau makes no specific recommendation at this time on an appropriate enforcement mechanism for Chapter 368D, HRS. However, the Bureau offers the following observations and conclusions for consideration by Hawaii's policy-makers.

A. Given the Current Uncertainty Surrounding the Federal Enforcement Standards, it May be Prudent to Postpone the Establishment and Implementation of an Enforcement Mechanism for Hawaii's Title IX Corollary Until the Federal Title IX Regulations are Finalized

- Stakeholders and members of the public submitted over 100,000 comments on the USDOE's proposed Title IX regulations as of the February 15, 2019, deadline for submission.[52] Although the proposed changes are expected to be finalized sometime this Fall, the resulting regulations may contain further changes that were not published in the USDOE's proposal.[53] Given this uncertainty, it may be prudent to wait until changes to the federal Title IX regulations are finalized before establishing and implementing a detailed enforcement infrastructure for Hawaii's Title IX corollary.

- On the other hand, it has been suggested that the USDOE's proposed changes to the Title IX regulations may be delayed or never take effect.[54] For example, if the USDOE's proposed regulations are challenged in court, it is likely their implementation may be delayed pending a decision.[55]

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[51] *See id*.
[52] *See* Chapter 3, notes 221 to 223, and accompanying text, *supra*.
[53] *See* Chapter 3, notes 224 and 243, and accompanying text, *supra*.
[54] *See* Chapter 3, note 252, and accompanying text, *supra*.
[55] *See* Chapter 3, note 253, and accompanying text, *supra*.

- Determining whether to wait until federal Title IX regulations are finalized or to forge ahead and establish an enforcement structure for Hawaii's Title IX corollary prior to federal Title IX regulations being finalized is a policy decision to be determined by the Legislature. However, we note that if the Legislature determines that a state agency or agencies will be responsible for enforcing both federal Title IX regulations and Hawaii's Title IX corollary, then for the ease of enforcement, it may be advisable to have the state Title IX corollary's enforcement standards mirror the federal standards as much as possible.

B. The Approaches of Other States That Have a Title IX Corollary Offer Insight into an Array of Enforcement Options

A number of states, including Hawaii, have enacted laws to promote sex or gender equity in education or prohibit sex or gender discrimination in education, sometimes by explicitly conditioning the receipt of state funds on compliance with the state law. This report examines eighteen laws of this nature in the following ten states: Alaska, California, Hawaii, Kentucky, Maine, Nebraska, New Hampshire, New York, Rhode Island, and Washington. The Bureau has characterized these laws as "state corollaries to Title IX" based upon the apparent intent and purpose of these laws to prohibit discrimination in education on the basis of sex, even if the language used therein does not closely resemble the language of the Title IX statute and implementing regulations. The Title IX corollaries of the other states examined vary significantly in scope and offer an array of enforcement options. Key provisions of these other state law corollaries, not including Hawaii's, are discussed below.[56]

- Of the other fifteen state law corollaries examined (excluding Hawaii's), just over half specifically address sex-based discrimination in a manner similar to Title IX, while the language of other state corollaries prohibits discrimination more broadly and includes protections for characteristics beyond sex.

    - Eight state laws (Alaska, Kentucky, both Nebraska laws, New York's Enough is Enough law, Rhode Island, and both Washington laws) address sex-based discrimination only. New York's Enough is Enough law is more narrowly tailored, specifically addressing the issue of sexual assault in post-secondary education.

    - Seven state laws (all three California laws, Maine, New Hampshire, New York's Human Rights Law, and New York's post-secondary admissions law) address sex-based discrimination as well as discrimination based on characteristics beyond sex, such as race or religion.

[56] For a detailed discussion of these state laws, *see* Chapter 6, part II, *supra.*

- Some state law corollaries use an enforcement mechanism that is identical to Title IX's, in which state funding is extended to a recipient institution in exchange for the institution's commitment that it will enforce the law or risk losing the funding. In contrast, the majority of states' corollaries contain no explicit reference to loss of state funding as a consequence for violating the law.

    - Five state laws (Alaska, California's Discrimination Article, California's K-12 law, Kentucky, and Washington's K-12 law) tie state funding to compliance with its corollary and provide an enforcement mechanism whereby a non-compliant educational institution could lose its funding.

    - A sixth law (California's post-secondary law) includes a provision requiring an educational institution to provide an assurance to the agency administering the funds that each of its programs or activities will be conducted in compliance with the law. However, there does not appear to be a mechanism specified in the law whereby a non-compliant institution could lose its funding.

    - Nine state laws (Maine, both Nebraska laws, New Hampshire, all three New York laws, Rhode Island, and Washington's post-secondary law) do not appear to tie state funding to an institution's commitment to enforce the corollary.

- The enforcement approaches utilized by the states examined in this report appear to fall into one of two broad categorizations:

    - In ten state laws, a local- or state-level board or an executive officer within a school, school board, or state-level education system is responsible for enforcing the law. This was the most typical approach among the states examined.

        - Four state laws (California's K-12 law, Nebraska's K-12 law, New Hampshire, and Washington's K-12 law) apply specifically to K-12 education and require that a state Board or the Department of Education enforce the law.

        - Three state laws (California's post-secondary law, Nebraska's post-secondary law, and New York's Enough is Enough law) apply specifically to post-secondary education and provide that each institution is responsible for ensuring enforcement at its own campus(es).

        - Alaska's law addresses discrimination at both the K-12 and post-secondary levels and requires its state Board of Education to enforce the law within the K-12 system and the governing board of its higher education system to enforce the law within the system.

        - New York's post-secondary admissions law is enforced by the State's Commissioner of Education and Board of Regents, which have jurisdiction over both K-12 and post-secondary education.

- In Rhode Island, a statewide Board of Education that has jurisdiction over both the K-12 and post-secondary systems oversees enforcement of the law at all levels.

- In three state laws (Maine, New York's Human Rights Law, and Washington's post-secondary law), a non-educational entity (e.g., a state human rights commission) enforces the law.

- Two other state laws do not fall into either of the above broad categories:

  - California's Discrimination Article may be enforced by an independent agency, the Department of Fair Employment and Housing. Alternatively, if the alleged discrimination took place in the K-12 education system, the law may be enforced by a local education agency and the Department of Education.

  - Kentucky's corollary is enforced by each respective state department or agency that extends state financial assistance to an educational program or activity.

- The state law corollaries have varying provisions regarding who has standing to bring an administrative complaint. The laws appear to fall into the following categorizations:

  - Eight of the state laws (Alaska, Maine, both Nebraska laws, all three New York laws, and Washington's post-secondary law) appear to allow a person aggrieved by a violation of the law to bring a complaint. Four of these eight state laws (Maine, New York's Human Rights Law, New York's post-secondary admissions law, and Washington's post-secondary law) also authorize certain public entities or officials, such as a Commissioner of Education, Human Rights Commission, or Attorney General, to bring a complaint on an aggrieved person's behalf.

  - Two state laws (Washington's K-12 law and California's K-12 law) appear to provide standing to any person. Specifically, Washington's K-12 corollary authorizes "anyone" to bring a complaint. California's K-12 corollary gives standing to any person who alleges that they have suffered discrimination. In addition, anyone who believes an individual or specific class of individuals has suffered from discrimination is authorized to bring a complaint on that individual's or specific class of individuals' behalf.

  - California's Discrimination Article provides two different administrative enforcement processes and has different standing rules for each. In the first enforcement process, administered by the Department of Fair Employment and Housing, only a state department or agency extending state funds to a program or activity has standing to bring a complaint. Under a second optional complaint

process, which is available only if a violation of the article occurs within a K-12 institution, any person who alleges that they have suffered discrimination may file a complaint. In addition, anyone who believes an individual or specific class of individuals has suffered from discrimination is authorized to bring a complaint on that individual's or specific class of individuals' behalf.

- Four laws (California's post-secondary law, Kentucky, New Hampshire, and Rhode Island) are silent altogether on the issue of administrative standing.

- The state law corollaries have varying provisions regarding who has standing to bring a private right of action in state court. The laws appear to fall into one of the following categorizations:

  - Eight of the state laws (Alaska, California's K-12 law, California's post-secondary law, Maine, both Nebraska laws, and both Washington laws) appear to allow a person aggrieved by a violation of the corollary to file suit. One of these eight states, Maine, also authorizes its Human Rights Commission to bring a suit on behalf of an aggrieved person.

