

# Title IX's Feeble Efforts Against Sexual Harassment: The Need for Heightened Requirements Within Title IX to Provide Comparable University and PreK-12 Policies

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## I. INTRODUCTION

The Millers<sup>2</sup> received a horrifying call in the middle of the night informing them that their fifteen-year-old daughter, Emily, was being rushed to the hospital after being raped on a high school field trip.<sup>3</sup> After Emily was diagnosed with rape trauma syndrome, she revealed that the alleged perpetrator of the incident was a classmate of hers at Garfield High School in Seattle, Washington.<sup>4</sup> For their investigation, law enforcement moved quickly to question the alleged perpetrator after receiving this information from Emily.<sup>5</sup> Throughout law enforcement questioning, the perpetrator repeatedly confessed to ignoring Emily's various pleas to stop, telling Emily just to "roll with it," and stated that he "did not pay attention to her that much" throughout the whole incident.<sup>6</sup>

Unbeknownst at the time, the horror for Emily and her family was just getting started. They spent the next several months reaching out to Emily's school to determine how this could have happened to their daughter on a school field trip and what the next step was in getting Emily back to school.<sup>7</sup> It was not until after six months of pleas from the Millers that the school conducted an investigation required under Title IX, which ultimately took fourteen months to conduct and resulted in the finding that no sexual harassment occurred due to "insufficient evidence."<sup>8</sup> However, during the school's unlawful decision to table the investigation, Emily's health greatly deteriorated and her family went \$50,000 in debt from paying just health facility costs—all while the alleged perpetrator was able to continue his education and publicly broadcast uncontested rumors of the incident, ultimately making Emily's return to Garfield High School unrealistic.<sup>9</sup>

The Millers believe that, had they known Emily's rights under Title IX, they could have helped protect their daughter from the mental and physical

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<sup>2</sup> The author of the cited article changed the names to protect the identity of the victim. Claire Gordon, *In Handling Rape, High Schools Are Worse than Colleges*, ALJAZEERA AM. (July 22, 2014, 5:00 AM), [<https://perma.cc/99HT-QJEE>]. To follow suit, this Article will refer to the family as the Millers as well.

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

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

<sup>5</sup> *Id.*

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

<sup>7</sup> *Id.*

<sup>8</sup> Gordon, *supra* note 2.

<sup>9</sup> *Id.*

health repercussions that followed the incident.<sup>10</sup> After months of pleading for the school to investigate the incident, the Millers discovered that Title IX requires schools to individually conduct a prompt investigation into any sexual harassment report, separate from any investigations by law enforcement.<sup>11</sup> However, the school was unaware of its own Title IX policy, which required the school to respond to a sexual harassment report within thirty days.<sup>12</sup> The lack of information on Title IX caused Emily to suffer additional emotional and mental distress from the incident by allowing the alleged perpetrator to circulate rumors for months in the school and create a hostile environment for Emily to come back to.<sup>13</sup> Had the school followed its own protocol, or had the Millers known their rights and demanded a timely investigation to take place, the Millers believe Emily might have been able to return to Garfield and start picking up the pieces of her life.<sup>14</sup>

Title IX of the Education Amendments Act of 1972 (Title IX) was adopted into Federal law with the intent to equalize opportunity to all educational systems for all sexes.<sup>15</sup> Similar to a contract, Title IX offers federal money to educational systems in exchange for recipients' promise not to discriminate on the basis of sex.<sup>16</sup> To ensure these promises are upheld, the Office for Civil Rights within the United States Department of Education (OCR) imposes certain requirements on educational programs receiving federal funding.<sup>17</sup> If educational programs do not abide by the Title IX requirements, both the Department of Justice and the OCR have the power to investigate any institution, preK-12 through higher education, that is found to have discriminated against sex within any educational program or activity.<sup>18</sup> Under Title IX, the OCR has the power to withhold federal funding if a school has failed to meet these requirements.<sup>19</sup> However, a school

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

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

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

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

<sup>14</sup> Gordon, *supra* note 2.

<sup>15</sup> U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 1 (June 23, 2012), [<https://perma.cc/M94T-XALG>] [hereinafter FORTY YEARS OF TITLE IX].

<sup>16</sup> *Title IX: Title IX Legal Manual*, U.S. DEP'T JUSTICE, [<https://perma.cc/DEZ3-4D9E>] (last updated Apr. 2018) [hereinafter *Title IX*].

<sup>17</sup> OFFICE OF THE ASSISTANT SEC'Y, U.S. DEP'T OF EDUC., TITLE IX GRIEVANCE PROCEDURES, ELEMENTARY AND SECONDARY EDUCATION, [<https://perma.cc/Z5G7-M9HY>] (last modified Jan. 10, 2020).

<sup>18</sup> FORTY YEARS OF TITLE IX, *supra* note 14, at 5.

<sup>19</sup> WHAT IS TITLE IX?, [<https://perma.cc/2K76-DCGK>] (last visited May 1, 2020).

has yet to lose any federal funding for failing to comply with the requirements.<sup>20</sup>

To aid women in gaining an education, Congress passed Title IX to eliminate many of obstacles women faced prior to the 1970s.<sup>21</sup> Today, Title IX continues to evolve through interpretation and application to try to address the obstacles women still face in the education system.<sup>22</sup> While Title IX today is often thought to have a scope limited to dealing with collegiate sports or college admissions, Title IX also protects individuals from sexual harassment.<sup>23</sup> Unfortunately, these important conversations about sexual harassment have been primarily focused on the university level.<sup>24</sup> Because Congress continues to focus on heightening requirements around the sexual harassment happening in higher education institutions, this Note focuses on moving those congressional improvements from higher education institutions directly into Title IX to provide preK-12 institutions with similar notice of non-discrimination and proactive policies against sexual harassment—equally situating all institutions in the fight against sexual harassment.

## II. BACKGROUND

To better understand why the current Title IX requirements are inadequate in protecting against sexual harassment at the preK-12 level, this Note will provide a brief summary of the history behind Title IX and its current requirements. This Note will then explain the rights and protections that Title IX affords, including protection against sexual harassment. After providing Title IX's history and current requirements, this Note will explain how higher education institutions are held to a higher standard of requirements for sexual harassment through amendments to Title IV, considered supplemental acts to Title IX by Congress, which do not apply to the preK-12 education system. Finally, this Note will provide an overview of statistical research relating to sexual harassment and where we stand today in the battle for equality.

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<sup>20</sup> *Id.*

<sup>21</sup> FORTY YEARS OF TITLE IX, *supra* note 14, at 2.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> Kristen M. Galles, *Filling the Gaps: Women, Civil Rights, and Title IX*, AM. BAR ASS'N (July 1, 2004), [<https://perma.cc/WYC3-UKPX>]; U.S. DEP'T OF EDUC., OFF. FOR C.R., TITLE IX RESOURCE GUIDE 15 (Apr. 2015) [<https://perma.cc/KTS2-N3QH>] [hereinafter RESOURCE GUIDE].

<sup>24</sup> Krista Millay & Martha Gilliland, *Colleges Must Confront Sexual Assault and Sexual Harassment Head On*, CONVERSATION (Apr. 2, 2018, 6:47 AM), [<https://perma.cc/S4AH-UMGA>].

*A. The History of Title IX: Understanding the Battle Women Once Faced*

While the fight for equality is far from over, it is small in comparison to the battle once faced by our mothers, grandmothers, and the women before them.<sup>25</sup> These women faced an uphill battle fighting against the belief that women were only suited to life at home for the sole purpose of performing their domestic duties as mothers and wives.<sup>26</sup> Society viewed women as having a “destiny and mission . . . to fulfil[] the noble and benign offices of wife and mother” with no rightful place in the professional world.<sup>27</sup> This supposition left little room for women to pursue access to equal education in a world where “[i]ntellectual pursuits were strongly discouraged” for women.<sup>28</sup>

However, the Women’s Rights Movement helped raise public awareness of these erroneous societal views and pressed for the government’s help to eliminate sex discrimination.<sup>29</sup> The second wave of the Women’s Rights Movement gave rise to various events that influenced a change in how society viewed women.<sup>30</sup> For example, a report by the Commission on the Status of Women found that sex discrimination was apparent in “virtually every area of American life.”<sup>31</sup> This report ultimately resulted in state and local governments adopting their own commissions for women to allow independent research into sex discrimination.<sup>32</sup>

Furthermore, the Women’s Rights Movement encouraged individuals to get involved in changing social norms by influencing day-to-day activity at a community level.<sup>33</sup> The 1960s saw hundreds of communities create women’s newspapers, women’s shelters, and health facilities that provided

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<sup>25</sup> See generally Bonnie Eisenberg & Mary Ruthsdotter, *Living the Legacy: The Women’s Rights Movement (1848-1998)*, NAT’L WOMEN’S HIST. ALLIANCE, [https://perma.cc/7H6S-YQYD] (discussing the timeline of the Women’s Rights Movement and the struggles they faced throughout the effort).

