

The Less Told Story:  
The Intersection of Title IX and Disability

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## I. **Introduction.**

The ultimate purpose of Title IX is to prevent discrimination on the basis of sex from acting as an artificial barrier to success in education; however, sex based discrimination is not a unilateral experience, and the current approach often fails to take into account the additional barriers that come with closely related issues of disability. In particular, there remain physical, social, and institutional barriers which uniquely obstruct access to education for students with disabilities bringing sex-based discrimination claims.

Complainant students may develop disabilities as a result of their experience, or pre-existing disabilities may exacerbate the impact of gender-based misconduct on their ability to recover and learn. Alternatively, Title IX policies which punish or prohibit disability-related behavior may violate federal disability anti-discrimination law, and require critical analysis. Thus, in crafting a Title IX policy that accomplishes the ultimate goal of equal access to education, universities should work toward an intersectional, interdepartmental, and inclusive approach. It is time to recognize in the legal field what medical and sociological literature has for decades: sexual trauma and disability are interrelated, and intervening measures should appropriately address this relationship.

Title IX and disability law are often treated as distinct entities: the Title IX coordinator is responsible for enforcing an institution of higher education's sex-based discrimination policy, and the ADA coordinator is responsible for enforcing disability-based discrimination policy. A lack of interdepartmental cooperation, communication, and cohesion can seriously undercut the efficacy of an institution's approach, particularly where incidents include elements of both gender and disability. Institutional barriers have had a siloing effect on post-assault resources, placing the burden on students to navigate a complex maze of administration to get the help that

they need.<sup>1</sup> These institutional barriers create physical barriers, for example, where offices are located far apart from one another, requiring that a student receiving resources from one office must travel across campus to receive complimentary services from the other. While students without disabilities might easily make this trip, for students with mobility issues, such a trip may constitute an additional difficulty that may act more powerfully to dissuade them from seeking post-assault services.

Finally, the physical separation of these offices, coupled with the institutional separation of responsibilities, may create social barriers where those working in Title IX lack training in how to interact sensitively with students with disabilities, and/or those working in disability lack training in how to identify indicators of conduct prohibited by Title IX, such as sexual or domestic violence, unique to the disabled community.

Although this paper focuses on the intersection of disability and gender among complainant students, Title IX mandates a prompt and *equitable* response. This language requires that the same considerations and services available to complainant students must also be made available to respondent students as necessary. Not only *must* both parties be treated equitably, but also institutions *should* embrace this mandate to fully realize the underlying policies and purposes for which the Americans with Disabilities Act and Section 504 of the Rehabilitation Act were enacted.

## II. **Complainant Students.**

I first started to think about the relationship between sexual violence and disability within the context of Higher Education law while at my most recent Florida State Sexual and Domestic Violence Advocacy certification refresher training. At the end of the training, the very last

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<sup>1</sup> Katie R. Guest Pryal, *Where Title IX Meets Title II*, <https://chroniclevitae.com/news/864-where-title-ix-meets-title-ii> (last visited Aug 12, 2016).

module we covered was labeled “special populations.” Here, we were trained in how to adjust our advocacy approach when working with individuals who were concurrently dealing with issues of sexual violence as well as additional issues of substance abuse, immigration and language barriers, elderly client needs, religious barriers, and disability.

That this last module was categorized as “special populations” made several important points: there was a presumed “default” or “typical” client with whom advocates work, and helping those “default” or “typical” clients was the central goal of our training. For those “special populations” who did not embody this archetype, the default approach we had been trained on, thus, did not fully apply. Not only had we established a norm, but in doing so, constructed resulting categories of deviance for those whose needs *our own training* would fail to meet. To capture what was going through my head at the time, I quickly jot down a few sentences. This is the first couple sentences of what I wrote:

“Students cannot learn where they do not feel safe. There are many reasons that students may feel unsafe, and even more reasons that an institution’s response may fail to successfully remedy these feelings. Where we fail to address and acknowledge the underlying forces contributing to this fear, we fail to remedy the hostile learning environment. One central issue that must be reckoned with is the impact of trauma on a students’ disability status. The deprivation of equal access to education which Title IX seeks to prohibit is fundamentally rooted in the interplay between trauma, coping, recovery, and disability.”

What do our archetypal students look like in Title IX? When we write policies and train employees on best practices, what underlying needs are we presuming must be met in order to fulfill our duty under Title IX to take prompt and equitable measures to remedy the hostile

learning environment? What is our default approach, if any? Do we wait for our approach to fail before adjusting it to our students' needs? Or is our default approach itself intersectional?

Students with disabilities face unique challenges in accessing comprehensive and appropriate post-assault services, and a Title IX remedial approach which fails to account for these issues may allow for these students to fall between the cracks of administration. In particular, where sexual violence is involved, students may develop disabilities as a result of the trauma involved, or in addition to pre-existing disabilities. The function of disability within the context of sexual violence may act to exacerbate barriers to equal access to education, a key fact which may be obscured by a uni-dimensional Title IX hostile learning environment analysis. When is a hostile learning environment under Title IX also a symptom of an underlying unaccommodated disability?

Through specific application of an institution's Title IX policy, a school may fail to properly consider whether discriminatory treatment on the basis of disability has also occurred. A student misses school to seek off-campus services because their prior existing disabilities require more complicated post-assault care beyond the scope of the campus counseling center. A student who was assaulted in the library has developed post-traumatic stress symptomatology and can no longer look at or enter the building without having intense, physiological flashbacks. A student whose ADHD accommodations are no longer sufficient with the addition of balancing their participation in a Title IX case, and their new struggles with time management, cause them to fall behind in class.

While each of these examples would establish a hostile learning environment caused by sex-based discrimination under Title IX, there are also underlying issues of disability that either exacerbate or create the hostile learning environment. In order to eliminate the hostile learning

environment and remedy its effect, therefore, these issues of disability must be resolved. In addressing these related issues of disability, institutions are bound by the federal requirements of the ADA and Section 504.

a. The current approach.

The current Title IX approach tends to presume that all discrimination on the basis of sex is experienced and remedied similarly. As noted by Kimberle Crenshaw, classifications made on the basis of one aspect of identity, such as gender or disability, tend to “conflate or ignore intragroup differences.”<sup>2</sup> Instead, the violence that many women experience is often shaped by other dimensions of their identities, such as race, class, and disability.<sup>3</sup> Where discrimination on the basis of race, gender, class, and disability converges, intervention strategies based solely on the experiences of women who do not share the same backgrounds will be of limited help to women who, because of disability, face different obstacles.<sup>4</sup> The needs of survivors with disabilities in particular are not met by a Title IX nor disability policy which treats these issues as mutually exclusive, because neither the ableism nor sexism they are subjected to is experienced unilaterally. Instead, the concept of intersectionality should be employed in discrimination intervention and remedial strategies.

The urgency with which I wrote can be explained by a few different contributing factors. First, I did not want to forget this idea before I had the opportunity to pursue it. I knew I was onto something, which brings me to my next point. I assumed that once I began my research, I would quickly find many law review articles and other sources which would expand upon this topic in meaningful, exciting ways. Yet, this was not the case. I could not find any secondary

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<sup>2</sup> Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1242 (1991).