  - One state law (California's Discrimination Article) establishes a private right of action but does not specify who has standing to file a civil action under the provision.

  - New York's Enough is Enough law expressly states that it does not establish a private right of action.

  - The remaining state laws (Kentucky, New Hampshire, New York's Human Rights Law, New York's post-secondary admissions law, and Rhode Island) are silent on the issue of whether a private right of action exists.

C. Factors to be Considered in Establishing a Detailed Enforcement Mechanism for Hawaii's Title IX Corollary

The following list illustrates, but is not exhaustive of, the many factors that the Legislature may wish to consider in establishing a detailed enforcement mechanism for Chapter 368D, HRS.

- Given that Chapter 368D, HRS, has an effective date of January 1, 2020, and that an aggrieved party may file a claim for administrative relief from that date, under section 368D-1(f), HRS, the Legislature may wish to consider how to address these potential claims in the absence of an explicit process in place; or whether, in the alternative, the rights of an aggrieved party at a public institution will be sufficiently protected under HDOE's pending, and UH System's recently established, rules, policies, and procedures.

- In view of the wide range of educational programs to which Title IX applies,[57] specifying clearly the scope of conduct to which section 368D-1, HRS (Hawaii's Title IX corollary), would apply.

- Clarifying whether enforcement would be based on contractual principles similar to Title IX, under which a recipient institution risks losing funding due to the institution's failure to comply with the law,[58] or whether enforcement would involve a non-financial penalty, such as the issuance of a cease and desist order, imposition of compliance monitoring on the institution, or other equitable remedies.[59]

- Designating or creating an appropriate agency to enforce Chapter 368D, HRS.

    - Determining whether to: place this responsibility with an existing state entity that has primary responsibility for education, such as the BOE or HDOE (for K-12), or University of Hawaii Board of Regents (UHBOR) (for post-secondary programs and activities); delegate enforcement authority to an existing agency that has experience with civil rights laws; or create a new state entity for the sole purpose of overseeing enforcement.

    - Determining the resources needed to ensure adequate enforcement capability, depending upon whether this responsibility is placed with an existing entity or a newly created entity, including: a sufficient number of staff (including managerial, investigative, and clerical) and the minimum level of subject matter expertise; sufficient office space and other resources; and a projected annual operating budget.

- Specifying the details of the complaint process, including: the manner in which investigations or hearings would be conducted and by whom; applicable time frames for filing, responding to, investigating, scheduling a hearing on, issuing a decision on, and appealing, a complaint; and the respective rights of complainants and respondents at different phases of the complaint process.

- Considering whether clarification is needed to section 368D-1, HRS, to specify whether "student" refers to current, former, and/or prospective students, in light of issues raised in recent federal appellate cases relating to a student's standing to sue a recipient institution.[60]

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[57] *See* Chapter 2, part I, subpart B, *supra*.
[58] *See* Chapter 2, notes 57 to 58, and accompanying text, *supra*.
[59] *See, e.g.,* Chapter 6, notes 144, 200, and 263 (cease and desist orders), and accompanying text, *supra*; Chapter 6, notes 187 and 244 (other equitable remedies), and accompanying text, *supra*; and Appendix D, discussion of the "Final disposition and ultimate penalty" for the New York Human Rights Law (imposition of compliance monitoring on the institution), *infra*.
[60] *See* Chapter 2, notes 76 to 86, and accompanying text, *supra*.

- Specifying the remedies or relief that may be granted to an aggrieved person in the administrative and judicial enforcement contexts,[61] including consideration of the following:

    - Informal resolution in lieu of a formal investigation and complaint process;

    - Interim measures or accommodations for complainants and accused persons;

    - Injunctive relief (e.g., a requirement that the perpetrator cease the discriminatory conduct, or a specific action to rectify the discrimination or its effects); or

    - Monetary damages (compensatory or punitive).

- Considering whether to allow an appeal of a decision on a complaint made pursuant to Chapter 368D, HRS. If an appeal is allowed, the Legislature may wish to further consider the following:

    - The extent to which a decision may be appealed (for example, the factual findings, or the sanctions and remedies imposed based on a finding, or both);

    - Whether the provisions relating to an appeal process apply equally to both the complaining and responding parties;

    - The party or parties permitted to initiate an appeal;

    - The entity responsible for conducting any further investigation, if applicable, during the appeal process; and

    - The entity responsible for rendering a decision on the appeal.

- Clarifying how Chapter 368D, HRS, will be construed in relation to other federal and state anti-discrimination laws if conflicts or inconsistencies arise among those laws.[62] Chapter 368D, HRS, is silent on how such conflicts may be resolved.

    - As an example of potential inconsistency, section 368D-1, HRS, permits an aggrieved student to file a civil action in court alleging a violation. In contrast, Hawaii's Gender Equity in Athletics Law (section 302A-461, HRS) prohibits a private right of action for violations of the law.

    - As an example of potential conflict, section 368D-1, HRS, specifically applies to "public charter schools," due to their inclusion in the section's definition of "[s]tate educational program or activity." In contrast, section 8-89-3 of the

[61] Examples of remedies and relief that may be granted in administrative and judicial enforcement contexts are provided throughout Chapters 2, 3, 4, and 6, *supra*.

[62] Examples of language from other states' Title IX corollaries addressing construction of their respective corollaries in relation to other laws are provided throughout Chapter 6, *supra*.

HDOE's proposed Chapter 89 (civil rights policy and procedure for student complaints against adult perpetrators),[63] whose stated purpose is to enforce Act 110, Session Laws of Hawaii 2018 (Chapter 368D, HRS), and other federal and state laws,[64] specifies that "[c]harter schools are excluded from this chapter and are subject to regulations promulgated by the Hawaii State Public Charter School Commission."[65]

- In addition, a potential conflict may arise between the federal Family Educational Rights and Privacy Act (FERPA)[66] and Hawaii's Title IX corollary, depending upon additional future provisions added to Chapter 368D, HRS, or the adoption of any related administrative rules. For example, the disclosure during a Title IX grievance process of certain information about the alleged accused that does not directly relate to the complainant may violate FERPA.[67] If Hawaii's Title IX corollary were to require such a disclosure, it would similarly conflict with FERPA.

- Further, Chapter 3 of this report discusses several potential conflicts between the USDOE's proposed new Title IX regulations and other federal laws related to Title IX, as raised by the University of Hawaii in its comments on the proposal.[68] These potential conflicts include issues related to: the scope of conduct that the school would be obligated to investigate under the new definition of sexual harassment, and the reporting requirements under the Clery Act related to incidents of sexual harassment. These conflicts presumably could impact enforcement of Hawaii's Title IX corollary. Additional inconsistencies or conflicts not apparent at this time may become evident at a later date once the

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[63] *See* Letter to the Honorable Catherine Payne, BOE Chairperson, from Dr. Christina M. Kishimoto, HDOE Superintendent, regarding new Chapter 89 to Title 8, Hawaii Administrative Rules (HAR) (February 7, 2019) (February 7, 2019 HDOE Letter on Chapter 89), at Attachment A, *available at* http://boe.hawaii.gov/Meetings/Notices/Meeting%20Material%20Library/GBM_02072019_Board%20Action%20on%20Approving%20for%20Public%20Hearing%20Repeal%20of%20Hawaii%20Administrative%20Rules%2c%20Chapter%2041%2c%20Civil%20Rights.pdf; Chapter 4, notes 262 to 274, and accompanying text, *supra*. *See also* Chapter 4, notes 167 to 183, and accompanying text, *supra* (discussing key provisions of Title 8, Chapter 41, HAR, which the proposed Chapter 89 is intended to replace).

[64] *See* February 7, 2019 HDOE Letter on Chapter 89, *supra* note 63, at Attachment A, proposed §8-89-1. Proposed §8-89-1(f) specifies that the HDOE "shall comply with all applicable state and federal nondiscrimination laws and regulations in administering" Title 8, Chapter 89, HAR, including Act 110, Session Laws of Hawaii 2018.

[65] *See* Chapter 4, note 274, and accompanying text, *supra*.

[66] FERPA generally prohibits the release of information from a student's "education record" without the consent of the student or the student's parent. *See* Chapter 3, part II, subpart C, *supra* (explaining FERPA's relevance to Title IX enforcement, including potential conflicts with Title IX).