<sup>26</sup> See Susan M. Cruca, *Changing Ideals of Womanhood During the Nineteenth-Century Woman Movement*, 19 AM. TRANSCENDENTAL Q. 187, 188–89 (2005), <https://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=6&sid=3d6aaa66-7ea3-4936-8422-8221b26988ba%40sdc-v-sessmgr02> (explaining the “Cult of True Womanhood” and the roles that women were expected to do to).

<sup>27</sup> *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (discussing the appropriateness of a females claim to a right to practice law in Illinois).

<sup>28</sup> Cruca, *supra* note 25, at 188–89.

<sup>29</sup> Eisenberg & Ruthsdotter, *supra* note 24.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See *id.* (discussing the community effort due to the re-emerging Women’s Rights Movement).

birth control and family planning guidance.<sup>34</sup> In 1963, Betty Friedan published a bestseller book, *The Feminine Mystique*, that influenced women to consider a life beyond the role of wife and mother.<sup>35</sup> These steps, taken by individuals at the community level—in addition to governmental involvement—started to produce measurable changes in how women were viewed in society.<sup>36</sup> As the Women's Rights Movement continued to evolve societal norms, laws started to form to provide a legal avenue for women as well.<sup>37</sup>

The initial proposal for Title IX focused only on protecting against the employment discrimination that was happening within higher education administration.<sup>38</sup> In fact, the idea for Title IX started out as a proposal to amend Title VI and Title VII of the Civil Rights Act of 1964.<sup>39</sup> However, Congress realized employment discrimination at the administrative level was not the only place where sex discrimination was happening within education systems.<sup>40</sup> Both professional women and younger women in the education system were experiencing discrimination.<sup>41</sup> While professional women were being denied employment, younger women were experiencing sex discrimination through lower educational admissions rates and scholarships.<sup>42</sup> The discrimination against younger women was having a massive impact on future opportunities available for women by removing education, which provides jobs and financial security.<sup>43</sup>

As a result, Congress determined that the scope of Title IX needed to address all sex discrimination happening in the education system and subsequently expanded the protections of the bill to protect both female faculty and the students from the sex discrimination that was happening within institutions.<sup>44</sup> To do so, Congress drafted an entirely new bill to address the sex discrimination that was happening to both young and old females throughout the entire educational system.<sup>45</sup> In 1972, President Nixon signed

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<sup>34</sup> *Id.*

<sup>35</sup> Eisenberg & Ruthsdotter, *supra* note 24.

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

<sup>37</sup> *Id.*

<sup>38</sup> RISA L. LIEBERWITZ ET AL., THE HISTORY, USES, AND ABUSES OF TITLE IX 69, 70 (2016), [<https://perma.cc/A6WW-DVK4>].

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 71.

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

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

<sup>43</sup> *Id.*

<sup>44</sup> LIEBERWITZ ET AL., *supra* note 37, at 71.

<sup>45</sup> *Id.*

Title IX into law, which officially declared 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 financial assistance . . . .”<sup>46</sup>

Title IX has had a miraculous impact on women’s legal right to education.<sup>47</sup> In 1970, only eight percent of women received a college degree, which greatly differed from the fourteen percent of men receiving college degrees at that time.<sup>48</sup> However, with the help of Title IX, this sparse eight percent increased to thirty-three percent of women receiving college degrees in 2015.<sup>49</sup> With thirty-two percent of men receiving college degrees in 2015, the gap in admissions substantially closed.<sup>50</sup> In fact, studies project that women will account for around sixty percent of undergraduate enrollment in 2019.<sup>51</sup> Title IX, however, protects much more than just getting women through the door of traditional educational institutions.<sup>52</sup>

After passing, many individuals argued that Title IX should have a narrow application.<sup>53</sup> First, it was unclear what constituted an “education program or activity” under Title IX.<sup>54</sup> In other words, it was uncertain whether Title IX would only apply to the traditional education setting, such as preK-12 and higher education institutions, or to an educational component within any program receiving federal assistance.<sup>55</sup> However, Congress answered this question in favor of the latter by amending Title IX with the Civil Rights Restoration Act of 1987 (CRRA).<sup>56</sup> The CRRA amended Title IX to include a broad definition of “program or activity.”<sup>57</sup> Presently, determining whether Title IX covers a program is a fact-specific inquiry into what part of a program is educational in nature, even if the program as a whole may

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<sup>46</sup> Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373.

<sup>47</sup> FORTY YEARS OF TITLE IX, *supra* note 14, at 1.

<sup>48</sup> *Id.* at 2; WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING 19 (2011), [<https://perma.cc/38EK-96HQ>].

<sup>49</sup> CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015 8 (2016), [<https://perma.cc/QT2E-BEQ3>].

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

<sup>51</sup> WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *supra* note 47, at 17.

<sup>52</sup> See LIEBERWITZ ET AL., *supra* note 37, at 71 (explaining how Title IX impacts admissions as well as matters ranging from athletics to standardized testing).

<sup>53</sup> Title IX, *supra* note 15.

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



not be educational.<sup>58</sup> For example, Title IX's antidiscrimination requirements apply to other recipients of federal assistance who teach sources of education that differ from traditional schooling, such as job-training programs and educational trainings for prison inmates.<sup>59</sup>

Furthermore, Title IX's scope has developed to apply to more than just admissions and employment within education institutions.<sup>60</sup> During the 1980s and 1990s, the focus of Title IX shifted to remedying the discrimination that was occurring within school-affiliated athletic programs.<sup>61</sup> Prior to Title IX, the "primary physical activities for girls were cheerleading and square-dancing."<sup>62</sup> However, after Title IX, both the number of sports offered and female participation substantially increased.<sup>63</sup> For example, the total participation for high school girls in sports increased from 295,000 in 1971 to 2.8 million in 2002–2003.<sup>64</sup> In addition, universities had an average of 8.32 female collegiate athletes teams offered in 2004, which was a substantial increase from the average 2.5 teams offered in 1972.<sup>65</sup>

After years of interpretation, Title IX encompasses ten key areas regarding women's educational opportunities.<sup>66</sup> These ten key areas include "access to higher education, athletics, career training and education, education for pregnant and parenting students, employment, the learning environment, math and science education, sexual harassment, standardized testing, and technology."<sup>67</sup> These key areas illustrate that while Title IX was initially understood to simply get women in the door of institutions, it has now been interpreted to also protect against discrimination once through those doors.<sup>68</sup>

### *B. Understanding How Sexual Harassment Falls Under Title IX*

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<sup>58</sup> *Id.*

<sup>59</sup> LIEBERWITZ ET AL., *supra* note 37, at 71.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> JAMES G. SPEIGHT, *ETHICS IN THE UNIVERSITY* 209 (2016).

<sup>63</sup> Richard C. Bell, *A History of Women in Sport Prior to Title IX*, *SPORT J.* (2008), [<https://perma.cc/P7XR-HC66>].

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

<sup>65</sup> *Id.*

<sup>66</sup> LIEBERWITZ ET AL., *supra* note 37, at 71.

<sup>67</sup> *Id.*

<sup>68</sup> *See id.* at 70–71 (discussing the different protections that Title IX provides once within the institutions).

Within the language of the original statute, Title IX does not make clear that the statute affords protection against sexual harassment.<sup>69</sup> To reiterate, the original language of Title IX states 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 financial assistance . . . .”<sup>70</sup> Instead, Title IX’s protection against sexual harassment developed through interpretation that Title IX’s antidiscrimination policies extend within the walls of the institution.<sup>71</sup> Since it has taken years of interpretation to understand that Title IX protects against sexual harassment, it has only recently become an area of concern.<sup>72</sup> The OCR defines sexual harassment as

[U]nwelcome conduct of a sexual nature, such as unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment and refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (*e.g.*, due to the student’s age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.<sup>73</sup>

Sexual harassment happens to both males and females and occurs in various forms, such as non-physical harassment or physical harassment.<sup>74</sup> However, the consequences that females experience from sexual harassment are higher than those faced by their male counterparts.<sup>75</sup>

While sexual harassment in the education system is not a new threat, society is now more aware of the impact it has on students.<sup>76</sup> Nearly half of the students that have experienced sexual harassment say the event has

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<sup>69</sup> *Id.* at 72.