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

<sup>4</sup> *Id.* at 1246.

sources, such as law review articles, which dealt squarely with the interaction between Title IX and disability in higher education law. Instead, the majority of sources which discuss the experience of disability and sex-based discrimination in the context of higher education are first-hand accounts provided by survivors. Although students with disabilities are facing these issues and able to articulate the ways in which in which gender and disability discrimination have converged against them, these stories are not reaching the scholarly realm.

i. *Guidance.*

The structure of anti-discrimination law may, in part, explain the sparse body of sources connecting gender and disability discrimination in higher education law. Responsibility for compliance with these statutes has been explicitly separated as either that of the “The Title IX Office” or “The Disability Office.” This approach may have a siloing effect on campus resource provision: separate laws, separate offices, separate guidance, and therefore, the separation of the post-assault services potentially necessary for a single incident. The false dichotomy between gender- and disability-based discrimination codified by statute may contribute to the trend seen in higher education law scholarship to favor inter-specialty research, rather than intra-specialty work seeking to combine anti-discrimination law’s working parts into one, larger picture.

In 2010, the Office for Civil Rights issued a dear colleague letter critiquing the tendency of institutions to apply anti-bullying state statutes, in isolation, when intervening in student harassment.<sup>5</sup> The letter cautioned against specific application of anti-bullying statute mandates, noting that some student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department of Education’s Office for Civil Rights (OCR.) A response that is limited to a specific

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<sup>5</sup> “Dear Colleague” Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ, *Harassment and Bullying* (Oct. 26, 2010), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

application of its anti-bullying disciplinary policy may result in a school's failure to properly consider whether the student misconduct also results in discriminatory harassment. Ultimately, "the unique effects of discriminatory harassment may demand a different response than would other types of bullying."<sup>6</sup>

My argument is similar in nature. Through specific application of either an institutions Title IX or disability policy, in isolation of the other, incidents which trigger concurrent responsibilities on part of recipient institutions may not be comprehensively remedied. For example, sexual violence has been employed as a means by which anti-disability animus is expressed, including within the context of higher education. In an analysis of the FBI Hate Crimes Report, college campuses were found to be the most common location in which hate crimes against persons with disabilities occurred.<sup>7</sup> In that same study, rape was found to be the third most common type of hate crime committed against persons with disabilities.<sup>8</sup> Taking these findings together, it is not unlikely that hate crimes against persons with disabilities are being committed on college campuses, in the form of rape.

Although discrimination on the basis of disability is covered by other federal law, Title IX protects all students from discrimination on the basis of sex, regardless of disability status. In the 2011 Dear Colleague Letter put out by the Office for Civil Rights (OCR) regarding sexual violence, sexual violence was defined as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent," including where an individual is "unable to give consent due to an intellectual or other disability."<sup>9</sup> When students are subjected to

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

<sup>7</sup> Brian T. McMahon, et. al, *Hate Crimes and Disability in America*, 47 Rehabilitation Counseling Bulletin 66, 71 (2004).

<sup>8</sup> *Id.* at 72.

<sup>9</sup> Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ, *Sexual Violence* (April 4, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>



harassment on the basis of their disability status, they may also be subjected to forms of sex discrimination prohibited under Title IX. In the 2014 Questions and Answers on Title IX and Sexual Violence, the OCR stated that federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address incidents in which students with disabilities experience sexual violence.<sup>10</sup>

The fact that the harassment includes discriminatory comments on the basis of disability, or is based on the target's actual or perceived disability status, does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. Similarly, where a school fails to recognize behavior as disability harassment, they may fail to adopt a comprehensive approach in eliminating the hostile environment engendered by ableism.

ii. *Case law.*

In case law, student plaintiffs are also forced to take an either/or approach: students with disabilities subject to sexual harassment bring either Title IX or ADA/Section 504 claims, with these cases including little to no analysis as to how the defendant's misconduct or its impact related to the combination of *both* the plaintiff's gender *and* disability. Students with disabilities are largely represented in Title IX cases, and some conduct prohibited by Title IX has also been alleged in cases brought under disability law.

In the context of K-12, the body of case law regarding these issues is far more developed, specifically in the context of Title IX cases brought by student plaintiffs with disabilities. In many Title IX cases involving children with disabilities in the K-12 context, one recurring theme is ableism providing the prime environment in which deliberate indifference to sexual

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<sup>10</sup> *Questions and Answers on Title IX and Sexual Violence*, ED. GOV (April 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

misconduct can flourish.<sup>11</sup> School employees simply chose not to deal with the hassle of confronting and intervening in known, ongoing sexual discrimination, a decision which was informed by their perceptions of students with disabilities as unreliable, untrustworthy, and without the ability, let alone power and influence, to advocate for themselves. Studies have shown that violent, aggressive behavior increases when (1) school rules and restrictions are unclear, (2) discipline is lax, and (3) when teachers fail to effectively monitor students' behavior or protect the "weaker students in the school."<sup>12</sup>

In the context of higher education, these are the same beliefs surrounding disability which (1) contribute to the likelihood of assailants to target students with disabilities, (2) denigrate complainant students by presuming them to be unreliable witness ("Oh, she's just crazy!"), and (3) prevent students with disabilities from coming forward, knowing that these stereotypes will be used against them.

These observations are embodied in *Doe v. Marshall*, one of the few higher education cases squarely addressing this issue.<sup>13</sup> In this case, a professor used his knowledge of a student's disability to engage in quid pro quo sexual harassment against the student. Specifically, he threatened that if she told anybody about the sexual harassment, he would make her disability status known to the school and the public at large. Not only does stigma contribute to the

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<sup>11</sup> See, *Dorothy v. Littlerock Sch. Dist.*, 7 F.3d 729 (8<sup>th</sup> Cir. 1993); *Braden v. Mountain Home School District*, 903 F.Supp.2d 729 (W.D. Ark. 2012); *Duncan v. Hampton County School Dist. No. 2*, 335 S.C. 535, 517 S.E.2d 449 (S.C. App. 1999); *Murrell v. School District No. 1, Denver, Colo.*, 186 F.3d 1238 (10<sup>th</sup> Cir. 1999); *Soper v. Hoben*, 195 F.3d 845 (6<sup>th</sup> Cir. 1999); *Walton v. Alexander*, 44 F.3d 1297, 1299 (5<sup>th</sup> Cir. 1995) (en banc); *M.W. v. Panama Buena Vista Union Sch. Dist.*, 1 Cal. Rptr. 3d 673 (Cal. App. 5<sup>th</sup> Dist. 2003); *Jennifer C. v. Los Angeles Unified Sch. Dist.*, 86 Cal. Rptr. 3d 274 (Cal. App. 2<sup>nd</sup> Dist. 2008); *Maxwell ex rel. Maxwell v. Sch. Dist. of City of Philadelphia*, 53 F. Supp. 2d 787 (E.D. Pa. 1999); *Teague v. Tex. City Indep. Sch. Dist.*, 185 F. App'x 355, 357 (5<sup>th</sup> Cir. 2006), aff'g 386 F. Supp. 2d 893 (S.D. Tex. 2005), vacating in part 348 F. Supp. 2d 785 (S.D. Tex. 2004); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1126 (10<sup>th</sup> Cir. 2008).

<sup>12</sup> Brittany Smith, *Fighting Back: How Students with Disabilities Can Hold Schools Liable for Peer-Inflicted Injuries*, 45 Val. U. L. Rev. 741, 747-48 (2011).

<sup>13</sup> *Doe v. Marshall*, 882 F. Supp. 1504, 1507 (E.D. Pa. 1995).

targeting of students with disabilities for sex-based misconduct, but it is also actively used as leverage to silence students from coming forward, and to obscure wrongdoing.

b. Interests of Students.