[67] *See id*. In its 2001 Revised Guidance on Sexual Harassment, the USDOE pointed out that requirements of FERPA and Title IX may conflict if, at the conclusion of the Title IX grievance process, a recipient institution discloses to a complainant the particular details of any sanction or discipline imposed upon the accused student, as opposed to merely informing the complainant that a sanction or discipline had been imposed. However, the USDOE also stated at that time its belief that information on sanctions or discipline may be disclosed to a complainant if (1) the information directly relates to the complainant (e.g., an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a post-secondary institution.

[68] *See* Chapter 3, notes 254 to 266, and accompanying text, *supra.*

proposed new Title IX regulations take effect and provisions relating to Hawaii's Title IX corollary are fleshed out either in statute or rule.

- Considering whether to require periodic reports to the Legislature by the educational programs and activities that must comply with section 368D-1, HRS. If periodic reports are to be required, the Legislature may wish to further consider the following:

  - The frequency of reporting;

  - The entity responsible for compiling and submitting reports;

  - The extent to which information about individual educational programs and activities may be consolidated or aggregated into a single report (for example, one report for an HDOE complex area that comprises multiple schools, or for a post-secondary system that comprises multiple campuses); and

  - The information to be included in reports.

- If the Legislature deems it appropriate, determining elements of the enforcement process that may be established through the administrative rulemaking process.

- Conforming the language of existing Hawaii statutes and/or administrative rules with that of section 368D-1, HRS, which specifies that discrimination on the basis of "sex" includes sex discrimination that is based on "gender identity or expression" and "sexual orientation." More specifically, conforming amendments would appear to be necessary to sections 302A-461, HRS,[69] and 302A-1001, HRS.[70]

[69] Section 302A-461, HRS, requires gender equity in high school athletics. *See* Chapter 6, notes 94 to 105, and accompanying text, *supra*.

[70] Section 302A-1001, HRS, prohibits sex-based discrimination in any educational or recreational program or activity receiving state or county financial assistance or utilizing state or county facilities. *See* Chapter 6, notes 106 to 109, and accompanying text, *supra*.

ACT 110

H.B. NO. 1489

A Bill for an Act Relating to Civil Rights.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

SECTION 1. The legislature finds that Title IX of the Education Amendment of 1972 (20 U.S.C. 1681 et seq.) (Title IX), renamed the Patsy Mink Equal Opportunity in Education Act in 2002, triggered a seismic shift in the education landscape by prohibiting discrimination on the basis of sex by any education program of activity receiving federal funds. The legislature also finds that Hawaii is rightfully proud of Patsy Mink's signature legislation, which has given millions of girls and women educational opportunities that were undreamed of before enactment of Title IX, in the classroom and on playing fields; in research, teaching, and graduate schools; and in employment, medicine, law, and other professions. The legislature recognizes, however, that Patsy Mink's celebrated legacy has not been fully realized, and that the efficacy of Title IX federal protections against sex discrimination in education has been diminished and eroded. For these reasons, the legislature believes it is time to consider and address the need for a corollary to Title IX in state law.

Accordingly, the purpose of this Act is to:

(1) Provide for a state corollary to Title IX that prohibits discrimination on the basis of sex, including gender identity or expression, or sexual orientation, in any state educational program or activity, or in any educational program or activity that receives state financial

assistance, without regard to whether the educational program or activity also receives federal funds; and

(2) Direct the legislative reference bureau to conduct a study of existing Title IX procedures on the federal level and in other jurisdictions and recommend proposed legislation.

PART II

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to title 20 to be appropriately designated and to read as follows:

"CHAPTER
DISCRIMINATION IN STATE EDUCATIONAL PROGRAMS AND ACTIVITIES

§ -1 **State educational programs and activities; discrimination prohibited.** (a) No person in the State, on the basis of sex, including gender identity or expression as defined in section 489-2, or sexual orientation as defined in section 489-2, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under:

(1) Any state educational program or activity; or

(2) Any educational program or activity that receives state financial assistance.

(b) Nothing in this chapter shall preclude a student participating in any educational program or activity who is aggrieved by a violation of this chapter from filing a civil action in a court of competent jurisdiction.

(c) A person, or an organization or association on behalf of a person alleging a violation of this chapter may file a complaint pursuant to this chapter.

(d) As used in this section:

"Educational program or activity that receives state financial assistance" means any educational program or activity that receives state financial assistance, in any amount, for any purpose. The term does not exclude an educational program or activity that also receives federal funds.

"State educational program or activity" means an educational program or activity of the University of Hawaii, the department of education, or public charter schools."

PART III

SECTION 3. The legislative reference bureau shall conduct a study of existing Title IX enforcement practices and procedures on the federal level and in other jurisdictions, including the following:

(1) A detailed review of enforcement entities responsible for overseeing the investigation and adjudication of complaints under Title IX and related state laws prohibiting discrimination on the basis of sex;

(2) An examination of issues related to service and standing for bringing applicable complaints;

(3) A review of the various remedies for violations that may be available to an aggrieved party, including alternative dispute resolution, injunctive relief, and civil damages; and

(4) An examination of any potential inconsistencies between multiple state and federal compliance mandates and regulatory schemes.

No later than twenty days prior to the convening of the regular session of 2019, the legislative reference bureau shall submit a report to the legislature

with findings and recommendations on the foregoing issues, including proposed legislation concerning an appropriate enforcement mechanism for chapter , Hawaii Revised Statutes.

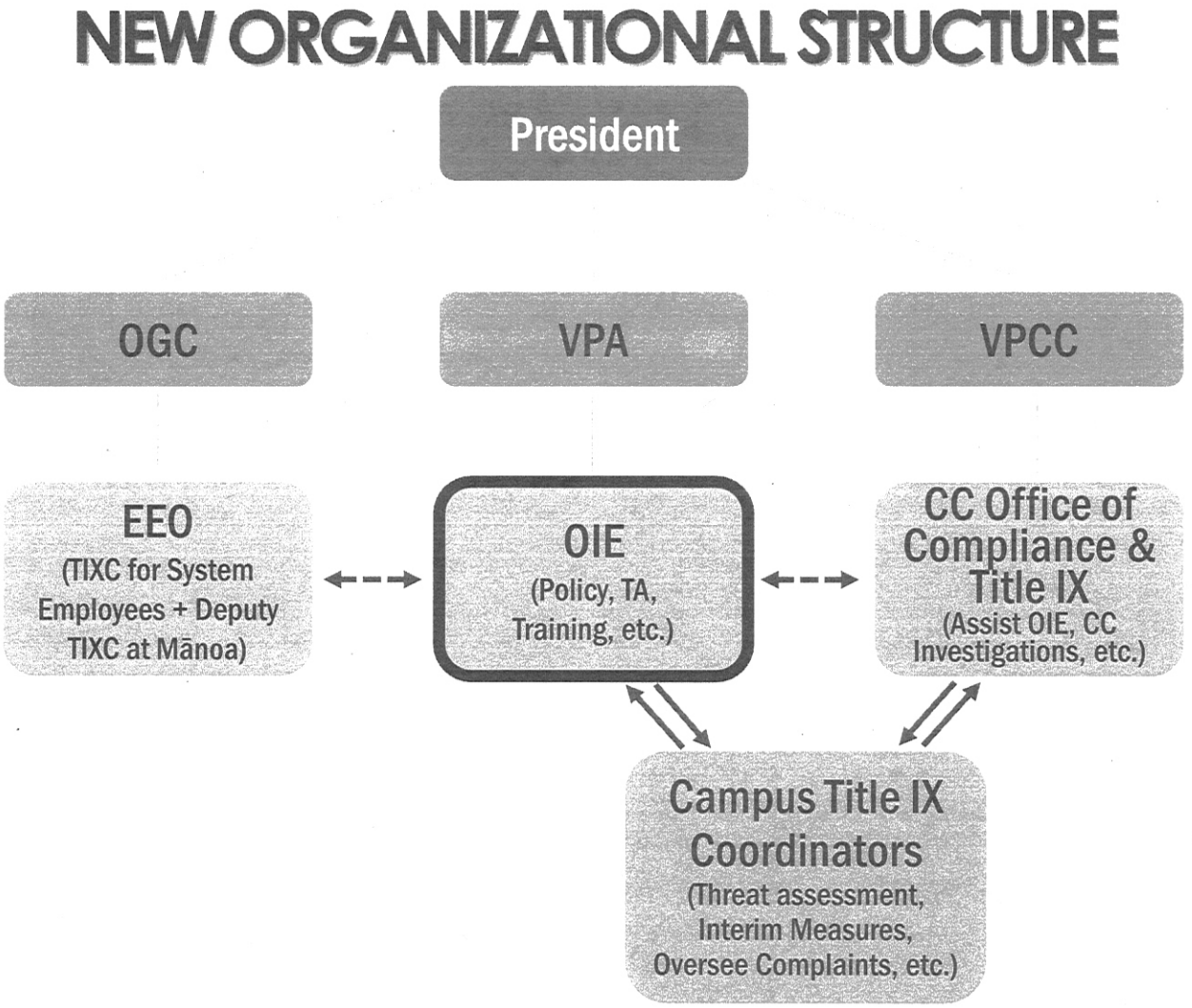
PART IV

SECTION 4. This Act shall take effect on January 1, 2020; provided that part III shall take effect on July 1, 2018.

