TITLE IX: AN EXCITABLE PROCESS THAT HAS OVERREACHING COMPLICATIONS

Damion P. Jones

I. Introduction

1964 was a precarious time in the United States. The Honorable Dr. Martin Luther King, Jr. had just been assassinated in the closing days of 1963. The philosophies of the Nation of Islam, guided and disseminated to the public by the Honorable Malcolm X, was taking hold in black households and communities all over America. Civil unrest was on the mind of nearly every black American, which materialized in race riots all over southern and midwestern cities in America. Finally, the United States realized it had a serious problem on its hands.

With the passing of legislation titled the Civil Rights Act of 1964, the United States of America attempted to move beyond its troubled past with racism and its illegal treatment of those individuals on the fringes of society, and thus most deserving of the protections guaranteed to all American citizens under the Constitution.

The introduction of the Civil Rights Act of 1964 expressly prohibited the discrimination of any citizen solely on the basis of []. Cite. In addition to banning discrimination based on these traits, the Civil Rights Act of 1964 allowed for the creation of Title IX – America wanted to prevent any form of discrimination against all individuals based on gender at college campuses, too.

The ramifications more than fifty years later have been catastrophic. *Stare decisis* expanded gender discrimination to cover sexual assault and abuse on college campuses. While this is an extraordinary ideal, the remaining legislation dropped the ball, by imposing excessively low burdens of proof, the allowance of bias to interfere in the fact-finding process, culminating in the deprivation of rights guaranteed at birth. The result is a quasi-judicial system without all of the guarantees of the American judicial system of justice. This article explores the history of Title IX, its progeny in the form of the 2001 Dear Colleague Letter, its offspring – the 2011 Dear Colleague Letter, as well as the body of case law that has shaped the system as we know it today.

In addition, this article offers a study on the documented but largely unknown application of Title IX and its mutations in the form of the 2001 and 2011 DCLs, as well as some alternatives.

a. 2001 Dear Colleague Letter

The 2001 Dear Colleague Letter ("2001 DCL") was drafted by the Department of Education's Office of Civil Rights. The 2001 DCL is deemed to be a "Significant Guiding Document", considered by the DOE rank-and-file to be authoritative on the application of Title IX across American secondary and post-secondary institutions.

The 2001 DCL requires all institutions of higher education to adopt and publish grievance procedures for adjudicating allegations of sexual assault pursuant to Title IX. However, in an effort to avoid lawsuits against the United States alleging State Action, the Department of Education does not require the adoption of a *specific* policy by all institutions, instead adopting language indicating that each university must adopt a standard meeting the general requirements of Title IX, as prescribed by the 2001 Guidance.[1] The OCR announced in the 2001 DCL that a preponderance of the evidence standard[2] governs Title IX adjudications.[3] This is a low standard of proof compared to the "clear and convincing evidence standard" in [types of civil matters using CCE] or the beyond a reasonable doubt standard in criminal proceedings. In fact, the OCR Case Processing Manual indicates that schools using the clear and

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[1] The caveat is that declining to require adoption of a specific policy by post-secondary institutions is ineffective if it causes students subject to the policy to be unsure or unaware of conduct considered to violate the policy against sexual harassment.

[2] The preponderance of evidence burden of proof requires an evidentiary showing that it is *more likely than not* that the defendant is liable for the acts alleged. [cite]. Courts interpret this standard to require 50.1% certainty that the defendant is liable for the acts alleged.

[3] The preponderance of the evidence standard governs title IX actions because in the 2001 DCL, the OCR states that in interpreting Title IX, federal courts look to Title VII cases for guidance in determining what constitutes sexual harassment. *See 2001 DCL*, fn. 4 (citing *Jennings v. University of North Carolina*, 444 F.3d 255, 268; fn. 26.) In other words, because federal courts utilize the POE standard in adjudicating Title VII cases, the OCR has found the POE standard equally applicable to Title IX matters. *But, "[a]*n agency's interpretation of legal precedent is not permitted *even the slightest bit of deference*" in concluding that Title VII and the standards announced in Title VII cases apply equally to Title IX cases)).

convincing evidentiary standard are not in compliance with the standard of proof in civil rights actions.[4]

In addition to defining the applicable standard of proof in Title IX matters, the 2001 DCL sets forth standards and procedures to be used in the adjudication of grievances under Title IX.[5] The 2001 DCL's stated goal is to provide the "prompt and equitable" resolution of sexual harassment complaints.[6] To meet the "prompt and equitable" resolution desired, the 2001 DCL announces several elements such as (1) notice to all parties of the school's Title IX procedures; (2) uniform application of Title IX procedures to the complaint; (3) an adequate, reliable, and impartial investigation into the allegations of the complaint;[7] (4) a designated, prompt timeframe for the stages of the process;[8] (5) notice of outcome to all parties; and (6) assurances to the complainant that the school will take steps to prevent the recurrence of harassment.[9]

However, the 2001 DCL also has some drawbacks. The DCL prohibits access to potentially exculpatory evidence that would serve as a check to the veracity of the accuser's[10] version of events. For example, the DCL does not allow the defendant access to the accuser's sexual history, while preventing the accuser from utilizing

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[4] 2001 DCL, fn. 27.

[5] *See 2001 DCL*, pp. 8, 10.

[6] *Id.* at 8.

[7] This includes the opportunity for both the complainant and the accused to be heard, present witnesses, and present evidence in support of his/her position. *Id.*

[8] Title IX's version of the speedy trial requirement in criminal matters under the Fifth Amendment to the United States Constitution.

[9] *Id.* at 8.

[10] I use the term "accuser" rather than "victim" for a specific purpose. "Victim" subconsciously presupposes the veracity of the accuser's version of events, often before all relevant evidence is gathered, evaluated, and the person on the opposite end rarely has a chance to be heard on his version of events. As a society, we all agree that sexual violence in any form is wrong. However, we must make a necessary distinction between "accuser" and "victim." Indeed, it is a term of art, albeit an important one.

the defendant's disciplinary record.[11] Moreover, the 2001 DCL discourages any policy that affords the right to counsel at Title IX proceedings.[12] Indeed, only public and state institutions require due process with regard to Title IX matters.[13] Although these policies interpreted as the OCR's attempt to level the playing field and to prevent Title IX proceedings from devolving into scandalous matters, the ultimate effect of such prohibitions is that it prevents justice from being done.[14]

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[11] *2001 DCL*, fn. 29. Although the Federal Rules of Evidence espouse similar prohibitions on access to the accuser's sexual history both in civil and criminal actions, there are certain well-settled and defined exceptions to said prohibition. *See* F.R.E. 801 (stating rule and exceptions). The 2001 DCL contains no such exceptions. Additionally, in criminal actions, the accuser has access to at least a portion of the defendant's criminal history. *See* F.R.E. 803.

[12] 2001 DCL, p. 12.

[13] *Id.*

[14] The Title IX adjudication process should mirror the American adversarial system. We have come to rely on the adversarial system because it allows each party access to uncomfortable information about the opposing party that causes a necessary friction and uncomfortable discussions about the merits of each side's case. In the process, justice is achieved.