Literature in the fields of medicine, mental health, and social programming have long noted the robust interaction between disability and effective post-assault services provision. The quality of rape survivors' experiences in seeking post-assault assistance has been shown to have a meaningful impact on their mental health outcomes. Mental health issues can affect all aspects of the students physical, emotional, cognitive, and interpersonal functioning, including a negative impact on academic performance, retention, and graduation rates.<sup>14</sup> These findings have meaningful implications for best practices in remedying a hostile learning environment under Title IX.

If survivors do not receive needed services and are treated insensitively, it can magnify feelings of powerlessness, shame, and guilt. For many rape survivors, the process of seeking post-assault help becomes a "second rape," a secondary victimization to the initial trauma.<sup>15</sup> Studies have found that secondary victimization is associated with increased post-traumatic stress disorder.

Many different factors can contribute to secondary victimization. For example, survivors of non-stranger rape whose cases were not prosecuted and who were subjected to high levels of insensitive and incomplete treatment have some of the highest rates of post-traumatic stress disorder (PTSD) of all rape survivors, even when compared to those who chose not to report to the legal system at all. The persistent myth that only stranger rape constitutes "real rape"

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<sup>14</sup> Martha A. Kitzrow, *The Mental Health Needs of Today's College Students: Challenges and Recommendations*, 41 NASPA Journal 167, 171 (2003).

<sup>15</sup> Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical, and Mental Health Systems*, *American Psychologist*, 702, 703 (2008).

contributes to the increased skepticism many survivors of acquaintance rape face, particularly where their assailant did not use physical forms of force.<sup>16</sup>

Taken together, these findings suggest that post-traumatic stress symptomatology is increased in likelihood and severity where survivors experience rape in a way that deviates from the stranger rape/physical force trope, and thus receive insensitive treatment and incomplete remedies from formal systems due to this stigma. These findings are particularly meaningful where a survivor's disability has been exploited or was the main impetus for sexual violence. In the context of disability, rape may look even less like the archetypal "stranger rape," and force may be exerted in ways which are unique to the disabled community. The need to use physical force may be diminished where physical disability precludes the survivor from physically fighting off their assailant. Furthermore, the majority of perpetrators of sexual violence against persons with disabilities are well known to the victim: intimate partners, family members, caregivers.<sup>17</sup>

Contact with formal help systems, such as going to the police, has been found more likely to result in the negative social reactions which are associated with increased PTSD symptomatology.<sup>18</sup> Low legal action (i.e., the case did not progress), as well as secondary victimization, has been associated with increased PTSD.<sup>19</sup> Thus, a Title IX response that fails to provide comprehensive and sensitive care for students with disabilities increases the likelihood that a student will develop post-traumatic stress disorder. Institutions should work to form their Title IX policies, procedures, and employee trainings in a way that treats students with

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<sup>16</sup> *Id.* at 705.

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

<sup>18</sup> Sarah E. Ullman & Henrietta H. Filipias, *Correlates of formal and informal support seeking in Sexual Assault Victims*, *Journal of Interpersonal Violence*, 1028, 1040 (2001).

<sup>19</sup> Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences in Military and Civilian Social Systems*, *Psychology of Women Quarterly*, 97, 104 (2005).

disabilities sensitively, and provides them with the services they need, including those which students without disabilities do not typically require.

c. Interests of Institutions.

For compliance purposes, it is best practice to integrate disability into gender-based discrimination responses. Not only does such an approach lessen the risk that the institutional response may re-victimize a student in crisis after-the-fact, it also presents an opportunity to identify risk and prevent further victimization from occurring in the first place. Vulnerability provides a space in which abuse may occur: students who lack the resources they need to survive are more likely to endure high risk situations to meet such needs. One particularly stark example is embodied in the first-hand account provided by a fully paralyzed survivor of campus intimate partner violence:

“So, my thought was, ‘I only have three months left until graduation, and graduating is so important to me.’ I thought ‘I can manage this relationship for three more months and then when I graduate I’ll have avenues to get out of this relationship.’ Three weeks later I was admitted into the hospital with a broken arm, a broken nose, broken ribs and my sternum was permanently damaged.”<sup>20</sup>

Title IX places a responsibility on institutions not only to respond appropriately once sex-based misconduct occurs, but also to take measures to prevent such incidents from occurring in the first place. The student quoted above illustrates the needs of students with disabilities which must be met to realize this preventative function for students with disabilities in the following quote:

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<sup>20</sup> Kimberly B Wisseman, “*You’re My Pretty Bird in a Cage: Disability, Domestic Violence, and Survival*,” 13 *Impact*, 2000, at 1, 4–25, <https://ici.umn.edu/products/impact/133/over1.html> (last visited Aug 12, 2016).

“During the battering relationship, if I had had information on safety planning, education, and domestic violence, and had an accessible shelter available, I would have been better able to protect myself- to get out of the relationship before I was severely beaten and before the hospital and the police had to become involved to get me out.”<sup>21</sup>

Ask yourself, what accommodations would your institution have provided to her via the disability office? Would they have been sufficient to provide her the means to leave her abusive partner? If they had not been, would there have been sufficient measures in place to intervene before her hospitalization? To identify her as a student at risk in the first place?

It is in the best interests of both the students as well as institutions of higher education to integrate disability-related issues into their Title IX approach. Funding, reputation, and as a result, enrollment, are all directly tied to the student body’s academic performance. When an institution’s response has the effect of re-victimizing its students, it will typically have the effect of higher rates of attrition, decreased average academic performance, and a poorer public image. Public image is particularly difficult to manage in the age of technology. With the advent of social media, the impact of student outrage is no longer geographically confined to the campus and its immediate surrounding area. Instead, students have access to a national platform on which to air their grievances. Student activist voices have increased in scope, audience, and breadth; in turn, institutional reputation is more dependent on honoring students’ rights than ever.

d. Recommendations.

- i. *Breaking the physical, social, and institutional barriers.*

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<sup>21</sup> *Id.*

To combat physical barriers, Title IX and disability offices should be located in close physical proximity, both in an easily accessed area on campus. Physical distance between offices should not act as an additional barrier to students' access to post-assault services. Due to the personal nature of sexual assault, it is one of the most underreported crimes. Even where barriers on the basis of disability are absent, the fear and stigma surrounding sexual assault acts as a powerful force in dissuading students from seeking help. Physical distance between offices pose an additional obstacle to an already difficult process, and in particular for students with mobility constraints, can act more powerfully to dissuade students from seeking necessary services.

There are many Title IX practices that can work to lessen the social barriers experienced by students with disabilities. Title IX employees should be trained in identifying disability-specific indicators of sex-based misconduct. Such training should include examples of how disability is exploited as a means of achieving sexual harassment, discrimination, and violence. When collecting community resource information, and making referrals, Title IX employees should be sure to include disability-specific or disability-friendly resources. Campus sexual violence educational efforts should specifically include information regarding disability.

Institutional barriers can be lessened by cross-training that allows employees from both offices to refer students to the other, providing insight and basic information as to how each process works. While it is not suggested that Title IX Coordinators or any other employees make unlawful inquiry into a student's disability status, reminding all students of their right to reasonable accommodations from the disability office can help to more efficiently guide students seeking post-assault services through the maze of administration.

- ii. *Disability documentation for students in trauma.*

While some institutions require documentation of disability in order for a student to receive accommodations from the disability office, others do not; instead, students meet with disability coordinators and accommodations are provided if the coordinator deems them to be appropriate. In the context of sexual assault, however, mental health diagnoses such as post-traumatic stress disorder are unavailable for a period of time due to persistence-based diagnostic criteria.