(Approved July 5, 2018.)

Appendix B

(Excerpted from January 25, 2018, Progress Update on Sexual Harassment and Gender-Based Violence Program at the University of Hawaii)



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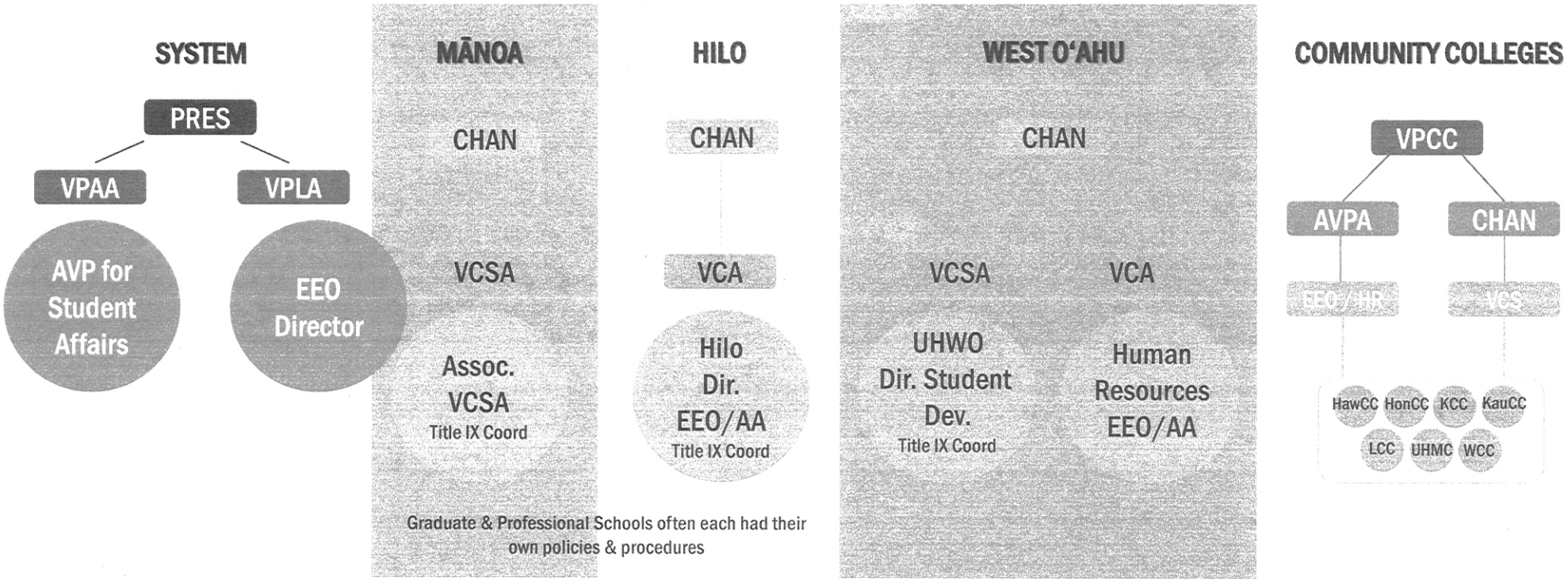

SILOED model: • Different procedures • Inconsistent outcomes • No sharing

EMPHASIS on: • Compliance • Investigation • Process

LIMITED ATTENTION to: • Immediate response • Safety • Outcomes

2

University of Hawai'i
Office of Institutional Equity

Reporting & Investigation Procedures Flowchart for Title IX Coordinators

Source: Interim Executive Policy EP 1.204 – Interim Policy and Procedure on Sex Discrimination and Gender-Based Violence

Last Updated 09.01.15

Appendix D: State Corollaries to Title IX—Enforcement Procedures

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
Alaska Chapter 14-18, Alaska Statutes (AS): Prohibition Against Discrimination Based on Sex or Race in Public Education Law applies to both K-12 and post-secondary, but procedure discussed here applies to K-12 only. Post-secondary procedure is per University of Alaska policy.	*Initial Enforcement Authority:* School district. "Each school district shall adopt and make available to the public a grievance procedure" to remedy violations of the law. 4 Alaska Admin. Code (AAC) 06.560. *Ultimate Enforcement Authority:* Board of Education and Early Development. "The board shall enforce compliance by school districts and regional educational attendance areas with the provisions of this chapter and the regulations and procedures adopted under it ...." AS 14.18.090.	Minimum requirements: (1) Provide for a hearing before the governing body of the district; (2) Require that the hearing be held on the record; and (3) Require that a final decision be issued within 60 days after the filing of the grievance. 4 AAC 06.560. *[Statute/rules are silent as to who conducts the investigation and who makes the decision at the local level.]*	If, after exhausting the school district's grievance procedure, aggrieved person believes that violation has not been remedied, the person may file complaint with Commissioner of Education and Early Development within 180 days of the alleged violation. Commissioner shall investigate complaint. If Commissioner determines violation occurred and action against school district is justified, Commissioner shall file accusation with Board. Board chair will request a single hearing officer to hear case. Board will accept or reject hearing officer's proposed decision at its next regular meeting. 4 AAC 06.560. BUT, Commissioner may enter into voluntary compliance agreement with a school district alleged to be in violation, "instead of further action under 4 AAC 06.560." Under a voluntary compliance agreement, admission of wrongdoing is not required, but school district must agree not to commit the violation in the future. Commissioner may require school district to submit a plan of compliance, which must contain at a minimum: (1) A timeline for compliance; (2) How compliance will be achieved; (3) Criteria by which compliance can be determined; and (4) The name of the person responsible at the district level for	After finding by Board that there was non-compliance and that the district is "not actively working to come into compliance," Board "shall institute appropriate proceedings to abate the practices" found to violate the law. After finding by Board of non-compliance AND ineffective abatement measures, board "shall withhold state funds." AS 14.18.090. BUT, Board has discretion to direct school district or hearing officer to formulate a plan of compliance. Commissioner may petition board to withhold state funds if school district fails to comply with voluntary compliance agreement or compliance plan or any other Board order. Board will hold abbreviated hearing on petition in which Commissioner shall state basis for petition and school district will have opportunity to respond. 4 AAC 06.580. Note that a decision by the Board may be appealed to the judicial system for further review pursuant to the state's Administrative Procedures Act. *See* 4 AAC 06.560 (providing that a hearing shall be in accordance with the Administrative Procedures Act)	Nothing precludes school district and complainant from settling complaint prior to hearing before governing body of school district. 4 AAC 06.560.