<sup>70</sup> Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 373.

<sup>71</sup> See LIEBERWITZ ET AL., *supra* note 37, at 71.

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

<sup>73</sup> RESOURCE GUIDE, *supra* note 22, at 15.

<sup>74</sup> See AAUW EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 32 (Jodi Lipson ed., 2001) [hereinafter HOSTILE HALLWAYS].

<sup>75</sup> See *Id.* (discussing the impact of sexual harassment on both boys and girls, with girls reporting higher rates of educational repercussions, decline in confidence, and emotional impact).

<sup>76</sup> *E.g., id.*

emotionally affected them in some capacity.<sup>77</sup> For example, the emotional effects from sexual harassment fester into additional repercussions such as not attending school, decreased participation in class discussions, difficulty studying, and difficulty focusing in class.<sup>78</sup> Furthermore, studies have found that both self-assurance and confidence decrease in students when sexual harassment was perpetrated, with more substantial decreases for girls than boys.<sup>79</sup> Therefore, students have shown to alter their school participation and daily routines to avoid the hostile environment created from sexual harassment.<sup>80</sup>

Allowing these hostile environments to persist limits the student's ability to benefit from the education system.<sup>81</sup> Schools are intended to serve as a safe environment where students are able to learn.<sup>82</sup> Therefore, Title IX requires institutions to take immediate steps to investigate any sexual harassment they know of or reasonably should have known of.<sup>83</sup> If the investigation shows that a hostile environment has been created from the sexual harassment, the institution must take "prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent the harassment from recurring, and, as appropriate, remedy its effects."<sup>84</sup> If the institution chooses to ignore the hostile environment created from the sexual harassment, this could constitute a violation of Title IX requirements and terminate the institution's ability to receive Federal funding.<sup>85</sup>

In addition, the Supreme Court of the United States has expanded on the protections against sexual harassment under Title IX.<sup>86</sup> For example, an individual in the past could only receive damages from a Title IX violation if the institution's agent was considered the perpetrator of the sexual har-

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 36.

<sup>79</sup> *Id.* at 32.

<sup>80</sup> HOSTILE HALLWAYS, *supra* note 73, 32.

<sup>81</sup> U.S. DEP'T OF EDUC., OFF. FOR C.R., DEAR COLLEAGUE 1 (2006) [<https://perma.cc/FPX4-CG7S>] [hereinafter DEAR COLLEAGUE 2006].

<sup>82</sup> *Id.*

<sup>83</sup> RESOURCE GUIDE, *supra* note 22, at 15.

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

<sup>85</sup> DEAR COLLEAGUE 2006, *supra* note 80 ("The guidance explains an educational institution's responsibility, as a condition of receiving Federal financial assistance, to take immediate and effective steps to end sexual harassment when it occurs, prevent its recurrence, and remedy its effects.").

<sup>86</sup> FORTY YEARS OF TITLE IX, *supra* note 14, at 7.

assment claims.<sup>87</sup> In other words, a victim of sexual harassment could potentially recover if the perpetrator was an employee, but that same individual would be unable to recover if the perpetrator of the sexual harassment was a student.<sup>88</sup> However, the OCR helped successfully argue that students and employees should be protected from more than just a specific type of perpetrator.<sup>89</sup>

In *Davis v. Monroe County Board of Education*, the OCR filed an amicus brief arguing Title IX should protect against sexual harassment originating from students as well as institutional employees.<sup>90</sup> In *Davis*, a classmate sexually harassed a fifth grade girl on at least eight separate occasions at the school they both attended.<sup>91</sup> The sexual harassment included things such as comments about the classmate's "desire to have sexual contact with her" and the classmate's attempts to touch her breasts and vaginal area.<sup>92</sup> When the sexual harassment would happen, the mother, the daughter, or both would immediately inform the school of each incident.<sup>93</sup> However, the school ultimately did not eliminate the hostile environment at school, which eventually resulted in the daughter's grades dropping and suicidal thoughts.<sup>94</sup>

In the amicus brief, the OCR heavily emphasized the detrimental effects on a student's ability to learn and benefit from the institution due to sexual harassment, regardless of whether the sexual harassment originates from another student or an employee of the institution.<sup>95</sup> The Court agreed with the OCR's argument and held that Title IX protects an individual against sexual harassment coming from either employees or other students.<sup>96</sup> In concluding so, the Court held that an institution may be held liable if it is shown that the institution actually knew of the sexual harassment happening and were deliberately indifferent about the harassment happening.<sup>97</sup>

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<sup>87</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

<sup>88</sup> See FORTY YEARS OF TITLE IX, *supra* note 14, at 7.

<sup>89</sup> See Brief for the United States, as Amicus Curiae Supporting Petitioner at 12, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843), 1998 WL 798868 [hereinafter Brief].

<sup>90</sup> *Id.* at 12–14.

<sup>91</sup> *Id.* at 2.

<sup>92</sup> *Id.* at 3.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 4.

<sup>95</sup> Brief, *supra* note 88, at 12.

<sup>96</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999).

<sup>97</sup> *Id.* at 643.

*C. Title IX Requirements: A Bird's-Eye View*

Under Title IX, institutions receiving federal financial assistance must (1) designate an employee that will put forth efforts to comply and carry out the responsibilities under Title IX (often known as Title IX Coordinator), (2) disseminate a notice of non-discrimination, and (3) adopt and appropriately publish the institution's grievance procedure.<sup>98</sup> Within these three prongs, the OCR has provided more specific requirements, such as certain language requirements for publishing the grievance procedures.<sup>99</sup> In an effort to better understand the current inadequate standards assigned to education institutions, this Note will briefly summarize the overarching responsibilities within these three prongs, placing higher emphasis on the notice of non-discrimination.

## 1. Title IX Coordinator

The OCR requires that each institution designate a Title IX Coordinator (Coordinator).<sup>100</sup> The Coordinator plays an essential role for an administration by ensuring institutional compliance with Title IX's requirements set by the OCR.<sup>101</sup> To accomplish this, the Coordinator should assist in drafting the grievance procedures adopted by an institution.<sup>102</sup> In addition, the Coordinator should provide all necessary training to ensure the institution and its employees understand their individual responsibilities under Title IX.<sup>103</sup> For example, the Coordinator will often work individually with administrative personnel with roles that have direct responsibilities under Title IX, such as coaches and counselors.<sup>104</sup>

Furthermore, the Coordinator plays an essential role for the public by serving as a reference for any Title IX questions and overseeing the institution's grievance process for Title IX claims.<sup>105</sup> With the Coordinator's contact information listed on the notice of non-discrimination disseminated by an institution, the Coordinator is often the primary contact for any questions from the public regarding Title IX.<sup>106</sup> As the primary contact, the Coordinator must be able to provide appropriate information to any public in-

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<sup>98</sup> U.S. DEP'T OF EDUC., OFF. FOR C.R., TITLE IX GRIEVANCES PROCEDURES, POSTSECONDARY EDUCATION (Aug. 4, 2004), [<https://perma.cc/X2YU-6TLC>].

<sup>99</sup> RESOURCE GUIDE, *supra* note 22, at 4.

<sup>100</sup> *Id.* at 1.

<sup>101</sup> *Id.* at 4.

<sup>102</sup> *Id.* at 2.

<sup>103</sup> *Id.* at 3.

<sup>104</sup> *Id.*

<sup>105</sup> *See* RESOURCE GUIDE, *supra* note 22, at 2–3.

<sup>106</sup> *Id.* at 6.

quiries on what is protected under Title IX or how to file a complaint with an institution.<sup>107</sup> Additionally, the Coordinator is also involved with assuring an institution appropriately responds to any complaint, which might include assisting in the investigation or working with law enforcement.<sup>108</sup> With the Coordinator's involvement in assisting both sides in the dispute, the Coordinator plays a unique role throughout the process.<sup>109</sup>

## 2. Notice of Non-Discrimination

In addition to assigning a Coordinator, the OCR requires institutions to publish a notice of non-discrimination with certain information to inform individuals of their protections under Title IX.<sup>110</sup> At a minimum, the notice of non-discrimination must acknowledge that the school cannot discriminate on race, color, national origin, sex, disability, or age.<sup>111</sup> In addition, the notice of non-discrimination must provide the name, address, and telephone number of the Coordinator as a primary contact for any questions the public may have.<sup>112</sup> The OCR provides the following as an example of a notice that meets Title IX requirements:

The (Name of Recipient) does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities and provides equal access to the Boy Scouts and other designated youth groups. The following person has been designated to handle inquiries regarding the non-discrimination policies . . . .<sup>113</sup>

The OCR requires institutions to publish these information requirements within two notices: an annual notice and a continuous notice.<sup>114</sup> Two requirement differences between the notices are the time an institution must publish and where they must be published.<sup>115</sup> An annual notice must

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<sup>107</sup> *See id.* at 2.