Rape Trauma Syndrome (RTS) refers to a cluster of symptoms or behaviors experienced by rape survivors.<sup>22</sup> In its first definition, RTS was described as “the acute phase and long-term reorganization process that occurs as a result of rape or attempted rape.”<sup>23</sup> The understanding of RTS has evolved now to be understood as compromised by five distinct phases. Phase 1, pre-assault discomfort, refers to the first point at which it becomes apparent that the victim is going to be assaulted.<sup>24</sup> During phase 2, the assault, victims may enter survival mode and may dissociate, become frozen with fear or hyperaware of their situation.<sup>25</sup> The next three phases are particularly important to understand for the purposes of proper Title IX response and disability accommodations.

Phase 3, acute crisis reaction, occurs immediately after the assault.<sup>26</sup> During this phase, victims may have difficulty describing what happened to them, and may not be able to cope with everyday tasks. Physical reactions can include dietary and sleep pattern changes, as well as physical pain from the attack itself. Emotional reactions may range from outward expression of self-blame, rage, and/or sadness, to a seemingly emotionless state of shock. Survivors may

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<sup>22</sup> Tammi A. Tannura, *Rape Trauma Syndrome Lesson Plan*, 9 *American Journal of Sexuality Education* 247, 251 (2014).

<sup>23</sup> Ann Wolbert Burgess, *Rape Trauma Syndrome*, 131 *American Journal of Psychiatry* 981, 982 (1974).

<sup>24</sup> Tannura, *supra*, note 22, at 249.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*



withdraw from their community to establish a sense of control, and flashbacks, re-experiencing the assault as if it were occurring again, may also occur.

During phase 4, outward adjustment, the victim wants to move on and forget the assault.<sup>27</sup> Lifestyle changes may be made to regain control, such as moving, ending a relationship, changing jobs, or even altering their educational path (change in major, for example.) Outward adjustment has been described as a “self-imposed time out from the intensity of the assault.” While phase 4 may create the illusion of completed recovery, this does not occur until phase 5, resolution and integration, when the trauma of rape is processed into the survivor’s sense of self and integrated into the survivor’s life.<sup>28</sup>

The symptoms and behaviors associated with phases 3 and 4 of RTS act to substantially limit or interfere with many of the daily tasks, including thinking, required of students. While documentation of RTS may not be available, or symptoms may persist for less than 6 months, reasonable accommodations should still be available from the disability office. Similar to the treatment of pregnancy in Title IX, Title VII, and disability law, this temporary limitation experienced by survivors of rape should be reasonably accommodated.

Ultimately, many of the symptoms and behaviors characteristic of RTS compromise the requisite denial of access to education (withdrawal, psychological stress, fear) that constitutes a hostile learning environment. By incorporating disability accommodations into Title IX intervention measures, disability law requirements will not erect artificial barriers to education (such as documentation or 6-month duration requirements) by allowing the hostile learning environment to proliferate.

iii. *Impact-centered approach.*

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

<sup>28</sup> *Id.*

Employees working in both Title IX and disability offices should be trained in impact-centered resource provision. The current enforcement scheme favors an intent-centered approach, one which emphasizes the intent of the alleged perpetrator above all else. In the context of Title IX, this looks like policies and procedures which prioritize the determination that the respondent acted on the basis of the complainant's gender; in the context of disability, this looks like policies and procedures which prioritize a determination that the respondent's misconduct was on the basis of the complainant student's disability.

While those ultimate determinations are an essential component of each process, such an aim should not bleed into the manner in which evidence is collected during the investigatory stage prior to adjudication of guilt or non-guilt on part of the respondent student, nor should it inform post-determination resource referral to either complainant or respondent. Instead, the emphasis should be placed on the actual impact that has been had on a student's ability to learn, predominantly using the ultimate classification of discrimination to inform filing and reporting responsibilities. Rather than emphasizing whether or not the root cause of their need for resources resulted from misconduct prohibited by Title IX, resource referral should be tailored to the impact of the case on the student rather than the legal classification of their mistreatment.

### **III. Respondent Students**

#### **a. Procedural Rights of Accused Students, Generally.**

It is important to frame a discussion of respondent student rights under Title IX through the lens of due process. As a constitutional concept, there are meaningful differences between private and public universities with regard to what process may be owed to accused students.

Private universities are private actors not bound by the U.S. Constitution, and therefore are not required to provide students accused of sexual misconduct with constitutional due

process. Instead, private university students' rights are predominantly contractual, arising from school policies, handbooks, and other programming. Applying contract law principles, courts have consistently held that private and public universities are required to provide substantial fairness, and are prohibited from acting in an arbitrary or capricious way in how they carry out disciplinary procedures articulated in school policies.<sup>29</sup> An institution's sexual misconduct policy is within the ambit of these contractually defined student rights. Thus, private institutions should ensure that their policies are flexible enough to respond appropriately to students with disabilities, and that these policies are in fact carried out.

Public universities are state actors bound by the constitution. Courts have held public universities to a general requirement that they provide fundamentally fair process, typically requiring that they provide students accused of sexual misconduct with notice of the charges and evidence against them, as well an opportunity to be heard. The U.S. Supreme Court has not established a bright-line rule delineating what specific procedural safeguards are owed to students accused of sexual misconduct. In refraining to establish such a rule, the Court has frequently emphasized that the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.<sup>30</sup>

Courts have held that, although there are some minimal due process requirements that need be provided to students facing disciplinary sanctions, this policy is limited by careful restraint in judicial interposition in the operation of public education.<sup>31</sup> Applying the factors articulated by the U.S. Supreme Court in determining the appropriate level of due process for administrative

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<sup>29</sup> *Schaer v. Brandeis U.*, 735 N.E.2d 373 (Mass. 2000); *Slaughter v. Brigham Young*, 514, F.2d 622 (10th Cir. 1975), *cert denied*, 423 U.S. 898 (1975).

<sup>30</sup> *Bd. of Curators of U. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978) (quoting *Cafeteria Workers v. McElroy*, 467 U.S. 886, 895 (1961)).

<sup>31</sup> *Goss v. Lopez*, 419 U.S. 565, 578 (1975).

proceedings<sup>32</sup>, the amount of due process required for students accused of sexual misconduct will vary based upon the severity of the disciplinary consequences, the type of case and evidence available, and the resources that the school would be required to expend in providing procedural safeguards.

In the context of interim measures or final conduct board decisions, Title IX, disability law, contract law, and due process interact in a meaningful manner. Where more severe disciplinary actions or interim measures are considered by an institution, disability law, contract law, and due process arguments are likely to be raised as a counterargument. Because of the important personal interests at stake that students accused of sexual misconduct have in maintaining their enrollment in an educational program, measures which wholly deny this right (dismissal or suspension) will be subject to more scrutiny than instances in which a student is alleging another type of response to be unfair, such as being required to move to a new dorm on campus or to attend educational training surrounding sexual harassment.

Disability law does not provide for a retroactive remedy, but instead offers an opportunity for accommodation throughout the process if proper notice and requests are given. Contract law and due process arguments are more likely to be raised post-adjudication. If a student has not been afforded the rights contractually delineated in an institutional policy, this may also give rise to potential institutional liability. Due process arguments may be made alleging that the student was erroneously deprived of a protected property interest in continued enrollment in higher education. The Supreme Court of the United States has never squarely held that there is a protected interest in continued enrollment in higher education for the purposes of due process,

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<sup>32</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (to determine appropriate level of due process balance: (1) the private interest affected by official action; (2) the risk of an erroneous deprivation through existing process; and (3) the governmental interest regarding fiscal and administrative burden).

although lower courts have differed on this point. Although disability-based arguments have been made to challenge a conduct board outcome, these cases have not been successful where the student had not put the institution on notice of their need and requested the accommodation before or during the process.

b. What is owed to accused students under disability law.