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
			supervising compliance. 4 AAC 06.570.	and AS §44.62.560 (authorizing judicial review).	
California California Government Code (Cal. Govt. Code), Title 2, Division 3, Part 1, Chapter 1, Article 9.5: Discrimination Law applies to all programs or activities that receive state funds.	Statute/rules authorize two separate means of administrative enforcement. Generally, the law is enforced by Department of Fair Employment and Housing (discussed in this row). *See* Cal. Govt. Code §11136. However, if the alleged discrimination took place in a K-12 setting, complaints may also be filed pursuant to the Uniform Complaint Procedure, which is discussed in the following row. *See* 5 CCR §4610(c).	"Whenever a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state has reasonable cause to believe that a contractor, grantee, or local agency" has violated the Discrimination Article or any regulation adopted to implement the law, "the head of the state agency, or his or her designee, shall notify the contractor, grantee, or local agency of such violation and shall submit a complaint detailing the alleged violations to the Department of Fair Employment and Housing for investigation and determination[.]" Cal Govt. Code §11136.	N/A.	If it is determined that a contractor, grantee, or local agency has violated the provisions of the Discrimination Article, pursuant to the process described in Section 11136, the state agency that administers the program or activity involved shall take action to curtail state funding in whole or in part to such contractor, grantee, or local agency. Cal Govt. Code §11137.	Statute silent.
California California Education Code (Cal. Educ. Code), Part 1, Chapter 2: Educational Equity Law applies to K-12 institutions.	*Initial Enforcement Authority:* Local educational agency ("LEA", which is defined by 5 CCR §4600(p) to include "any public school district and county office of education or	A person alleging unlawful discrimination, harassment, intimidation, or bullying may file a complaint "not later than six months" from the date of the alleged violation. (District superintendent may extend this timeframe.) 5 CCR §4630(b). The LEA must "conduct and complete an investigation of the complaint" in accordance with the local procedures it adopted pursuant	The complainant may appeal the LEA's decision to the California Department of Education within 15 days of receiving the LEA's decision. 5 CCR §4632. The Department may refer a complaint back to the local educational agency if the Department determines that: (1) The appeal raises issues not contained in the complaint; or	"Upon a determination that a local agency violated the provisions of this chapter, the Department shall notify the local agency . . . that it must take corrective action to come into compliance. If corrective action is not taken, the Department may use any means authorized by law to effect compliance, including, but not limited to: (1) The withholding of all or part of the local agency's	Nothing precludes the parties "from utilizing alternative methods to resolve the allegations in the complaint, including . . . mediation." 5 CCR §4631(f). In cases filed directly with the Department

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
California uses a uniform complaint procedure for federal and state law requirements for education programs. *See* 5 California Code of Regulations (CCR) §§4600-4687 (Uniform Complaint Procedure). The procedure may be used to address complaints under both the Educational Equity law and the California Discrimination Article.	direct-funded public school") has "primary enforcement responsibility to insure compliance with applicable state and federal laws and regulations." (5 CCR §4620). Each LEA must adopt policies and procedures for the investigation and resolution of complaints. 5 CCR § 4621(a). *Ultimate Enforcement Authority:* Department of Education. Cal. Educ. Code §262.3 (providing that an LEA's decision may be appealed to the Department of Education).	to 5 CCR §4621. The investigation must include an opportunity for the complainant to "present the complaint(s) and evidence or information leading to evidence to support the allegations of non-compliance with state and federal laws and/or regulations." 5 CCR §4631(a)-(b). LEA generally must prepare a written decision within 60 days of the receipt of the complaint. 5 CCR §4631(e). *[Statute/rules are silent as to who conducts the investigation and who makes the decision at the local level.]* BUT, a complainant may file a complaint directly with Department of Education and bypass local educational agency in certain circumstances, such as if the LEA fails or refuses to cooperate with the investigation or if filing with the LEA would cause "immediate and irreparable harm". 5 CCR §§4640(a) and §4650. In such cases, the Department must complete its investigation within 60 days of receiving the request and issue a report with 60 days of completing the investigation. 5 CCR §§4662(b) and 4664(b).	(2) The local educational agency's decision failed to address an issue raised by the complaint. 5 CCR §4632(d) and (e). "If the [Department] finds that the [LEA's] Decision is supported by substantial evidence, and that the legal conclusions are not contrary to law, the appeal shall be denied." 5 CCR §4633(g). However, if the Department finds that the grounds for the appeal have merit, it may: (1) Remand the investigation to the local educational agency for further investigation if there is a lack of substantial evidence or a procedural defect in the investigation; (2) Issue a decision based on the evidence in the investigation file received from the local educational agency; or (3) Conduct a further investigation of the allegations and issue a decision following the investigation. 5 CCR §4633(h).	relevant state or federal fiscal support in accordance with state or federal statute or regulation; (2) Probationary eligibility for future state or federal support, conditional on compliance with specified conditions; (3) Proceeding in a court of competent jurisdiction for an appropriate order compelling compliance. No decision to curtail state or federal funding to a local agency under this chapter shall be made until the Department has determined that compliance cannot be secured by other means." 5 CCR §4670.	pursuant to 5 CCR §4640, the Department is required to consider "alternative methods" to resolve the allegations in the complaint." If mediation is requested, the Department must "offer to mediate the dispute which may lead to a state mediation agreement. 5 CCR §4660(a).
California	Primary enforcement responsibility is assigned:	Each post-secondary educational institution is required to adopt its own written policy on sexual harassment. *See* Cal. Educ. Code	"A party to a written complaint of prohibited discrimination may appeal the action taken by the governing board of a community college district	Each post-secondary educational institution is required to adopt its own written policy on sexual harassment, so specific remedies	Statute silent.

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
Cal. Educ. Code, Part 40, Chapter 4.5: Equity in Higher Education Act Law applies to post-secondary institutions.	(1) For each community college district, to the district's governing board; (2) For the California State University system, to the Chancellor of the system and the respective president of each campus; and (3) For the University of California system, to the President of the system and the respective chancellor of each campus. Cal. Educ. Code §§66292-66292.2.	§66281.5. Specific complaint procedures may differ between institutions	or the president of a campus of the California State University . . . to the Board of Governors of the California Community Colleges or the Chancellor of the California State University, as applicable." Cal. Educ. Code §66292.3(a). *[No similar provision exists for the University of California system.]*	may differ between institutions. *See* Cal. Educ. Code §66281.5	
Hawaii Hawaii Revised Statutes (HRS) §302A-461: Gender Equity in Athletics Law applies to grades 9-12.	Statute silent.	Statute silent.	Statute silent.	Statute silent.	Statute silent.

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
Hawaii HRS §302A-1001: Prohibition Against Student Bias Law applies to any educational or recreational program receiving state or county funds or using state or county facilities, including K-12 and potentially post-secondary institutions. The procedure described here applies to public K-12 schools.	*Initial Enforcement Authority:* A district complaint board, which consists of a district superintendent or designee, a principal of a public school within the district, the equal educational opportunity coordinator of the district, the director of management analysis and compliance branch or designee, and the president of the district student council or designee. Hawaii Administrative Rules (HAR) §8-41-4. *Ultimate Enforcement Authority:* Department of Education. *See* HAR §8-41-13.	"The complainant shall file a written complaint with the district superintendent of the school district in which the violation took place. The written complaint form shall be filed within twenty days of the alleged violation," but there is no time limit to file a complaint alleging "systemic discrimination." HAR §8-41-11(a). "The district shall investigate and afford all parties a hearing on all written complaints[.]" HAR §8-41-11(b). "The district complaint board shall provide the complainant and respondent a written decision within ten days of concluding its hearing on the complaint." HAR §8-41-11(d).	The decision of the district complaint board shall be final, unless the district complaint board is unable to reach a decision because there is no concurring majority. HAR §8-41-11(e). A concurring majority means "a majority of the board members or designees who are present at the board hearing[.]" HAR §8-41-4(h). "If a district complaint board fails to reach a decision because there is no concurring majority, the complaint, recorded proceedings of the hearing, and any and all evidence accepted at the hearing shall automatically be forwarded to the state superintendent of education or designee who shall hear and examine the evidence and render a decision on the merits of the case within fifteen days from the date the district complaint board concluded its hearing. The decision of the state superintendent or designee shall be final[.]" HAR §8-41-11(f).	"If a decision of a district complaint board, or the state superintendent of education or designee . . . requires remedial action by the department [of education], the state superintendent of education shall promptly and equitably determine an appropriate remedy and be responsible for its implementation." HAR §8-41-13.	Statute/rules silent.
Hawaii	Statute silent.	"A person, or an organization or association on behalf of a person alleging a violation of this chapter	Statute silent.	Statute silent.	Statute silent.