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

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

<sup>110</sup> U.S. DEP'T OF EDUC., OFF. FOR C.R., *Notice of Non-Discrimination* (Aug. 2010), [<https://perma.cc/T6DG-7GRZ>].

<sup>111</sup> *Id.*

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

<sup>113</sup> *Id.* (footnote omitted) (continuing with a template for the contact information for the Title IX Coordinator).

<sup>114</sup> Iowa Dep't of Educ., *Guidance for Nondiscrimination Notices 1* (Aug. 2015) [hereinafter *Guidance for Nondiscrimination Notices*], [<https://perma.cc/QN5R-M8AQ>].

<sup>115</sup> *Id.* at 3–4.

be disseminated to the public prior to the beginning of each school year.<sup>116</sup> To ensure that the public can access this information, an institution has several forum options to which it can publish the notice of non-discrimination.<sup>117</sup> For example, the annual notice can be published within a local newspaper, district publication, district website, or any other forum that could be broadcast to the public.<sup>118</sup>

In contrast, the continuous notice may be posted throughout the year in more intimate forums within an institution.<sup>119</sup> For example, the postings of the continuous notices can be made on school bulletins, written material distributed to the students, or within the student handbooks.<sup>120</sup> The locations of where the notices can be published tend to differ based on the primary target audience.<sup>121</sup> While the annual notice seems to be geared towards providing the general public access to the information, the continuous notice is more concerned about whether the Title IX information is accessible throughout the year for the institution's students and employees.<sup>122</sup>

### 3. Grievance Procedure

The final Title IX requirement set forth by the OCR is an institution must produce and publish grievance procedures that provide a "prompt and equitable resolution" to any sexual harassment claim brought to the institution's attention.<sup>123</sup> The purpose in creating and publishing these grievance procedures is to be able to identify and remedy the discrimination as quickly as possible.<sup>124</sup> However, because the OCR understands that what is the most effective way to identify and remedy discrimination within one institution might not be as effective for another, institutions are given discretion in adopting their own policies in accordance to what has shown to work best for their unique institution.<sup>125</sup> For example, larger institutions might have different grievance procedures than smaller institutions have, due to either administrative structure or size of student body.<sup>126</sup> Moreover,

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<sup>116</sup> *Id.* at 3.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 4.

<sup>120</sup> *Guidance for Nondiscrimination Notices*, *supra* note 113, at 4.

<sup>121</sup> *See generally id.* (discussing the differences in audiences for primary and continuous notices).

<sup>122</sup> *See generally id.* (indicating where and when different notices can be published).

<sup>123</sup> RESOURCE GUIDE, *supra* note 22, at 4.

<sup>124</sup> *Id.*

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

<sup>126</sup> *Id.*

institutions often exercise their discretion in adopting different language to accommodate to the age of the audience the material is circulated to.<sup>127</sup> Despite the wide range of discretion, all institutions must have a procedure that provides a prompt and equitable resolution to all parties.<sup>128</sup>

*D. Preventing Sexual Harassment Beyond Title IX: Additional University Requirements within Title IV*

In addition to the three requirements under Title IX described above, Congress has taken additional steps to confront sex discrimination happening within higher education institutions by amending Title IV of the Higher Education Act of 1965.<sup>129</sup> The Department of Education has explicitly stated that these amendments to Title IV, which apply only to colleges and universities, do not directly change any of the Title IX requirements.<sup>130</sup> Rather, the Department of Education has described these amendments as supplemental acts to Title IX to help protect students in higher education from sexual harassment.<sup>131</sup> However, some scholars believe these additional requirements effectively alter Title IX's responsibilities by requiring additional regulation over the same subject matter.<sup>132</sup> Regardless of whether the Department of Education categorizes these amendments to Title IV as supplemental or direct changes to Title IX's requirements, these amendments to Title IV require higher education institutions to take additional steps to combat sexual harassment and violence, which, unfortunately, do not apply to the sexual harassment happening at the preK-12 level.<sup>133</sup>

Title IV of the Higher Education Act of 1965 (HEA), as amended by the Higher Education Opportunity Act of 2008 (HEOA), sought "to strengthen the educational resources of our colleges and universities and to provide financial assistance to students in postsecondary and higher education."<sup>134</sup> The HEA provides substantial federal assistance to both higher

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

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

<sup>129</sup> See 20 U.S.C. § 1092 (2018).

<sup>130</sup> Mackenzie Wilfong & Brandee Hancock, *Title IX - The Basics and Recent Changes*, 86 OKLA. B.J. 1053, 1055 (2015), <https://heinonline.org/HOL/Page?handle=hein.barjournals/oklbajo2015&collection=barjournals&id=1069&startid=&end=1074>.

<sup>131</sup> See HEATHER B. GONZALEZ & JODY FEDER, CONG. RESEARCH SERV., SEXUAL VIOLENCE AT INSTITUTIONS OF HIGHER EDUCATION 7 (2016), [<https://perma.cc/28PV-7695>].

<sup>132</sup> Wilfong & Hancock, *supra* note 129, at 1055.

<sup>133</sup> See 20 U.S.C. § 1092 (2018).

<sup>134</sup> Suzanne Gould, *Why the Higher Education Act Matters*, AAUW (Nov. 12, 2015), [<https://perma.cc/Y37E-QNQF>].



education institutions and the students attending these institutions.<sup>135</sup> In 2016–2017 alone, 239.1 billion federal dollars were given to students attending undergraduate or graduate institutions.<sup>136</sup> Many students would not be financially able to obtain higher education degrees without these funds to aid in the cost of attending higher education institutions.<sup>137</sup> However, before a higher education institution can receive and distribute this crucial financial assistance to students, the institution must be considered “eligible” under Title IV.<sup>138</sup>

Over the years, Congress has heightened the requirements that institutions must comply with to be considered eligible to receive and award financial assistance. As it relates to this Note, an important amendment to the HEA eligibility requirements has been Title II of the Student’s Right-to-Know and Campus Security Act of 1990, later named the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).<sup>139</sup> Further, the Clery Act itself has had amendments, such as the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA) that has further shaped eligibility requirements.<sup>140</sup> The Clery Act and the VAWA amendment have played a substantial role in how higher education institutions must approach the topic of sexual harassment on campus.<sup>141</sup> If an institution does not meet the eligibility requirements set forth by the Clery Act, the institution is unable to disburse the critical federal financial aid to the institution’s current and prospective students, which would likely limit enrollment to only individuals who are financially able to afford higher education without the aid.<sup>142</sup>

### 1. The Clery Act

Congress enacted the Clery Act in 1990 “to increase the accountability and transparency of Institutions of Higher Education . . . in meeting certain responsibilities with regard to the safety and security of students on their

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<sup>135</sup> 20 U.S.C. § 1070(a).

<sup>136</sup> SANDY BAUM ET AL., TRENDS IN STUDENT AID 2017, at 9 (2017), [<https://perma.cc/YHG5-8R4H>].

<sup>137</sup> See *generally id.* (illustrating the substantial amount of loans and grants given to students each year).

<sup>138</sup> See 20 U.S.C. § 1092(a)(1) (2018).

<sup>139</sup> 20 U.S.C. § 1092(f)(18) (2018); GAIL MCCALLION, CONG. RESEARCH SERV., HISTORY OF THE CLERY ACT: FACT SHEET 1 (2014), [<https://perma.cc/82L5-ALSD>].

<sup>140</sup> MCCALLION, *supra* note 138, at 1.

<sup>141</sup> See *id.*

<sup>142</sup> See 20 U.S.C. § 1092(a)(1) (2018).

campuses.”<sup>143</sup> The Clery Act compels higher education institutions to be more accountable and transparent to students and employees by requiring Annual Security Reports (ASRs) of their safety procedures and statistics.<sup>144</sup> Originally named the Student Right-to-Know and Campus Security Act of 1990, the Clery Act initially required institutions receiving federal assistance to disclose security information and statistics of certain crimes recorded on campus.<sup>145</sup> However, since the initial enactment of the Clery Act, Congress has heightened the expectations on higher education institutions’ safety procedures and crime reports to ensure more accountability and transparency through additional amendments.<sup>146</sup>

Each additional amendment to the Clery Act has created new prerequisites for institutions to be eligible for financial assistance.<sup>147</sup> In 1991, the first amendment to the Clery Act changed some of the calendar requirements for reporting.<sup>148</sup> For example, the 1991 amendment changed the time period to record crime statistics from a calendar year down to an academic year.<sup>149</sup> Congress amended the Clery Act again in 1992 in order to require institutions to implement preventative policies and procedures to provide protections for sexual assault survivors.<sup>150</sup> After 1992, the Clery Act was not amended again until 1998.<sup>151</sup>

The 1998 amendment made substantial substantive changes to what institutions must report and officially renamed the law.<sup>152</sup> In honor of Jeanne Clery, the Act was renamed to its current name—the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.<sup>153</sup> Jeanne Clery was a college student who was tortured and murdered on her college campus in 1986 after the perpetrator walked through three open doors to access her room.<sup>154</sup> It was not until after the parents filed a lawsuit against

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<sup>143</sup> MCCALLION, *supra* note 138, at 1.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1–2.