Not only would this paper be incomplete without addressing the role that disability plays in an institution's Title IX policy and approach, it would also violate one of the most basic tenets of institutional duty articulated by the Office for Civil Rights: a recipient institution must be prompt *and equitable* in responding to allegations of Title IX violations.<sup>33</sup> In the context of this paper, not only does Title IX's mandate of an equitable response require that institutions consider disability in both cases of complainant and respondent students, but also the institution is mandated to do so under various federal disability discrimination law.

Federal law prohibits institutions receiving federal financial assistance from discriminating on the basis of disability against otherwise qualified individuals with disabilities. An individual is deemed to have a disability if such individual has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.<sup>34</sup> Congress intended to provide for broad coverage under the ADA, as demonstrated by the ADA Amendments Act of 2008 (ADAAA), which provided a definition of major life activities including:

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<sup>33</sup> Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ, *Sexual Violence* (April 4, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

<sup>34</sup> 42 U.S.C. § 12102(2); 29 U.S.C. § 705(21)(B) (2006).

“Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>35</sup>

These amendments clarified that federal anti-discrimination law provides coverage for both physical, as well as mental and psychological disabilities. Thus, institutions of higher education receiving federal funds are bound by federal requirements to take a non-discriminatory approach in responding to and accommodating needs arising from physical as well as mental health-related disabilities.

Not only must an individual meet the basic definition of having a disability, but also must be otherwise qualified to receive protection under federal law. To be otherwise qualified means that an individual can carry out the essential functions of the program, with or without reasonable accommodation.<sup>36</sup> Applied to the higher education context, students are expected to comply with qualification standards articulated by academic and conduct requirements set out by school policy, with or without reasonable accommodation. This includes compliance with an institution’s Title IX policy.

c. Qualification standards and Title IX policies.

As part of the broader conduct-related regulatory scheme, an institution’s Title IX policy creates qualification standards by which students are bound, and by which students with disabilities may not be entitled to legal protection from disciplinary sanctions if they cannot be reasonably accommodated in order to comply with the behavioral requirements propagated by

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<sup>35</sup> ADA Amendments Act of 2008 § 4(a).

<sup>36</sup> *Southeastern Community College v. Davis*, 442 U.S. 397, 407 (1979).

them. A student with a disability is not otherwise qualified if they represent a direct threat on campus; particularly where the student poses a direct threat to others.<sup>37</sup>

In determining whether or not an individual poses a direct threat, and is therefore not otherwise qualified, institutions must conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry should serve the goal of properly balancing legitimate concerns of significant health and safety risks against the goal of protecting individuals with disabilities from deprivations based on prejudice, stereotypes, or unfounded fear. To serve this end, the Supreme Court has articulated the basic factors to be considered: (1) the nature of the risk, (2) the duration of the risk, (3) the severity of the risk, and (4) the likelihood that the risk will actually occur, and cause varying degrees of harm.<sup>38</sup>

Institutions of higher education have significant discretion in their ability to dismiss a student for failure to comply with academic and conduct requirements articulated by their school policies; however, certain policies and practices can still be found to violate federal protections against discrimination on the basis of disability. A good rule of thumb for institutions is to consider the appropriateness of the course of action that it would take if the student did not have a disability. Typically, so long as an institution makes a decision in good faith, in compliance with the procedures set out by their own policies, based upon an individualized assessment of the specifics of the case, courts are hesitant to judicially intervene in a school's decision.<sup>39</sup>

An institution must determine the appropriate course of action only after considering the specific facts and circumstances, using a case-by-case analysis, especially when considering

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<sup>37</sup> See, 42 U.S.C. § 12113(b).

<sup>38</sup> *School Bd. Of Nassau County, Fla. V. Arline*, 480 U.S. 273, 288 (1987).

<sup>39</sup> See, *Horowitz*, 435 U.S. 78 (1978); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985).

disciplinary measures such as dismissal or suspension.<sup>40</sup> Interim measures provided for under an institution's Title IX policy should include the requirement of such an individualized assessment prior to arriving at an ultimate decision.

Title IX guidance has articulated factors which suggest that there is an increased risk of the alleged perpetrator committing additional acts of violence, sexual or otherwise.<sup>41</sup> These factors include, but are not limited to:

“Indications of repeat offenders (e.g., whether there have been other complaints of sexual violence made about the same student, or whether the student has arrests or records from a prior school indicating a history of violence); whether the alleged perpetrator threatened further violence; whether the sexual violence was committed by multiple perpetrators; whether the student's report reveals a pattern of perpetration at a given location or by a particular group; whether a weapon was used to perpetrate the violence; and the age of the student subjected to the violence.”<sup>42</sup>

Such an assessment may be supplemented with the factors articulated in the direct threat assessment under disability law. For example, an institution might consider how student functions in different situations. A student may represent a direct threat in some situations but not in others.

Many of the factors articulated by Title IX guidance will also be relevant in conducting the comprehensive and individualized direct threat assessment, and this guidance does not

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<sup>40</sup> Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691, 702 (2009).

<sup>41</sup> *Questions and Answers on Title IX and Sexual Violence*, ED. GOV (April 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

<sup>42</sup> *Id.*



necessarily contradict disability law. It is important to note, however, that neither these factors specifically nor the 2014 Questions and Answer guidance generally explicitly address issues surrounding disability. For example, perhaps a student accused of sexual harassment may also have a history of prior conduct violations in the K-12 context. While this factor would contribute to the increased likelihood of further violence analysis put forth in Title IX-specific OCR guidance, it may also fail to account for the ways that students with disabilities are often met with discipline rather than rehabilitation in the K-12 system.

Perhaps the student's prior conduct infractions were a result of disability-related behavior. Often times individuals on the autism spectrum have sensory sensitivities, and in particular young children may respond to an overwhelming experience in a non-verbal manner that resembles a temper tantrum. If a student was disciplined for such an episode, then it is possible that they will have a record of conduct violations, but may not necessarily indicate a potential for violence. Therefore, while these factors enumerated in Title IX specific guidance may serve the end of making an individualized direct threat assessment to a certain extent, to consider them in isolation of disability can be problematic.

d. Accommodations and Title IX policies.

The propensity of the courts to defer to academic and conduct regulation by institutions of higher education holds true even where a student's failure to comply is disability-related, so long as such student has been provided with reasonable accommodation. It is important to consider whether the threat can be mitigated so that the student remains qualified. Institutions may consider whether this can be achieved by providing a student with reasonable accommodations, or through steps the student is taking or has agreed to take, such as attending

therapy sessions. Such an approach, however, is not required where a student has failed to put the institution on notice of their disability status and request accommodation.

Where a student's failure to comply with an institution's Title IX policy is due to a need for accommodation, institutions need only provide *reasonable* accommodations to serve this end. An institution need not provide a student with a disability an accommodation which would fundamentally alter the nature of the program. The court in *Wynne v. Tufts University School of Medicine* established the standard for whether an accommodation is a fundamental alteration.<sup>43</sup> The Court held that an institution has the burden of demonstrating that officials considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result in either lowering academic standards or requiring substantial program alteration.<sup>44</sup>

In instances which a student's inability to comply with their school's Title IX policy is due to an institution's failure to provide a specific accommodation, a university will only be legally vulnerable where they have been put on notice of the need for such accommodation and the accommodation requested is reasonable. Institutions of higher education, unlike in the K-12 context, have no duty to identify students with disabilities protected under federal law. Instead, the burden is on the student to provide an institution with notice of a disability, and their request for accommodation. Thus, federal disability law does not provide for retroactive protection.