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
HRS §368D-1: Prohibition on Discrimination in State Educational Programs and Activities Law applies to K-12 and post-secondary institutions.		may file a complaint pursuant to this chapter." HRS §368D-1(f). The chapter does not provide additional details on the complaint process.			
Kentucky Kentucky Revised Statutes (KRS) §§344.550-344.575: Sex Equity in Education Law applies to K-12 and post-secondary institutions.	Each state department and agency that extends state financial assistance to an education program or activity; provided that the financial assistance represents at least two percent of the total state financial assistance received by the educational institution. KRS §344.560.	Each state department or agency that is "empowered to extend state financial assistance to any education program or activity" must adopt its own regulations to "effectuate the provisions" of the corollary. KRS §344.560. "However, no action shall be taken [to enforce compliance] until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply [with the law,] the chief officer of the state department or agency shall file with the committees of the House of Representatives and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No	"Any final action taken by a department or agency . . . shall be subject to such judicial review as may otherwise be provided by law for similar action taken by the department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to KRS 344.560, any funding recipient aggrieved may obtain judicial review of the action in the Franklin Circuit Court." KRS §344.565. *[The Franklin Circuit Court is the circuit court that includes Kentucky's state capital, Frankfort.]*	"Compliance with any requirement adopted . . . shall be effected: (1) By the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to such a finding as been made, and shall be limited in its effect to the particular program, or part thereof, in which the noncompliance has been found; or (2) By any other means authorized by law." KRS §344.560.	Statute silent.

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
		such action shall become effective until thirty (30) days have elapsed after the filing of such report." KRS §344.560.			
Maine Maine Revised Statutes, Chapter 337, Subchapter 5-B: Educational Opportunity Law applies to K-12 and post-secondary institutions.	*Initial Enforcement Authority:* Educational institution. *See* 05-071 Code of Maine Regulations (CMR) ch. 4-A, §05. An educational institution is defined by 05-071 CMR ch. 4-A §02(B) as any public school or educational program, any public postsecondary institution, and any private school or educational program [that receives state funds] if both male and female students are admitted, and the governing board of each such program.	Complaints are filed under oath with the Maine Human Rights Commission, within 300 days after the act of alleged discrimination. 05-071 CMR ch. 4-A, § 03. After complaint is filed, the Commission "shall refer complaints to the respondent educational institution for ten days to enable the grievance procedure established by the educational institution to review the complaint and resolve the matter with the complainant, prior to investigatory action or settlement discussion by the Commission or its representatives." HOWEVER: The Commission is not required to refer a complaint to the educational institution if "the educational institution has not established a grievance procedure or where the complaint alleges sexual harassment by a member of the educational institution." 05-071 CMR ch. 4-A, § 05. *[Statute/rules are silent as to who conducts the investigation and who makes the decision at the local level.]*	"After a complaint has been filed . . . a Commission investigator will conduct such preliminary and impartial investigation as is necessary." 05-071 CMR ch. 4-A, § 07(A). (NOTE: Upon agreement of the complainant, or by decision of the Commission's Executive Director, the complaint may be referred to the DOE for an investigation pursuant to its procedures. A joint investigation between the Commissioner of Education and the Human Rights Commission is also possible. 05-071 CMR ch. 4-A, § 07(E).) After investigation is completed, the investigator submits a report of the investigation that includes "recommendations concerning the disposition of the complaint." The complainant and respondent have an opportunity to respond in writing before the report and any written submissions are transmitted to the Maine Human Rights Commission. 05-071 CMR ch. 4-A, § 07(F) to (H). "The Commission must conclude its investigation within 2 years after the notarized complaint is filed with the Commission." 05-071 CMR ch. 4-A, § 07(I).	If conciliation efforts fail, "the Commission Counsel is authorized to file a civil action in the Superior Court seeking appropriate relief, including, but not limited to, temporary restraining orders and preliminary injunctions." If the Commission Counsel "is unable to file expeditiously such a civil action, the Commission shall so notify the complainant of her/his right to file a civil action[.]" 05-071 CMR ch. 4-A, § 11. If the court in such an action finds that unlawful discrimination occurred, its judgment must specify an appropriate remedy or remedies for that discrimination. The remedies may include, but are not limited to: (1) An order to cease and desist from the unlawful practices specified in the order; (2) An order to "pay to the victim of unlawful discrimination . . . civil penal damages not in excess of $20,000 in the case of the first order under this Act . . . not in excess of $50,000 in the case of a 2nd order . . . and not in excess of	"[P]rior to a determination of whether there are reasonable grounds to believe that unlawful educational discrimination has occurred, the Commission's Compliance Manager . . . will engage in a settlement discussion. The Compliance Manager will encourage written agreements between the parties to resolve the matter. The Compliance Manager may also offer the parties an opportunity to participate in a third-party neutral mediation program established by the Commission." 05-071 CMR ch. 4-A, §06(A). "[I]f the matter is resolved to the

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	Ultimate Enforcement Authority: Maine Human Rights Commission and, in certain cases, the Commissioner of Education. *See* 5 Maine Revised Statutes (MRS) §§4566 and 4604.		"After considering the Investigator's Report . . . the Commission will make a determination whether reasonable grounds exist to believe that unlawful educational discrimination has occurred. The Commission shall issue a Statement of Finding in support of its determination." If reasonable grounds are found to exist, the Commission's Compliance Manager will then "endeavor to resolve the matter by informal means such as conference, conciliation, or persuasion." If the matter is resolved to the mutual satisfaction of the complainant and respondent and to the satisfaction of the Commission . . . the proceeding will be dismissed…." 05-071 CMR ch. 4-A, § 08. If a determination of reasonable grounds has been made, the Commission "shall attempt to achieve a just resolution and to obtain assurances that the respondent will eliminate the unlawful educational discrimination. Disposition of a matter pursuant to this section shall be in the form of a written agreement and approved by a majority of the Commission[.]" 05-071 CMR ch. 4-A, § 10.	$100,000 in the case of a 3rd or subsequent order . . . ." 5 MRS §4613. The Court may also award attorney's fees in certain cases. *See* 5 MRS §§ 4614 and 4622.	mutual satisfaction of the complainant and respondent and to the satisfaction of the Commission's Executive Director . . . the Executive Director . . . shall have the authority to sign any settlement agreement on behalf of the Commission, together with the parties." 05-071 CMR ch. 4-A, §06(B).
Nebraska Nebraska Revised Statutes (Neb. Rev. St.),	Enforcement authority is given to the governing boards of each respective educational	Any person aggrieved by a violation of the law or a rule adopted under the law "may file a complaint with the governing board of the educational institution committing such violation." The complaint	If the claimant accepts the governing board's written disposition of the complaint, the claimant "shall notify the board in writing within 60 days of such disposition, at which time such disposition shall be deemed final and	N/A.	Statute silent.

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
Chapter 79, Article 2(l): Nebraska Equal Opportunity in Education Law applies to K-12 institutions.	institution. Neb. Rev. St. §79-2,117. "Governing board" means the duly constituted board of any public school system of elementary or secondary schools. Neb. Rev. St. §79-2,115.	must be made within 180 days of the violation. Neb. Rev. St. §79-2,118(1). "The governing board may take such action as may be necessary to correct such violation, including, but not limited to, (a) terminating the discriminatory practice or policy complained of and (b) awarding to the aggrieved person or persons such compensatory money damages as the particular facts and circumstances may warrant." All dispositions "shall be in writing and signed by the chief officer of the governing board[.]" Neb. Rev. St. §79-2,118.	conclusive. A failure to notify the board of such acceptance within the time period provided in this section shall be deemed a rejection of such disposition." Neb. Rev. St. §79-2,119. If the claimant elects not to accept the governing board's disposition, the claimant, within 180 days of receipt of the disposition, may file an action in district court "for equitable relief and compensatory money damages." Neb. Rev. St. §79-2,120. If the governing board fails to dispose of a written complaint within one-hundred eighty days after the date of filing, the complaint may be withdrawn by the claimant and the claimant may file an action in district court. Neb. Rev. St. §79-2,121.		
Nebraska Neb. Rev. St., Chapter 85, Article 9(l): Nebraska Equal Opportunity in Postsecondary Education Law applies to post-secondary institutions.	Enforcement authority is given to the governing boards of each respective educational institution. Neb. Rev. St. §85-9,169. "Governing board" means the respective boards of the University of Nebraska, Nebraska State Colleges, and the state community college system.	Any person aggrieved by a violation of the law or a rule adopted under the law "may file a complaint with the governing board of the educational institution committing such violation." The complaint must be made within 180 days of the violation. Neb. Rev. St. §85-9,170(1). "The governing board may take such action as may be necessary to correct such violation, including, but not limited to, (a) terminating the discriminatory practice or policy complained of and (b) awarding to the aggrieved person or persons such compensatory money damages	If the claimant accepts the governing board's written disposition of the complaint, the claimant "shall notify the board in writing within 60 days of such disposition, at which time such disposition shall be deemed final and conclusive. A failure to notify the board of such acceptance within the time period provided in this section shall be deemed a rejection of such disposition." Neb. Rev. St. §85-9,171. If the claimant elects not to accept the governing board's disposition, the claimant, within 180 days of receipt of the disposition, may file an action in district court "for equitable relief	N/A.	Statute silent.