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

<sup>148</sup> *Id.* at 1.

<sup>149</sup> MCCALLION, *supra* note 138, at 1.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 565 (2014).

the institution that they discovered that over thirty violent offenses had taken place on the college campus within a span of three years.<sup>155</sup>

In addition to a new name, the 1998 amendment substantially increased the reporting requirements for institutions reporting under the Clery Act.<sup>156</sup> The scope of the recording requirements expanded in two specific ways.<sup>157</sup> First, higher education institutions now have to include statistics on additional crimes that were not previously required in the ASRs—arson and negligent manslaughter.<sup>158</sup> Second, the Clery Act requires schools to report crimes that happened outside of what was previously considered “campus” in a geographical sense.<sup>159</sup> Now, institutions are required to include crimes that happen in “residence halls, non-campus buildings not geographically contiguous to the campus owned or operated by the IHE [Institution of Higher Education], and public property immediately adjacent to a facility that is owned or operated by the institution for educational purposes.”<sup>160</sup> These locations within institutions were commonly considered off-campus crimes for previous reporting requirements of the ASRs.<sup>161</sup>

In addition, 1998 amendment allows institutions to be more transparent by requiring additional reporting and access to records.<sup>162</sup> For example, if an institution has a college security or police department, the department must keep crime logs and allow the public to have access to the records.<sup>163</sup> Furthermore, institutions must annually disclose their ASRs to current students and employees, and the institutions must also disclose these reports to prospective students and employees on request.<sup>164</sup>

More recently, the Clery Act has been further amended by the requirements put forth by the VAWA.<sup>165</sup> The VAWA amended the Clery Act and added additional eligibility requirements that specifically adjust how institutions look to prohibit and respond to sexual harassment on campuses.<sup>166</sup> While the actual VAWA also regulates how areas other than educational

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<sup>155</sup> *Id.*

<sup>156</sup> MCCALLION, *supra* note 138, at 1.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *See id.*

<sup>162</sup> MCCALLION, *supra* note 138, at 1.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 2.

<sup>166</sup> *Id.*

systems must approach sexual harassment, this Note will focus on the specific impact the VAWA had on the Clery Act and the VAWA's application to higher education institutions under Title IV.

## 2. Violence Against Women Act

Congress passed the VAWA to address the extensive health care costs generated in the United States by the violence women were experiencing in intimate partner relationships.<sup>167</sup> Congress found that intimate partner violence was generating annual health-related costs in excess of \$5,800,000,000.<sup>168</sup> For example, Congress found that when comparing abused women to general enrollees in health plans, abused women were typically costing an additional \$1775 per year for health care costs.<sup>169</sup> Discovering the substantial costs that intimate partner relationship violence was causing, Congress enacted VAWA with the intent to

improve the health care system's response to domestic violence, dating violence, sexual assault, and stalking through the training and education of health care providers, developing comprehensive public health responses to violence against women and children, increasing the number of women properly screened, identified, and treated for lifetime exposure to violence, and expanding research on effective interventions in the health care setting.<sup>170</sup>

To effectively address these concerns, Congress included various sections in the Act, ranging from sections dealing with certain housing concerns for battered women to other sections outlining available grants to help implement education to teach appropriate responses to the violence.<sup>171</sup>

Section 304 of the Act addresses higher education and imposes additional requirements on institutions through the Clery Act to ensure protection of students from acts of violence against women.<sup>172</sup> With the VAWA amendment, higher education institutions are required to provide a report in the ASRs as to the preventive steps they are taking to promote awareness of certain sexual assault and sexual harassment crimes—domestic violence,

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<sup>167</sup> See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 501–02, 119 Stat. 2960, 3023–24 (2006).

<sup>168</sup> *Id.* at § 501, 119 Stat. at 3023.

<sup>169</sup> *Id.* at § 501, 119 Stat. at 3024.

<sup>170</sup> *Id.* at § 502, 119 Stat. at 3024.

<sup>171</sup> *Id.* at § 2, 119 Stat. at 2961.

<sup>172</sup> 20 U.S.C. § 1092(f)(8)(A)(i) (2018). See Violence Against Women and Department of Justice Reauthorization Act of 2005 § 304, 119 Stat. at 3013.

dating violence, sexual assault, and stalking.<sup>173</sup> These preventive steps required by the amendment include things such as training students and administrators on what sexual harassment is, requiring students and administrators to complete bystander programs, publishing statements of what is considered as prohibited conduct in clear language, and providing information to victims on how they can seek help or file a grievance against the predator.<sup>174</sup> In addition to the initial training and extensive notice, the amendment requires institutions to provide “ongoing prevention and awareness campaigns” to inform the student body and administration of the prohibited conduct, similar to the continuous notice required under Title IX.<sup>175</sup>

As a result of the VAWA amendment to the Clery Act within Title IV, higher education institutions are subject to more extensive requirements for sexual harassment than other educational institutions.<sup>176</sup> These heightened requirements include rigorous reporting efforts as well as preventative policies that aim to thwart the possibility of sexual harassment before it arises.<sup>177</sup> These extensive measures to combat sexual harassment supplement the requirements set forth in Title IX.<sup>178</sup> Although both Title IX and Title IV overlap in regulating the same subject matter, only higher education institutions are subject to the Clery Act’s heightened requirements.<sup>179</sup>

#### *E. Preventing Sexual Harassment: PreK-12 Requirements*

As a result of the Clery Act only applying to higher education institutions, preK-12 education systems only need to meet the requirements imposed by Title IX.<sup>180</sup> As a result, preK-12 institutions only need to adopt the aforementioned Title IX requirements, such as assigning a person to be the Title IX Coordinator, disseminating a notice of non-discrimination, and publishing a grievance procedure.<sup>181</sup> However, evidence shows that preK-12

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* §§ 1092(f)(8)(B)(i), 1092(f)(8)(B)(i).

<sup>175</sup> *Id.* § 1092(f)(8)(B)(i)(II).

<sup>176</sup> *See id.* § 1092(f)(8).

<sup>177</sup> *Id.*

<sup>178</sup> *See generally* GONZALEZ & FEDER, *supra* note 130, at 7 (describing the separation of the two acts and the purpose of each).

<sup>179</sup> 20 U.S.C. § 1092(f)(8) (2018).

<sup>180</sup> *See* U.S. DEP’T OF EDUC., OFF. FOR C.R., *Notice of Non-Discrimination*, (Aug. 2010), [https://perma.cc/4NLY-5VJZ].

<sup>181</sup> U.S. DEP’T OF EDUC., OFF. FOR C.R., *TITLE IX GRIEVANCES PROCEDURES, POSTSECONDARY EDUCATION* (Aug. 4, 2004), [https://perma.cc/6YUY-WFWR].

schools frequently fail to meet even those minimum requirements.<sup>182</sup> For example, recent OCR investigations show that institutions most commonly fail to appropriately identify the Title IX Coordinator and fail to provide the primary contact information within the notice of non-discrimination.<sup>183</sup>

However, some preK-12 institutions have voluntarily implemented additional policies to combat sexual harassment that are similar to the approaches higher education institutions are required to implement under the Clery Act.<sup>184</sup> For example, some preK-12 institutions have been adopting bystander programs that help train third parties to intervene when the third party sees an incident developing.<sup>185</sup> One well-known bystander program that has been adopted at the preK-12 level throughout various states is the Green Dot program.<sup>186</sup> Similar to other bystander programs, Green Dot was developed to teach students how to intervene when they see harassment happening to other individuals.<sup>187</sup> To do so, the Green Dot program looks to “train individuals as potential bystanders to effectively and safely identify potentially violent situations and effectively intervene to prevent violence.”<sup>188</sup> By providing more students with these effective tools and education, the Green Dot program looks to change the social norms surrounding sexual and dating violence.<sup>189</sup> In fact, a study using several Kentucky high schools found a significant decrease in sexual violence events by implementing Green Dot.<sup>190</sup> As bystander programs continue to yield positive results, more and more schools are adopting bystander programs to combat either general harassment or to specifically address sexual harassment happening in schools.<sup>191</sup>

Furthermore, some states have expanded on the Title IX requirements by providing additional information to students in preK-12 schools to bet-

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<sup>182</sup> U.S. DEP’T OF EDUC., OFF. FOR C.R., DEAR COLLEAGUE (2004), [<https://perma.cc/WQL9-QJ6J>].