Courts have consistently held that where a student failed to make known their need for disability accommodation prior to a conduct board hearing or investigation, providing after-the-fact notice to an institution of their need for reasonable accommodation will not constitute a violation of federal disability anti-discrimination law. For example, in *Pierre v. University of*

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<sup>43</sup> *Wynne v. Tufts University School of Medicine*, 932 F.2d 19 (1<sup>st</sup> Cir. 1991).

<sup>44</sup> *Id* at 26.

*Dayton*, a student with a disability was found responsible for sexual assault under the university's internal Title IX process.<sup>45</sup> The student appealed the ruling, and in the appeal cited that he had not been provided appropriate accommodation for disability-related difficulty speaking in public.

The student argued that, due to his disability, he had not been able to give effective in-person testimony before the conduct board, and that by providing only a written statement he had not received the opportunity to present his side of the story as effectively as the complainant. The Court found that there had been no violation of disability law, nor Title IX. It was not until he filed his appeal that the student had disclosed his need for disability accommodation. Because the school had provided both students with the opportunity to present in-person and/or written testimony, it had met its responsibility for equitable treatment under Title IX. Furthermore, the student failed to state a claim for failure to accommodate under disability law because he did not mention a need for any accommodation until after his disciplinary hearing.<sup>46</sup>

This paper does not advocate for retroactive accommodations. Instead, it argues that students should be provided with the information necessary to navigate the complex maze of administration to seek such accommodations as they become necessary, as well as put on notice of their responsibility to put an institution on notice of their need for accommodation at the appropriate time.

e. Institutional Policy: Best Practices.

Although students are expected to comply with essential qualification standards, including but not limited to those set forth in an institution's Title IX policy, it is important to ensure that neither disciplinary actions nor policies are pretext for discrimination. Specifically,

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<sup>45</sup> *Pierre v. U. of Dayton*, 3:15-CV-362, 2017 WL 1134510 (S.D. Ohio Mar. 27, 2017).

<sup>46</sup>*Id* at 10.

students must not face adverse action based upon unfounded fear, prejudice, or stereotypes; institutions must avoid sanctioning or dismissing a student with a disability for behavior tolerated from others.

Even where student behavior violates a code of conduct, institutions must not sanction a student if their inability to comply with behavioral requirements is due to institutional failure to provide reasonable accommodations. A 2008 report put out by the JED foundation is a key resource for institutions seeking to balance student disability status and risk management on college campuses.<sup>47</sup> Many of the following recommendations have been adapted from the report.

Under some instances, suspension from campus or putting a student on a mandatory leave of absence may be appropriate. Where such a measure has been put in place, re-entry requirements for a student on leave of absence cannot discriminate on the basis of disability. An institution cannot require that an illness be cured or that disability-related behavior never recur, unless such behavior rises to the level of a direct threat which cannot be mitigated through reasonable accommodation.<sup>48</sup> Conditions for re-entry should be reasonably related to the reason a student was on leave of absence, whether that be due to physical or mental health, or personal reasons such as family obligations. Requirements for re-entry after a leave of absence due to physical or mental reasons should be similar.<sup>49</sup>

Courts have split as to whether institutions can mandate that a student with a disability receive mental health treatment as a condition of re-admittance when on a leave of absence. The OCR has permitted this practice, so long as the student has been deemed a direct threat after

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<sup>47</sup> Jed Foundation, *Student Mental Health and the Law: A Resource for Institutions of Higher Education* (2008), available at [http://www.jedfoundation.org/assets/Programs/Program\\_downloads/StudentMentalHealth\\_Law\\_2008.pdf](http://www.jedfoundation.org/assets/Programs/Program_downloads/StudentMentalHealth_Law_2008.pdf)

<sup>48</sup> *Id.* At 18.

<sup>49</sup> *Id.* At 14.

appropriate analysis, and a mental health professional states that a particular course of treatment will mitigate the threat.<sup>50</sup> However, requiring treatment for a student whose disability-related behavior violates conduct policy, but does not rise to the level of a direct threat, may violate disability law.<sup>51</sup>

If a student's failure to engage in treatment is the sole reason for dismissal or suspension, an institution may be in violation of disability law. Rather, the school should make a determination to take such an action based upon the fact that the student is a direct threat and that threat has not been mitigated, rather than a failure to comply with specific treatment recommendations.<sup>52</sup>

While it is not necessary for an institution to consider a student's disability as a mitigating factor in disciplinary proceedings, it should do so if it takes situational mitigating factors into account when disciplining students without disabilities.<sup>53</sup> Applying such a factor may include considering whether the student could meet essential requirements in the future if provided with reasonable accommodations, or whether the student is participating or willing to participate in a course of treatment recommended by a physical or mental health professional. In considering the role of disability status in conduct processes, an institution should consider whether the nature of the disability is in fact related to the behavior in question. For example, that a student assistant uses a wheelchair may be unrelated to allegations that he has systemically excluded women from attending office hours.

Involving personnel experienced and trained in student disability issues is important to a disability-friendly conduct regulation approach. In particular, student advisors should be trained

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<sup>50</sup> *Id.* At 17.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* At 14.

<sup>53</sup> *Id.*

in disability issues. Advisors may help to inform students of their rights to reasonable accommodations under federal disability law throughout the Title IX process. Because disability law does not provide for retroactive protection, advisors can play an important role in connecting students with the resources and knowledge to request accommodations at a time where they may still be beneficial.

Although institutions are not obligated to identify students with disabilities on campus, nor provide for accommodations which have not been requested from them, it is still important that the Title IX process support help-seeking behavior rather than impede it. Title IX and other school policies which provide for no-tolerance responses to issues surrounding mental health may prevent a student from coming forward with relevant information to their case, or worse, from seeking help due to fear of increasing the likelihood of dismissal or other severe disciplinary action.

The presence of other students serving on a conduct board may impede the likelihood that a student struggling with personal disability-related issues come forward. Where students are forced to choose between revealing their disability status to their peers, or not to bring up disability-related concerns to the tribunal responsible for determining their level of responsibility, help-seeking behavior may be impeded.<sup>54</sup>

An institution's standard disciplinary procedure should be flexible enough to incorporate students with disabilities into its process; however, some institutions have taken alternative approaches to complying with disability law. Some institutions have established dual disciplinary procedures for student misconduct, one standard policy and one tailored for instances in which a student's disability may have factored into the misconduct.

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<sup>54</sup> *Id.* At 15.

In the context of Title IX, having distinct standard and disability-tailored policies may be problematic. Because Title IX requires that institutions put students on notice of school policy, and publicize and share the policy, having multiple Title IX policies may result in a violation of Title IX's public notice requirement. To have multiple distinct policies and procedures under Title IX may create confusion among students seeking to determine what rights they have, what procedures they will be subjected to, and to whom they should report. Instead, an institution's Title IX policy and procedure should include language that provides for a sufficiently individualized assessment to satisfy both Title IX as well as disability law requirements.

Additionally, it is important for institutions to keep in mind the potential of a breach of contract claim. If university policies are not clear on what rights are afforded to accused students, and the role that disability may play in the disciplinary process, institutions may be exposing themselves to potential litigation.

#### IV. **Hypotheticals and examples.**

The following hypotheticals and examples sought to adapt the content of the Bullying and Harassment Dear Colleague Letter<sup>55</sup> to the Higher Education context, specifically with regard to fulfilling concurrent responsibilities under Title IX and disability law.