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
	Neb. Rev. St. §85-9,167.	as the particular facts and circumstances may warrant." All dispositions "shall be in writing and signed by the chief officer of the governing board[.]" Neb. Rev. St. §85-9,170.	and compensatory money damages." Neb. Rev. St. §85-9,172. If the governing board fails to dispose of a written complaint within 180 days after the date of filing, the claimant may withdraw the complaint and file an action in district court. Neb. Rev. St. §85-9,173.		
New Hampshire New Hampshire Revised Statutes (N.H. Rev. Stat.) §186:11: Duties of the State Board of Education - Discrimination Law applies to K-12 institutions.	*Initial Enforcement Authority:* School district. New Hampshire Code of Administrative Rules (N.H. Code Admin. R.), Board of Education (Ed), §303.01. *Ultimate Enforcement Authority:* Board of Education. N.H. Rev. Stat. §186:11 (XXXIII).	Each school board is required to "establish a policy on sexual harassment, written in age appropriate language and published and available in written form to all those who must comply[.]" The policy must include certain elements, including: (1) The names and roles of all persons involved in implementing the procedures; (2) A description of the process so all parties know what to expect, including the time frames and deadlines for investigation and resolution of complaints; (3) A description of "possible penalties, including termination;" and (4) A requirement that a written factual report be produced regardless of the outcome of the investigation. N.H. Code Admin. R., Ed 303.01(j).	The policy adopted by the school board must include "[a]t least one level of appeal of the investigator's recommendation." N.H. Code Admin. R., Ed 303.01(j)(8).	Statute/rules silent.	Statute/rules silent.
New York New York Executive Law, Article 15: Human Rights Law	Division of Human Rights. N.Y. Exec. Law §295(6).	After a complaint is filed, the Division of Human Rights shall make "a prompt and fair investigation of the allegations of the complaint." 9 NYCRR 465.6(a).	Within 270 days after a complaint is filed, the division shall issue and serve a written notice requiring the respondent or respondents to appear at a public hearing before a hearing examiner. N.Y. Exec. Law §297(4)(a).	If the Commissioner finds that a respondent has engaged in a unlawful discriminatory practice, the commissioner "shall state findings of facts and shall issue" an order, which may	"Prior to the issuance of the notice of hearing, a settlement calendar may be held wherein each case where probable

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
Law applies to K-12 and post-secondary institutions.		"The division, may, at any time after the filing of the complaint, endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation, or persuasion." 9 NYCRR 465.7(a)(1). Within 180 days after a complaint is filed, the division "shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint . . . has engaged or is engaging in an unlawful discriminatory practice." N.Y. Exec. Law §297(2)(a).	A hearing before an administrative law judge is conducted pursuant to 9 NYCRR 465.12. Following the hearing, the "administrative law judge shall prepare a proposed order for the commissioner [of human rights] containing findings of fact and a decision[.]" 9 NYCRR 465.17(c)(1). The final order is issued within 180 days of the date the hearing commenced. *See* N.Y. Exec. Law §297(4)(c) and 9 NYCRR 465.17.	include the following provisions: (1) A requirement that the respondent cease the practice; (2) A requirement that the respondent take affirmative action; (3) Award of compensatory damages to the aggrieved person; (4) Requiring payment to the state of profits obtained by the respondent due to the unlawful discriminatory acts; (5) Civil fines and penalties in an amount not to exceed $50,000; and (6) A report of the manner of compliance. N.Y. Exec. Law §297(4)(c). "Not later than one year from the date of a conciliation agreement [or an order], and at any other times in its discretion, the division shall investigate whether the respondent is complying with the terms of such agreement or order. […] Upon a finding of noncompliance, the division shall take appropriate action to assure compliance." 9 NYCRR 465.18. "Any complainant, respondent or other person aggrieved by an order of the commissioner which is an order after public hearing,	cause has been found may be considered for settlement." 9 NYCRR 465.10. The division's general counsel "may, at any time after a finding of probable cause, endeavor to achieve settlement of a case by proposing a settlement to the respondent[.]" 9 NYCRR 465.15(a).

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
				a cease and desist order, an order awarding damages, an order dismissing a complaint, or by an order of the division which makes a final disposition of a complaint may obtain judicial review thereof[.]" The proceeding "must be instituted within 60 days after the service of such order." N.Y. Exec. Law §298.	
New York New York Education Law (N.Y. Educ. Law) §313: Unfair Educational Practices Law applies to post-secondary institutions.	*Initial Enforcement Authority:* Initial complaints are filed with the Commissioner of Education. N.Y. Educ. Law §313(5)(a). *Ultimate Enforcement Authority:* Board of Regents University of the State of New York. N.Y. Educ. Law §313(5)(e).	A person "seeking admission as a student who claims to be aggrieved by an alleged unfair educational practice," or the person's parent/guardian, may file a petition (complaint) with the commissioner of education. N.Y. Educ. Law §313(5)(a). The commissioner shall conduct an investigation. If the commissioner determines that "probable cause exists for crediting the allegations of the petition," the commissioner shall "attempt by informal methods of persuasion, conciliation or mediation to induce the elimination of such alleged unfair educational practice." N.Y. Educ. Law §313(5)(a).	"If such informal methods fail to induce the elimination of the alleged unfair educational practice, the commissioner shall have power to refer the matter to the board of regents," which shall issue to the respondent "a complaint setting forth the alleged unfair educational practice charged and a notice of hearing before the board of regents." The Board of Regents must issue this complaint "within two years after the alleged unfair educational practice was committed." N.Y. Educ. Law §313(5)(e). Note the law does not direct the Board to conduct an additional investigation, but evidence/witnesses may be presented at the hearing. N.Y. Educ. Law §313(5)(f). "After the hearing is completed the board of regents shall file an intermediate report which shall contain its findings of facts and conclusions upon the issues in the proceeding." Each party has 20 days to respond to the report. N.Y. Educ. Law §313(5)(h).	"If, upon all the evidence, the regents shall determine that the respondent has engaged in an unfair educational practice, the regents shall state their findings of fact and conclusions and shall issue and cause to be served upon such respondent a copy of such findings and conclusions and an order requiring the respondent to cease and desist from such unfair educational practice, or such other order as they deem just and proper." N.Y. Educ. Law §313(5)(i). "Any party to the proceeding, aggrieved by a final order of the board of regents, may obtain a judicial review thereof by a proceeding . . . in the appellate division of the supreme court for the third judicial department." N.Y. Educ. Law §313(6)(b).	Statute silent.

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New York N.Y. Educ. Law, Article 129-B: "Enough is Enough" Law applies to post-secondary institutions.	New York State Education Department is responsible for issuing regulations, collecting data, and producing reports. N.Y. Educ. Law §6449(4).	Law does not establish an independent complaint procedure; however, N.Y. Educ. Law §6444(5) does provide certain minimum requirements that institutions must include in their existing procedures. Specifically, students are guaranteed the right to a process that includes, at a minimum: (1) Notice to a respondent describing the date, time, location and factual allegations concerning the violation, a reference to the specific code of conduct provisions alleged to have been violated, and possible sanctions; (2) An opportunity to offer evidence during an investigation, and to present evidence and testimony at a hearing, where appropriate, and have access to a full and fair record of any such hearing, which shall be preserved and maintained for at least five years from such a hearing and may include a transcript, recording or other appropriate record; and (3) Access to at least one level of appeal of a determination before a panel, which may include one or more students, that is fair and impartial and does not include individuals with a conflict of interest. N.Y. Educ. Law §6444(5)(b). The law also mandates certain protections in proceedings involving	Law does not establish an independent complaint procedure; however, N.Y. Educ. Law §6444(5) does require, in order to effectuate an appeal, that a respondent and reporting individual "receive written notice of the findings of fact, the decision and the sanction, if any, as well as the rationale for the decision and sanction. In such cases, any rights provided to a reporting individual must be similarly provided to a respondent and any rights provided to a respondent must be similarly provided to a reporting individual." N.Y. Educ. Law §6444(5)(b).	N/A.	Statute silent.