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

<sup>184</sup> Iowa Dep’t of Educ., *Bullying, Harassment Down 79%? Oh, Yeah!*, EACH AND EVERY CHILD, Feb. 2018 [hereinafter EACH AND EVERY CHILD], [<https://perma.cc/CP6J-MUZE>]; Patricia G. Cook-Craig et al., *Challenge and Opportunity in Evaluating a Diffusion-Based Active Bystanding Prevention Program: Green Dot in High Schools*, 20 VIOLENCE AGAINST WOMEN 1179, 1187 (2014).

<sup>185</sup> EACH AND EVERY CHILD, *supra* note 183.

<sup>186</sup> *Id.*; Cook-Craig et al., *supra* note 183, at 1181.

<sup>187</sup> Cook-Craig et al., *supra* note 183, at 1184.

<sup>188</sup> *Id.* at 1181.

<sup>189</sup> *Id.*

<sup>190</sup> Ann L. Coker et al., *RCT Testing Bystander Effectiveness to Reduce Violence*, 52 AM. J. OF PREVENTATIVE MED. 566, 569 (2017).

<sup>191</sup> EACH AND EVERY CHILD, *supra* note 183.

ter notify students of their specific rights against sexual harassment.<sup>192</sup> For example, California enacted the California Sex Equity in Education Act, which states that written sexual harassment policies must be disseminated to students, parents, and faculty as to what procedures must be followed to specifically address sexual harassment and how an individual can pursue available remedies.<sup>193</sup> This additional State requirement likely aids in informational gap regarding sexual harassment in schools. In fact, students who say their schools have a policy and distribute materials on sexual harassment are more likely to know what sexual harassment is compared to those whose schools do neither.<sup>194</sup>

#### *F. Sexual Harassment Today*

Educational institutions at all levels struggle to protect their students from the serious threat of sexual harassment.<sup>195</sup> Notwithstanding the fact that these statistics are likely lower than reality due to under-reporting, the numbers associated with sexual harassment are still staggering.<sup>196</sup> Within higher education institutions alone, eighty-nine percent of students reported the presence of sexual harassment on campus.<sup>197</sup> Nearly two-thirds of these students reported being personally subject to some form of sexual harassment during their college years.<sup>198</sup> Furthermore, statistics show that twenty percent of women and six percent of men in college will experience some of the worst levels of sexual harassment, including actual or attempted sexual assault.<sup>199</sup>

At the same time, sexual harassment happens at an alarming rate within preK-12 education systems as well.<sup>200</sup> Eighty-three percent of girls reported

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<sup>192</sup> *Know Your Rights at School: Sexual Assault & Sexual Harassment*, EQUAL RTS. ADVOCS., [https://perma.cc/4JVM-URYS] (last visited Apr. 26, 2020).

<sup>193</sup> *Id.*

<sup>194</sup> HOSTILE HALLWAYS, *supra* note 73, at 1.

<sup>195</sup> EQUAL RTS. ADVOCS., *supra* note 191.

<sup>196</sup> OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, THE 2016 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT 12 (2016), [https://perma.cc/Q6TF-YQH7] ("Despite the high prevalence rate, and adverse health consequences of experiencing sexual assault, reporting rates remain low.").

<sup>197</sup> CATHERINE HILL & ELENA SILVA, AAUW EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 14 (2005).

<sup>198</sup> *Id.*

<sup>199</sup> U.S. DEP'T OF EDUC., OFF. FOR C.R., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE BACKGROUND, SUMMARY, AND FAST FACTS 1 (2011), [https://perma.cc/Q8PY-9UYN].

<sup>200</sup> *See* HOSTILE HALLWAYS, *supra* note 73, at 20.

experiencing sexual harassment by their junior year of high school.<sup>201</sup> Of those reported experiences of sexual harassment, some incidents were reported to have begun by the time the students were in sixth grade, if not earlier.<sup>202</sup> Knowing these statistics, reports have also shown that children who experienced sexual violence in their childhood are 13.7 times more likely to experience rape or attempted rape in their first year of college.<sup>203</sup> Therefore, this study showing higher changes of rape or attempted rate in college suggests some correlation between the problem of sexual harassment in the preK-12 system and the harassment that is happening at higher education institutions.<sup>204</sup>

In fact, many scholars believe the problem of sexual harassment in the preK-12 institutions and the harassment in higher education institutions are linked by a behavioral connection.<sup>205</sup> For example, Professor Paul Schewe, a violence prevention scholar at the University of Illinois, Chicago, stated, “college is just way too late” when talking about adjusting individuals’ behaviors towards sexual harassment.<sup>206</sup> Schewe further elaborated by saying, “when kids go through puberty, that’s when their ideas about sex and beliefs and behaviors are forming, so that’s really a critical period.”<sup>207</sup> In addition, Carolyn Laing, who works at the University of California, Berkeley as a counseling psychologist stated, “we have to meet them at the right developmental stage. By the age of six, moral development has already begun to occur.”<sup>208</sup>

The failure to correct individuals’ behavioral attitudes towards sexual harassment can be seen by viewing research and the reported responses to sexual harassment.<sup>209</sup> Given the current social climate on sexual harassment, these incidents that are happening within the education systems are often viewed as “seem[ing] almost normal.”<sup>210</sup> However, these experiences with some forms of sexual harassment are having “real, measurable consequenc-

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<sup>201</sup> *Id.*

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

<sup>203</sup> *Child Sexual Abuse Statistics*, NAT’L CTR. FOR VICTIMS OF CRIME, [https://perma.cc/Q93A-4ANQ], (last visited Apr. 30, 2020).

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

<sup>205</sup> Tovia Smith, *To Prevent Sexual Assault, Schools and Parents Start Lessons Early*, NPR (Aug. 9, 2016, 4:48 AM), [https://perma.cc/T5KB-576W]; Mojola Omole, *The Case for Teaching Kids About #MeToo in Elementary School*, QUARTZ (Jan. 18, 2018), [https://perma.cc/P68D-KL27].

<sup>206</sup> Smith, *supra* note 204.

<sup>207</sup> *Id.*

<sup>208</sup> Omole, *supra* note 204.

<sup>209</sup> *See generally* HILL & SILVA, *supra* note 196.

<sup>210</sup> *Id.* at 14.



es on students' futures."<sup>211</sup> For example, sexual harassment incidents are leaving students struggling to engage in academics, ultimately resulting in them more likely to drop out of college.<sup>212</sup> Therefore, allowing sexual harassment to persist is driving women out of the education system that Title IX worked so hard to get them into.<sup>213</sup>

The United States is currently experiencing the wave of a powerful movement, known as the #MeToo movement, advocated by women and men who want to change this "normal" perception on how society views and addresses sexual harassment.<sup>214</sup> Founded in 2006, the viral hashtag launched the #MeToo movement into a national conversation within six months.<sup>215</sup> This social movement has allowed more and more survivors of sexual harassment to finally find the strength to talk about their sexual harassment experiences.<sup>216</sup> However, many believe that preK-12 institutions have stayed insulated from the movement.<sup>217</sup> To facilitate the social movement of addressing sexual harassment to the younger generation, a non-profit, Sexual Assault in Schools, launched the hashtag #MeTooK12.<sup>218</sup> The campaign hopes to spotlight the vast sexual harassment happening at a young age and underscore "the urgency of addressing this problem in early education."<sup>219</sup>

### III. ANALYSIS

This Note will first explain why Title IX should heighten the notice of non-discrimination requirement for all education institutions and why the Clery Act serves as an adequate model to follow in redrafting the notice of non-discrimination requirement. Next, this Note will emphasize why the proactive policies against sexual harassment that the Clery Act requires of higher education institutions are important in the battle against sexual harassment and why these proactive policies should be adopted within Title IX

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<sup>211</sup> Banyard et al., *Academic Correlates of Unwanted Sexual Contact, Intercourse, Stalking, and Intimate Partner Violence: An Understudied but Important Consequence for College Students*, J. INTERPERSONAL VIOLENCE 1, 11 (2017)

<sup>212</sup> *Id.* at 3.