##### a. Sexual harassment resolved, failure on disability.

*A student approaches her teaching assistant and tells him that she has had difficulties keeping up in class. As a result, the two begin to meet on a weekly basis to go over the materials. After a few weeks of this arrangement, the student feels comfortable enough to inform her teaching assistant that the reason she has difficulties keeping up in class is because she has been diagnosed with ADHD but is too embarrassed to disclose this fact to administration, and thus*

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<sup>55</sup> "Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ, *Harassment and Bullying* (Oct. 26, 2010), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

*she has not sought disability accommodations and does not intend to. The teaching assistant responds by telling her she will receive a passing grade on all of her homework that she grades regardless of her performance, but only if she provides him with sexual favors. Furthermore, the teaching assistant threatens that if she refuses his offer, and/or if she tells anybody about his offer, he will tell everyone about her ADHD diagnosis.*

*After a while, the student goes forward to the Title IX Coordinator and makes a complaint against the Teaching Assistant for sexual harassment. Applying the school's Title IX policy, the Title IX Coordinator deems the Teaching Assistant's behavior to constitute quid pro quo sexual harassment. Due to a requirement in the Teaching Assistant's employment contract that students may not hold such a position if they are found in violation of the academic or conduct policies, the teaching assistant is terminated from their position.*

*The complainant student is granted a no-contact order against the Teaching Assistant, and the Teaching Assistant is made to move off-campus. Throughout the entire process, the Title IX Coordinator makes no mention of the disability office or who to contact regarding accommodations, despite knowing that the student's ADHD diagnosis was used as leverage against her to prevent her from coming forward about the sexual harassment.*

*After this incident, the student does not seek accommodations from the disability office for her ADHD. Not only is she even more terrified to speak about her disability than she was before the sexual harassment, but she is also unaware that she has the right to reasonable accommodations for her disability. Her grades suffer, and she loses her academic scholarship.*

Through specific application of their Title IX policy, this school has failed to identify the student's need for disability accommodations, as well as the underlying hostile learning environment on the basis of disability. Here, the student's harassment has resulted in her being



fearful to come forward to the disability office to ask for accommodations that she is entitled to. Additionally, her grades suffer and she loses her scholarship as a result of the fear and shame her mistreatment by the Teaching Assistant instilled in her.

While the sexually hostile learning environment has been remedied, as the harassment has been put to a stop, the student responsible for harassing her has been properly disciplined, and a no-contact order has been put in place to prevent further harassment, the underlying hostile environment on the basis of disability status has continued. Because she was not provided the information for contacting the disability office and seeking accommodations, and the Title IX process was not successful in addressing her feelings of shame and fear surrounding her disability status, her grades have suffered, causing her to lose her academic scholarship.

Instead, a comprehensive approach to remedying the hostile learning environment would have included referral to the disability office, publishing the procedures for seeking disability accommodations, and working with the student to determine what she fears about the school finding out about her disability status. By informing the student of the school's policies regarding disability, the student may realize that disclosing her status to the disability office will result in support rather than some other result which she feared.

b. Disability policy applied, failure to implement systemic response under Title IX.

*Over the course of orientation week, employees received reports of several incidents of sexist and ableist conduct on campus. At the fraternity A house on campus, a banner was placed on public display that read "feminazis and special snowflakes go home- we'll trigger you." At the same campus, a professor caught two males, both members of fraternity A, blocking the entry of two women to the campus counseling and health center. The males told the women, "The real world doesn't have safe spaces- if you want to survive on this campus then stop being such a thin*

*skinned special snowflake! What, do you need the counseling center because you were triggered? What, do you have to go get treatment for your post-traumatic stress disorder because someone told it the way it is? Women are such whiney bitches these days!”*

*After that incident, women started avoiding the campus counseling and wellness center because it was located near the fraternity house. At the same campus, sorority B, the sorority that most often associates with fraternity A, sent out an email to their membership stating that they were not a “PC house” and that “special snowflake whining about trigger warnings and safe spaces, looking for coddling at the CCWC” would be grounds for immediate dismissal from the group. It went on to say that “feminazis” were unwelcome. A counselor at the center makes a complaint to the school that access to the center is being obstructed by student harassment.*

*When school administrators investigated the incident, they determined that the women were not actually diagnosed with post-traumatic stress disorder, but were instead visiting the center because they both had suspected cases of strep throat. To cover their bases, the school sends out an email to the student body stating that it is against their policies to harass students on the basis of their disability status, including the contact information and hours of the campus counseling and wellness center at the bottom of the email.*

In this example, the school has failed to acknowledge the pattern of harassment indicating a sexually hostile environment in violation of Title IX. Here, the harassing conduct included sexist behavior (“feminazis,” sex-based epithets) and also targeted students on the basis of their sex (e.g., the banner and email directed at women students). A sexually hostile environment that interfered with students’ access to school resources (i.e., counseling center, sorority housing) has been demonstrated, based upon the nature of the harassment, the number of incidents, and the women students’ avoidance of the counseling center.

Had the school recognized that a hostile learning environment under Title IX had been created, it would have known that it had an obligation to implement a systemic response to address the unique effect that the misconduct had on the school climate for women. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school's Title IX policy against discrimination on the basis of sex, publicizing the procedures for making reports of sex-discrimination on campus, training faculty on constructive responses to sex-based conflict (i.e., working with the counselor on how to encourage women students to attend the center), hosting class discussions about sexual harassment and sensitivity, and conducting outreach to identify problems and improve the school climate (such as conducting a campus climate survey.)

c. Disability policy applied, failure under Title IX to respond to gender stereotyping.

*Over the course of a semester, a female student with muscular dystrophy was called names (including ableist slurs and sexual comments) both to her face and on social networking sites, physically assaulted, threatened, and ridiculed because she did not conform to stereotypical notions of how women are expected to act and appear (e.g., lacking womanly curves, nontraditional choice of extracurricular activities, apparel, and personal grooming choices). In particular, after two students blocked the wheelchair ramp to the natural sciences building, the student made a complaint to the school that she was being targeted for harassment because of her disability.*

*The school responded to complaints from the student by sending an email to the student body reminding them of their policy against disability discrimination. The school also responded to the complaint from the student by requiring the two identified students to write a paper on the importance of wheel chair accessibility. The reprimands of the two identified students stopped*

*the harassment by those individuals; however, it did not stop others from undertaking similar harassment of the student. As a result, the student dropped out of the mathematics program, changing her major to sociology with the hopes that students in this discipline would be more understanding and less likely to engage in further harassment.*

Based on the student's disability and the ableist nature of some of the harassment, the school did not recognize that the misconduct included discrimination covered by Title IX. Title IX prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, sex discrimination occurs where students are harassed for failing to conform to stereotypical notions of masculinity and femininity. This is true regardless of actual or perceived disability status.

Here, the student was subjected to gender-based and sexual harassment. The harassing conduct was based in part on the student's failure to look as some of her peers believed a woman should look. The fact that the harassment complained of included elements of disability-based discrimination does not relieve a school of its obligation under Title IX to investigate and remedy overlapping gender-based harassment.

The harassment created a hostile environment that limited the student's ability to participate in the school's education program (e.g., to continue being a natural science major). Despite the fact that the student did not identify the harassment as sexual or gender-based harassment, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

Because the school had an obligation to take prompt and equitable action to eliminate the sexually hostile environment under Title IX, it was not enough to merely apply the institution's disability policy. Instead, the more appropriate action would have been to respond under Title IX

to prevent further harassment in the natural sciences building, conduct increased training on the scope of the school's sexual harassment and discrimination policies, provide resources for needs other than the student's disability (i.e., to cope with the sexual nature of the harassment, such as a women's helpline number), and educating the entire campus on civil rights and expectations of tolerance, specifically as they apply to stereotypes based on gender and disability. The school also should have clearly communicated that gender-based and sexual harassment are not tolerated, and perpetrators will be held responsible through disciplinary means.

d. Failure to report disability and sex-based harassment to Title IX Coordinator.