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
		an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct. These protections include, but are not limited to, the right: (1) For the respondent, accused, and reporting individual to be accompanied by an advisor of choice throughout the judicial or conduct process including during all meetings and hearings related to such process; (2) To a prompt response to any complaint and to have the complaint investigated and adjudicated in an impartial, timely, and thorough manner by individuals who receive annual training in conducting investigations of sexual violence; (3) To an investigation and process that is fair, impartial and provides a meaningful opportunity to be heard, and that is not conducted by individuals with a conflict of interest; (4) To have the institution's judicial or conduct process run concurrently with a criminal justice investigation and proceeding, except for temporary delays as requested by external municipal entities while law enforcement gathers evidence;			

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		(5) To review and present available evidence in the case file, or otherwise in the possession or control of the institution, and relevant to the conduct case, consistent with institution policies and procedures; and (6) To make an impact statement during the point of the proceeding where the decision maker is deliberating on appropriate sanctions. N.Y. Educ. Law §6444(5)(c).			
Rhode Island General Laws of Rhode Island (R.I. Gen. Laws), Section 16-38-1.1: Discrimination Because of Sex Law applies to K-12 and post-secondary institutions.	K-12: Commissioner of Elementary and Secondary Education. Post-secondary: The president of each public college, community college, university, and other public institution of higher learning. R.I. Gen. Laws. §16-38-1.1.	Statute silent.	Statute silent.	Statute silent.	Statute silent.
Washington Washington Revised Code (Wash. Rev. Code) Title 28A, Chapter 640: Sexual Equality	*Initial Enforcement Authority:* School district or public charter school, which is required to adopt and implement a sexual harassment	Upon receiving a complaint, the employee of a school district or public charter school designated to receive complaints must "ensure that the school district or public charter school conducts a prompt and thorough investigation into the allegations in the complaint." WAC 392-190-065(4).	The complaint procedure must "provide an option to appeal the decision" to a "party or board that was not involved in the initial complaint or investigation." If a school district or public charter school establishes a time limit to file an appeal, it can be "no less than ten calendar days from the date the complainant received the	"All corrective actions [from the Office of Superintendent's written decision] must be completed within the timelines established in the written decision unless the office of superintendent of public instruction grants an extension. If timely compliance by a school	"The complainant and the school district or public charter school may agree to resolve the complaint in lieu of an investigation. If the complaint is resolved to the

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
Law applies to K-12 institutions.	policy. WAC 392-190-057. *Ultimate Enforcement Authority:* Superintendent of Public Instruction, who is responsible for monitoring school districts' and public charter schools' compliance with the law. WAC 392-190-076(1).	"Following the completion of the investigation, the designated employee or employees must provide the district superintendent, charter school administrator, or designee with a full written report of the complaint and the results of the investigation" and respond to the complaining party in writing within 30 calendar days of receiving the complaint. The response to the complaining party must include: (1) A summary of the results of the investigation; (2) Whether the school district or public charter school has failed to comply with the equal educational opportunity law; (3) Notice of the complainant's right to appeal; and (4) The corrective measures deemed necessary to correct the noncompliance, if applicable. WAC 392-190-065(5) and (6).	school district's or public charter school's response[.]" WAC 392-190-070(1) and (2). An appeal decision must be provided within 20 calendar days of the date the appeal was received, unless otherwise agreed to by the complainant. A copy of the appeal decision must be sent to the Superintendent of Public Instruction. WAC 392-190-070(3). If the complainant disagrees with the initial appeal decision, the complainant may file a complaint with the Office of Superintendent of Public Instruction ("Office of Superintendent") within thirty calendar days of receiving the prior appeal decision, unless the Office of Superintendent "grants an extension for good cause." WAC 392-190-075(1). The Office of Superintendent *may* initiate a new investigation and may also "investigate additional issues related to the complaint that were not included in the initial complaint or appeal[.]" WAC 392-190-075(2). The Office of Superintendent "will make an independent determination as to whether the school district or public charter school has failed to comply with [the equal educational opportunity law]. The office of superintendent of public instruction will issue a written decision . . . that	district or public charter school is not achieved, the office of superintendent of public instruction may take actions to ensure compliance. Such actions may include, but are not limited to, referring the school district or public charter school to appropriate state or federal agencies empowered to order compliance with the law or initiations of sanctions or corrective measures under WAC 392-190-080." WAC 392-190-075(4). Sanctions or corrective measures under WAC 392-190-080 include, but are not limited to: (1) The termination of all or part of the state apportionment or categorical moneys to the offending school district or public charter school; (2) The termination of specified programs wherein the violation or violations are found to be flagrant in nature; (3) The institution of a mandatory affirmative action program within the offending school district or public charter school; and (4) The placement of the offending school district or public charter school on probation with appropriate sanctions until such time as compliance is achieved or is	satisfaction of the parties involved, no further action is necessary under this section." WAC 392-190-065(8). If appealed to the Office of Superintendent, the complaint may also "be resolved at any time when, before the conclusion of an investigation, the complainant, the school district, or the public charter school voluntarily agrees to resolve the complaint." WAC 392-190-075(5). "A school district or public charter school may offer mediation, at the district's or charter school's expense, to resolve complaints at any time during the complaint procedure[.]" The mediation "must be voluntary and requires the agreement of both parties." The mediator must be "qualified and

State Law	Oversight or enforcement responsibility	Initial complaint procedure and disposition	Appeal or subsequent complaint disposition	Final disposition and ultimate penalty	Optional early resolution language
			addresses each allegation in the complaint and any other noncompliance issues . . . identified in the investigation. The written decision will include corrective actions deemed necessary to correct any noncompliance[.]" WAC 392-190-075(3).	assured. WAC 392-190-080. Note that a party may further appeal the written decision of the Office of Superintendent directly to the Superintendent of Public Instruction by filing notice of the appeal "within thirty calendar days following the date of receipt of the office of superintendent of public instruction's written decision[.]" In such an appeal, the Superintendent of Public Instruction must conduct a formal administrative hearing. WAC 392-190-079.	impartial" and may not be an employee of the school district or public charter school. WAC 392-190-0751.
Washington Wash. Rev. Code Title 28B, Chapter 110: Gender Equality in Higher Education Law applies to post-secondary institutions.	Complaints of violations of the law are filed with the Washington State Human Rights Commission pursuant to Wash. Rev. Code §28B.110.050.	After a complaint is filed, the Chairperson of the Human Rights Commission shall refer it to the appropriate section of the Commission's staff for prompt review and evaluation. Wash. Rev. Code §49.60.240. Following an investigation, the Commission issues a findings document, which shall contain findings of fact and "an ultimate finding of reasonable cause or no reasonable cause for believing that an unfair practice has been or is being committed," or a finding that the Commission does not have jurisdiction over the matter. WAC 162-08-098. If it is found that there is reasonable cause that an unfair practice has been or is being committed, the	If an agreement cannot be reached by conference, conciliation, or persuasion, "the chairperson of the commission shall thereupon request the appointment of an administrative law judge" to hear the case. Wash. Rev. Code §49.60.250. *[Hearings are conducted pursuant to WAC 162-08-211 to 162-08-311.]* Following the hearing, the judge shall issue a final order. WAC 162-08-301.	"The administrative law judge has the power to exercise the general jurisdiction of the commission to eliminate and prevent discrimination by means of orders to respondents who have been found after hearing to have engaged in an unfair practice or practices." If the administrative law judge "finds that a respondent has engaged in an unfair practice the administrative law judge shall order the respondent to cease and desist from that unfair practice." The judge may also order other remedies that will "effectuate the purposes of the law against discrimination." WAC 162-08-298(1) to (4).	"[A] complaint may be settled before findings of fact are made, when the commission's staff and a respondent have entered into a written settlement agreement. Prefinding settlement agreements shall be presented to the commissioners. The commissioners, if they approve, shall enter an order setting forth the terms of the agreement[.]"

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		commission's staff "shall immediately endeavor to eliminate the unfair practice by conference, conciliation, and persuasion." Wash. Rev. Code §49.60.240. An agreement must be voted on by the Commission at a meeting before it becomes binding. WAC 162-08-106.		"Any respondent or complainant, including the commission, aggrieved by a final order of an administrative law judge, may obtain judicial review of such order[.]" Wash. Rev. Code §49.60.270.	WAC 162-08-099(3).