<sup>213</sup> *See generally id.* (discussing the consequences of sexual harassment within college).

<sup>214</sup> *History & Vision*, ME TOO, [https://perma.cc/KHX9-WKNP] (last visited Apr. 30, 2020).

<sup>215</sup> *Id.*

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

<sup>217</sup> Lauren Camera, *#MeToo Goes to School*, U.S. NEWS & WORLD REP. (Jan. 8, 2018, 4:38 PM), [https://perma.cc/9HEN-3WDQ].

<sup>218</sup> *Id.*

<sup>219</sup> Esther Warkov, *Combating Rampant Sexual Harassment and Assault*, STOP SEXUAL ASSAULT IN SCHOOLS, [https://perma.cc/8WLT-87B8] (last visited Apr. 26, 2020).

as well. Finally, this Note will explain how Title IX better serves its purpose of protecting against sexual discrimination if Title IX adopted heightened notice of non-discrimination requirements and proactive policies, rather than maintaining the current stagnant requirements.

*A. Adopting Notice Requirements within Title IX that are Similar to what the Clery Act Requires would Provide Adequate Notice to Students*

The current Title IX requirement for the notice of non-discrimination is inadequate at protecting students within preK-12 institutions from the sexual harassment that impacts far too many students today in the education system. The evidence shows sexual harassment affects students at all levels of education.<sup>220</sup> However, Congress has only taken additional steps to provide more information to students about sexual harassment within higher education institutions by enacting supplemental acts, such as the Clery Act, which do not apply to preK-12 institutions. Therefore, students within preK-12 institutions are left behind with the inadequate Title IX requirements that most institutions continue to fall short of without any loss of federal funding. However, the OCR could remedy the current insufficient notice requirements within Title IX by adopting notice requirements similar to the Clery Act.

1. Current Title IX Requirements for the Notice of Non-Discrimination are Inadequate in Informing Students of the Protection Against Sexual Harassment

The current Title IX requirements of the notice of non-discrimination fail to adequately educate students and faculty regarding the rights they possess under Title IX. The purpose of the notice of non-discrimination is to inform individuals of the protections that Title IX affords to them.<sup>221</sup> However, the OCR's current Title IX requirements for the notice of non-discrimination do not provide this information in regard to the protection against sexual harassment in clear language for individuals. The ambiguity of what protections fall under Title IX is evident in the language of the sample notice that would pass OCR standards. To reiterate, the OCR only requires institutions under Title IX to meet the following requirements for notice of non-discrimination:

The (Name of Recipient) does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities and provides equal access to the Boy Scouts and other designated youth groups. The fol-

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<sup>220</sup> HILL & SILVA, *supra* note 196, at 14; HOSTILE HALLWAYS, *supra* note 73, at 20.

<sup>221</sup> U.S. DEP'T OF EDUC., OFF. FOR C.R., *Notice of Non-Discrimination* (Aug. 2010), [<https://perma.cc/ZJ3Y-T68D>].

lowing person has been designated to handle inquiries regarding the non-discrimination policies . . . .<sup>222</sup>

This sample, which would pass all Title IX requirements, provides no clarification or insight that students are protected under Title IX from sexual harassment. The closest the notice of non-discrimination gets to informing students regarding protection against sexual harassment is that the institution cannot discriminate on the basis of sex. However, this prohibition against sex discrimination language requires individuals to understand the indirect reasoning behind why sexual harassment is a form of sex discrimination, which is not clear to many.

## 2. The Required Notice for Higher Education Institutions Provides Adequate Information to Students Regarding their Rights and Remedies Against Sexual Harassment

In contrast to Title IX's notice of non-discrimination requirements, the notice requirements within the Clery Act for higher education institutions provide adequate initial and continuous notice to student bodies and faculty regarding sexual harassment protections.<sup>223</sup> For example, the Clery Act requires clear language stating higher education institutions "prohibit the offenses of domestic violence, dating violence, sexual assault, and stalking," and requires that institutions define these offenses.<sup>224</sup> Rather than providing a vague description of non-discrimination protections like the OCR's current standard for Title IX, higher education institutions are required to publish notices that provide clarity regarding specific sexual harassment offenses.<sup>225</sup> This clarity of notice requirements within the Clery Act provides answers to many of the questions the Title IX notice leaves unanswered.

Furthermore, the notice requirement under the Clery Act goes beyond clearly informing students of their rights by providing information regarding where a victim of sexual harassment can seek personal assistance. As discussed, the impact of sexual harassment is too dire without appropriate support to victims. While both Title IX and the Clery Act require a prompt and equitable investigation into the incident by the institution, the OCR's requirements for Title IX are silent when it comes to additional support for victims of sexual harassment. In contrast to Title IX, the Clery Act requires higher education institutions to provide information on how a victim of sexual harassment can seek help.<sup>226</sup> In fact, the Clery Act requires this in-

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<sup>222</sup> *Id.* (footnote omitted).

<sup>223</sup> 20 U.S.C. § 1092(f)(8)(B) (2018).

<sup>224</sup> *Id.* §§ 1092(f)(8)(B)(i)(aa)-(bb).

<sup>225</sup> *Id.* § 1092(f)(8)(B)(i).

<sup>226</sup> *Id.* § 1092(f)(8)(B)(iii).

formation on assistance to be provided in ongoing prevention and awareness campaigns that are accessible to students and faculty throughout the year.<sup>227</sup> Because additional sexual harassment information and support are critical, the OCR should adopt similar requirements within Title IX that mirror the Clery Act, requiring individuals be better informed about sexual harassment protections and where to seek help.

### 3. Heightening the Notice of Non-Discrimination Requirements within Title IX Shows to be Easier Now Than Ever

Heightening the requirements for notice of non-discrimination within Title IX would primarily impact preK-12 institutions, allowing for smoother integration for the new requirements. If the OCR would adopt many of the notice and information requirements already required for higher education institutions under the Clery Act, the changes would not add to any existing higher education requirements. Instead, adopting similar notice requirements would simply put all educational institutions on the same footing in protecting their students against sexual harassment. As stated, the current disparity in preK-12 and higher education notice requirements is unnecessary and inappropriate, given the evidence showing sexual harassment is happening equally at both levels. However, given that higher education institutions are already abiding by the higher notice requirements, the OCR could look to focus on getting preK-12 institutions up to speed.

#### *A. Title IX Should Require Institutions to Adopt Proactive Policies Similar to the Policies Required by the Clery Act*

In addition, the OCR should require educational institutions receiving federal funds to not only provide sufficient notice to students and faculty of their rights and protections, but implement more proactive programs to handle sexual harassment. For example, the Clery Act requires higher education institutions to provide educational training for students and faculty as well as implement bystander programs.<sup>228</sup> Educational training programs promote awareness by teaching students and faculty through interactive courses regarding sexual harassment definitions and where an individual can go if they personally experience sexual harassment.<sup>229</sup> This training should be available for students and faculty at all education levels. In fact, it seems counterintuitive that we would require higher education institutions, which primarily deal with adults more capable of independently obtaining this information, to provide more information and resources than we would to minors within the preK-12 educational institutions.

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<sup>227</sup> *Id.* § 1092(f)(8)(B)(i)(II).

<sup>228</sup> *Id.* §§ 1092(f)(8)(A)(i), § 1092(f)(8)(B)(i).

<sup>229</sup> 20 U.S.C. § 1092(f)(8)(A)(i)(2018); 20 U.S.C. § 1092(f)(8)(B)(i) (2018).

Further, the required bystander programs within the Clery Act teach students and faculty what they can personally do to safely stop sexual harassment if they notice it happening.<sup>230</sup> However, these bystander program requirements of the Clery Act are beyond any Title IX requirements that preK-12 education institutions must abide by. PreK-12 education institutions have only voluntarily adopted these bystander programs. This requirement discrepancy seems unfortunate, given that bystander programs implemented within preK-12 are effective means to combat sexual violence incidents.<sup>231</sup> However, the difference in requirements for higher education institutions and preK-12 institutions illustrates that additional, effective methods are available for preK-12 institutions. The proactive programs the Clery Act requires would be a great model example for the OCR to adopt for Title IX.