*Several students repeatedly called a student with a learning disability "stupid," "idiot," and "retard" during class and on campus. When the student entered into a relationship with another female student on campus, these students began to relentlessly tease him and his partner, making sexually charged jokes about his sexual performance, his "obsession" with his girlfriend, and even harassing his girlfriend for dating such an "undesirable" person, claiming that she must be "a whore without standards" for being willing to be intimate with him. The student complained to his Professor that he was continually being taunted and teased. The Professor suggested that the student seek help from the disability office, but did not discipline the offending students. No report was made to the Title IX Coordinator, despite the fact that the Professor was a responsible employee for Title IX purposes. As a result, the harassment continued.*

*The student, who had been performing well academically, became angry, frustrated, and depressed, and often refused to go to class to avoid the harassment. His girlfriend, who had also been performing well academically, became fearful of going to classes, ashamed of her reputation for sexual promiscuity, and avoided classes as well as the library in order to avoid the harassment.*

Here, through specific application of their disability policy, the institution has failed in its Title IX responsibilities to identify and remedy the underlying sexually hostile learning environment. With respect to the student with a disability, the school's failure was in part attributable to the fact that the student reported the harassment to a responsible employee for Title IX purposes, yet there was no Title IX report, and thus, no investigation or response. Although the harassment included elements of disability discrimination, this did not absolve the duty to investigate and respond to overlapping sexual and gender-based harassment prohibited by Title IX. To prevent this from occurring in the future, responsible employees should be trained in how to identify and report instances of gender-based and sexual harassment, and should specifically include examples involving students with disabilities.

Additionally, the girlfriend of a student with a disability has been subject to harassment on the basis of associating with an individual with a disability, which is based on her sex. The harassment included explicit sexist behavior, such as being called a "whore." Furthermore, the harassment has resulted in a hostile learning environment, as demonstrated by the effect of the harassment has had in causing her to avoid public places such as the library, and her suffering grades. Despite the fact that the student's girlfriend has not come forward in her individual capacity, a responsible employee should still have reported these facts as relayed by her boyfriend to the Title IX Coordinator, and such a report would have triggered a duty to investigate.

e. Respondent Student with disability.

*A complainant student alleges that they are being stalked: the respondent student has been following the complainant around campus, sending them multiple emails every day asking complainant to meet up with them to "hang out," goes to the parking lot at the end of every day*

*to wait by complainant student's car (which respondent has memorized by make, model, and license plate) in order to ask how complainant's day went, and has taken to telling all of the other students on campus who will listen to respondent that the two are "very close."*

*The Title IX Coordinator investigates and determines that such behavior could potentially constitute stalking under the institution's current Title IX policy and initiates a formal resolution process. Respondent is found guilty of stalking, and is prohibited from continuing to live in on-campus housing, although allowed to continue taking classes that complainant is not enrolled in as well. He is removed from all courses that the complainant student was previously enrolled in, which is problematic, as they are both studying the same major. Unknown to the Title IX Coordinator, respondent has been diagnosed with an intellectual disability.<sup>56</sup> Respondent was sincerely attempting to replicate friendship seeking behavior, and felt he was doing an effective job of it, until now.*

This hypothetical illuminates the importance of having disability-trained student advisors. Although there are no facts here to suggest that the student made the institution aware of his intellectual disability, if he had been given access to someone trained in disability issues there may have been an opportunity for the student to advocate for himself by seeking accommodations. Additionally, it is important for an institution to have a full picture of the factors contributing to harassing conduct before denying the student access to campus or classes. If the institution were to have considered his disability status along with the other factors that need to be considered in assessing the risk posed for continued or additional harassment.

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<sup>56</sup> The DSM-V defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." One of the three required diagnostic criteria includes "deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community." [Criterion B]. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (APA, 5th ed. 2013) (DSM-V).

f. Physical, social, and institutional barriers: tying it all together.

*At University A, the Title IX Coordinator schedules a meeting with a student for a preliminary assessment of the allegations filed in a complaint. The student is in a wheel chair, and the Title IX Coordinator's office is located on the second floor of a building located across campus from the dorm area. During the meeting, the student discloses that they have had to increase the frequency of their physical therapy sessions due to injuries resulting from the complained of incident, and the student is concerned that the number of absences their treatment regimen now requires will be grounds for dismissal from the institution.*

*The Title IX Coordinator tells the student to meet with the ADA coordinator to discuss this issue. The ADA Coordinator's office is located in a building on another side of campus. The Title IX Coordinator does not remember where in the building the ADA coordinator's office is located, and suggests that the student ask somebody at the front desk upon arrival. The student leaves the meeting with the Title IX Coordinator, emotionally reeling from having had to relive the trauma of the incident while relaying the facts to the Title IX Coordinator. Not wanting to be seen in this state, the student does not wish to speak to anybody at the front desk in the next building; emotionally exhausted, the student does not wish to make the long trip to yet another side of campus; ultimately, the student decides not to follow up with the ADA coordinator.*

The student in this hypothetical was dissuaded from seeking post-assault services in part due to the physical barriers in place: the way the campus was physically laid out imposed an additional obstacle for this student with mobility issues. The additional obstacle imposed by the physical setup of the campus, thus, resulted in the student's decision not to seek necessary accommodations for absences due to physical therapy requirements. Even if physical barriers do not prevent a student from accessing post-assault services, the nature of the services may not be



adequate due to institutional barriers. Students may have unique needs as a result of their disability: what works for some Title IX complainant students may be insufficient to remedy the impact of gender-based misconduct enacted against a student with a disability.

In this hypothetical, the student had to increase the frequency of physical therapy sessions due to the interaction of the injury complained of and the pre-existing mobility status. The separation of the Title IX and ADA offices, both in physical location as well as in their scope of responsibilities, the requirement for the student to go to an additional office to speak with additional people about the incident she already had difficulty talking about, are all institutional barriers that contributed to the student deciding not to seek post-assault resources.

The institutional separation of disability and gender-based misconduct remedial approaches not only places the burden on students to navigate a difficult maze of administration in seeking the care they require following an assault, it also contributes to social barriers in access to post-assault care. For example, in the hypothetical, it is possible that the student felt her needs were being brushed off by the Title IX Coordinator when she asked for an accommodation for absences due to her physical therapy protocol and was told to go to another office. The message conveyed can be easily interpreted as “this is not my problem,” thus causing a student to doubt the severity of their experience, the necessity of the sought care, and ultimately, the interest of the university in the student’s best interests.

The OCR imposes a responsibility under Title IX to train employees in how to properly identify and report sex-based misconduct; however, students with disabilities are specifically vulnerable to methods of abuse and control that students without disabilities are not. For example, an abuser may falsely imprison a student with a wheel chair by causing damage to the chair, or may push the student in the wheel chair down the stairs as a method of control and

abuse. Whose problem is that? Is it up to the ADA coordinator? The Title IX Coordinator? This line of questioning exemplifies the administrative approach that is typical in cases such as these, and the very root of the problem this paper seeks to illuminate. These issues are not unidimensional: interdepartmental cooperation and education is a prerequisite to a truly remedial enforcement procedure.