1. Proactive Policies Would Help Change the Social Views that Sexual Harassment is “Normal”

While the #MeToo movement continues to try to change how society responds to sexual harassment, implementing proactive policies at both higher education institutions and preK-12 level would aid in adjusting the social climate surrounding sexual harassment. Though the #MeToo movement has done substantial work in bringing the conversation to the national news and highlighting the damage done to sexual harassment victims, many believe this movement is not hitting the generation we need it to hit most—the younger generation.<sup>232</sup> The Clery Act has required this conversation to happen within higher education for over a decade by providing educational tutorials and training peers to intervene if they see harassment happening. However, preK-12 institutions have not been required to proactively address the social stigma around sexual harassment under Title IX. Both the bystander intervention programs and the in-depth education programs would proactively educate every generation on what society holds as unacceptable behavior when it comes to sexual harassment. Until the law catches up, the social movement can only do so much to end the sexual harassment culture.

2. Addressing Sexual Harassment Through Proactive Measures Earlier in the Education System Can Prevent Sexual Harassment Later in Life

Not only would addressing the sexual harassment problem at preK-12 institutions by implementing proactive programs have an immediate outcome on the sexual harassment happening to younger students, but it ap-

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<sup>230</sup> 20 U.S.C. § 1092(f)(8)(A)(i) (2018); 20 U.S.C. § 1092(f)(8)(B)(i) (2018).

<sup>231</sup> Coker, *supra* note 189, at 569.

<sup>232</sup> Camera, *supra* note 216.

pears stopping sexual harassment at a younger age could have preventative advantages later in life.<sup>233</sup> As stated above, many scholars believe that perpetrators of sexual harassment in both younger and later years can be traced to poor behavioral development associated with sexual harassment perception.<sup>234</sup> These same scholars believe these behavioral development issues could be addressed by proactive measures implemented during childhood.<sup>235</sup> For example, while some scholars view college as “way too late” for changing these views, there is agreement that intervention during younger years seems to show the most promise in adjusting behavioral norms associated with sexual harassment.<sup>236</sup> By implementing proactive programs at a younger age, these programs would change behaviors before they are able to form into more concrete perceptions of what is considered normal behavior surrounding sexual harassment.

*C. Adequate Notice to Students of their Rights Against Sexual Harassment allows Schools to be More Effective in Providing an Environment that does not Discriminate on the Basis of Sex*

Requiring institutions to provide more information within the notice of non-discrimination and adopt proactive programs better aligns with the purpose behind Title IX. The purpose of Title IX is to remove sex discrimination that happens within education institutions.<sup>237</sup> To bring about Title IX’s purpose, the OCR codified certain requirements to ensure an educational environment that does not discriminate on the basis of sex. The OCR has structured these requirements based upon their perception of an efficient way to remedy sexual harassment in educational institutions. Unfortunately, the OCR frustrates the effectiveness of other Title IX requirements and hinders the significance of more recent interpretations of sex discrimination by maintaining outdated requirements over the years.

1. Today’s Interpretation of Title IX is Hindered by Allowing Outdated Requirements to Govern Institutional Application

Instead of evolving requirements to be as efficient as possible, the OCR has hindered Title IX’s purpose by allowing outdated and insufficient requirements to continue to govern institutional sex discrimination policies. While Title IX’s purpose to remove sex discrimination within the education system has remained the same, what it takes to fulfill Title IX’s purpose has evolved with time. It is likely that the OCR’s requirements were effective in

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<sup>233</sup> See *Child Sexual Abuse Statistics*, *supra* note 202.

<sup>234</sup> Smith, *supra* note 204; Omole, *supra* note 204.

<sup>235</sup> Smith, *supra* note 204; Omole, *supra* note 204.

<sup>236</sup> Smith, *supra* note 204.

<sup>237</sup> Lieberwitz et al., *supra* note 37, at 71.

removing what was previously considered sex discrimination in education systems. However, the OCR needs to adopt new requirements to represent Title IX's modern interpretation. For example, it is likely that the current notice of non-discrimination was sufficient prior to the interpretation that Title IX protects against sexual harassment. Today, Title IX protects against sexual harassment, and therefore, a notice of non-discrimination mentioning nothing about sexual harassment is clearly insufficient.

While the OCR continues to fight for more rights under Title IX, the OCR needs to adjust the requirements to provide information on the new scope of Title IX to the individuals they are fighting for. As elaborated on above, the lack of information on the sexual harassment protection under Title IX has various negative effects, such as inadequately informing students of redress they have related to sexual harassment. Further, this lack of information has been shown to lead to unfortunate results and overall misunderstanding within society of what is appropriate behavior surrounding sexual harassment.

## 2. Providing Low Standards for the Notice of Non-Discrimination Negatively Impacts Other Requirements within Title IX

Lack of appropriate information about sexual harassment within requirements of the notice of non-discrimination impacts other OCR requirements, such as the effectiveness of the grievance procedure. Grievance procedures within Title IX are meant to discover incidents of discrimination as early as possible.<sup>238</sup> Unfortunately, the OCR has inhibited institutional potential to discover incidents of discrimination as early as possible by maintaining a low bar for the other requirements within Title IX. This is especially problematic in today's society where individuals view sexual harassment as almost normal.<sup>239</sup> If students are given no notice that sexual harassment is considered sex discrimination protected under Title IX, it is unlikely that they will know to report the prohibited conduct to the school. Furthermore, if students are not provided educational training or bystander intervention programs, the behavioral norms surrounding sexual harassment will continue to be viewed as "normal." Due to the failure of institutions to provide sufficient education regarding Title IX, students succumb to the normalization of sexual harassment and are further unaware that it is prohibited. Instead, these requirements enable hostile environments and allow the sex discrimination to persist longer than it would have had the individual or victim known better.

Furthermore, the low standards for the notice of non-discrimination impact a Coordinator's ability to inform the public of rights protected un-

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<sup>238</sup> RESOURCE GUIDE, *supra* note 22, at 4.

<sup>239</sup> HILL & SILVA, *supra* note 196, at 14.

der Title IX. A Coordinator has the responsibility to provide additional information to the public on inquiry into Title IX's protections.<sup>240</sup> However, without adequate initial notice within the notice of non-discrimination stating that sexual harassment falls under the Title IX umbrella, it is less likely that an individual would even know to inquire for information to resolve the matter. In other words, without clear language in the initial notice of non-discrimination stating Title IX protects against sexual harassment, a Title IX Coordinator is not an effective source to the public. Instead, the Coordinator's information on the notice of non-discrimination requirement does not provide any additional help for an individual experiencing sexual harassment. Therefore, the inadequate notice of non-discrimination proves to restrict the Title IX Coordinator and is an ineffective way to inform the public, administration, or student body of the significant protection against sexual harassment that falls under Title IX.

In contrast, heightened requirements within Title IX for the notice and adoption of proactive programs would provide students with sufficient information regarding sexual harassment and would allow the grievance policy and Title IX Coordinator to be as effective as possible. As the evidence shows above, students are more likely to report and properly identify sexual harassment their school has provided them with Title IX policies as well as additional information about sexual harassment.<sup>241</sup> Knowing that sexual harassment is protected under Title IX and that it is not normal is something that all students, preK-12 and higher education, have the right to know. Had Emily or her family known that she was protected from sexual harassment under Title IX, Emily's life might have had a different outcome.

#### IV. CONCLUSION

The current Title IX requirements are no longer effective in combating the sex discrimination that is happening today to too many individuals within education institutions. The subdivision of the Office for Civil Rights within the Department of Education needs to adopt new requirements to re-align Title IX with its purpose—removing sex discrimination from the education system. To do so, new requirements need to be adopted directly within Title IX to combat the sexual harassment happening within all education systems. First, Title IX's current requirement for the notice of non-discrimination needs to be heightened to provide clear language within the notice that sexual harassment is protected under Title IX. Next, Title IX needs to require institutions to enact proactive programs, such as bystander programs and more in-depth education programs on what sexual harassment is.

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<sup>240</sup> See RESOURCE GUIDE, *supra* note 22, at 2–3.

<sup>241</sup> See HOSTILE HALLWAYS, *supra* note 73, at 15–16.



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For efficient guidance in rewriting the requirement standards, the Department of Education Office for Civil Rights should look to the Clery Act within Title IV of the Higher Education Act as an exemplar to adopt. The proposed heightened requirements for notice of non-discrimination and proactive programs that have addressed sexual harassment more aggressively have been required of higher education institutions for over a decade through Congress enacting supplemental acts to Title IX. However, these supplemental acts to Title IX have been only directed towards higher education institutions; preK-12 education institutions have only adopted similar policies by voluntary means. Unfortunately, sexual harassment is a real threat and more needs to be done to address the issue rather than waiting for preK-12 institutions to voluntarily adopt more aggressive programs. Adopting these new heightened requirements within Title IX would allow heightened awareness and knowledge to students, faculty, and the public on what Title IX protects and would allow for a more effective program to combat the sex discrimination that is prominent at all levels of education.