

Boston University School of Law

## Scholarly Commons at Boston University School of Law

---

Faculty Scholarship

---

2023

### Title IX's Unrealized Potential to Prevent Sexual Violence

Katharine B. Silbaugh

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)



Part of the [Education Law Commons](#), [Law and Gender Commons](#), and the [Sexuality and the Law Commons](#)

---

#### Recommended Citation

Katharine B. Silbaugh, *Title IX's Unrealized Potential to Prevent Sexual Violence*, in 103 Boston University Law Review Online 12 (2023).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/3556](https://scholarship.law.bu.edu/faculty_scholarship/3556)

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).



---

## TITLE IX'S UNREALIZED POTENTIAL TO PREVENT SEXUAL VIOLENCE

KATHARINE SILBAUGH\*

The mandate of Title IX is equality in educational opportunities. If educational institutions could prevent sexual assaults from occurring, they would more fully ensure that students are not limited in their ability to benefit from the school's educational programs. However, Title IX administration on college campuses still focuses far more on post-assault infrastructure than on assault prevention.<sup>1</sup>

Yet with the ever-increasing particularity of the assault response requirements emanating from the Department of Education ("DOE")<sup>2</sup> and courts, Title IX jurisprudence has strayed too far from this basic purpose: to ensure that students in federally funding schools are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex.<sup>3</sup> To deliver on the promise of educational equality, preventing sexual assault is at least as important as responding to it. To offer educational opportunities equally is to offer educational environments that are as free of sexual assault as may be accomplished within the state of knowledge on sexual assault prevention. Yet Title IX today promises only a highly intentional and developed response to assault when it happens. It does little to motivate institutions to use the tools available to them to avoid assault from the outset. This essay explores three questions: first, is the DOE's post-assault focus an

---

\* Professor of Law, Boston University School of Law. Thank you to Naomi Mann for helpful comments on an earlier draft.

<sup>1</sup> Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1055 (2015) [hereinafter Silbaugh, *Reactive to Proactive*].

<sup>2</sup> E.g., OFF. FOR C.R., U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT (June 28, 2022) [hereinafter *Q&A on Title IX*], <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf> [<https://perma.cc/KMP7-LQ8K>]; Press Release, Office for Civil Rights, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [<http://perma.cc/D9Z7-XA2>].

<sup>3</sup> 20 U.S.C. § 1681 ("No 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 . . . .").

intentional understanding of equality in education? Second, what does prevention look like? And third, can universities achieve it?

The DOE regulations that form the basis of Title IX's administrative enforcement recommend, but do not require, that universities take sexual assault prevention measures.<sup>4</sup> Typically, universities provide single-session sexual assault prevention workshops during freshman orientation and do not sustain their engagement on the issue. Such single-meeting sessions have not been shown to change the incidence of sexual assault on campuses.<sup>5</sup>

*The overwhelming focus on reaction and not prevention is an accident of doctrine.* The focus on assault response is not an intentional part of Title IX's design or university predisposition, but instead an artifact of borrowing jurisprudence and standards from the Title VII context (related to employment discrimination).<sup>6</sup> Judicially-articulated elements of sex discrimination formulated under Title VII have come to dominate the understanding of sex discrimination under Title IX.<sup>7</sup> Yet important differences between the structures of Title VII and Title IX should have led the DOE and the courts to pursue a different primary approach to ensuring equal educational opportunity under Title IX. That better approach would ensure educational equality by insisting institutions be *proactive* in their transformation of campus environments and culture to reduce the likelihood of assault.

Title VII is designed to be enforced through a private right of action given to employees experiencing discrimination on the basis of sex.<sup>8</sup> By contrast, Title IX does not expressly anticipate private rights of action, but instead contemplates administrative enforcement by the DOE. The law of Title VII has developed in light of the need to create parameters for the private cause of action. As courts came to permit a private cause of action under Title IX despite the statutory silence on the matter, they adapted Title VII's private cause of action infrastructure and reasoned that they should narrow it because Title IX does not expressly contemplate a private cause of action. When the DOE seeks

---

<sup>4</sup> *Q&A on Title IX, supra* note 2, at 4 (“The 2020 amendments focus on ‘setting forth requirements for [schools’] responses to sexual harassment.’ However . . . OCR encourages schools to undertake prevention efforts that best serve the needs, values, and environment of their own educational communities.”).

<sup>5</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES: LESSONS FROM RESEARCH AND PRACTICE 2, 5 (2014) [hereinafter CDC, PREVENTING SEXUAL VIOLENCE], <https://stacks.cdc.gov/view/cdc/43896> [<https://perma.cc/2LVC-VF5K>] (noting that “[e]ffective prevention strategies are comprehensive—addressing the multiple levels of influence for sexual violence victimization and perpetration in the social ecology. These levels include characteristics of individuals, their relationships, and their physical, social and cultural environments,” and multiple skill-based sessions are the most effective).

<sup>6</sup> 42 U.S.C. §§ 2000e-1 to -17.

<sup>7</sup> For an elaboration of this point, see Silbaugh, *Reactive to Proactive, supra* note 1, at 1058-59.

<sup>8</sup> See 42 U.S.C. § 2000e-5(f)(1).

administrative enforcement under Title IX, it nonetheless applies conditions narrowed for this different context—the private cause of action.<sup>9</sup>

The Supreme Court developed an approach to hostile work environment cases under Title VII<sup>10</sup> that does not impose institutional responsibility if an employer can show that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”<sup>11</sup> The Supreme Court thus allowed employers to avoid liability for harassing conduct under a modified version of agency principals. Constructive notice, or some version of “should have known,” can lead to employer responsibility, thus incentivizing employers to learn about risks in the workplace and then to address them. The Supreme Court created an incentive to “prevent and correct promptly” harassing behavior. Prevention would be rewarded, and employers developed programming designed to actually prevent incidents of discrimination.

By contrast, while case law has allowed a private cause of action under Title IX,<sup>12</sup> it narrowed the circumstances in which complainants can pursue private causes of action due to the lack of express statutory authorization in Title IX. Under the Supreme Court’s Title IX precedent,<sup>13</sup> an educational institution is only responsible for assault when it has *actual* knowledge of an assault. That far more restrictive condition of liability removes the institution’s incentive to know, learn, and to seek out information proactively.<sup>14</sup> But proactive risk information-gathering is a key component of prevention.

The administrative, spending clause enforcement practices explicitly anticipated under Title IX did not need to mimic the caselaw developed for private causes of action. Yet that same narrowing has been imported in effect into the DOE’s administrative implementation, through a restrictive understanding of constructive notice when there is not actual notice to a university that an assault has occurred.<sup>15</sup> In sum, colleges risk consequences

---

<sup>9</sup> See Silbaugh, *Reactive to Proactive*, *supra* note 1, at 1059.

<sup>10</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

<sup>11</sup> *Faragher*, 524 U.S. at 807.

<sup>12</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-88 (1998); *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 633 (1999) (finding that a private right of action may lie against a school board in cases of student-on-student harassment, “but only where the funding recipient acts with deliberate indifference to known acts of harassment”).

<sup>13</sup> *Davis*, 526 U.S. at 633.

<sup>14</sup> Nancy Chi Cantalupo, *Institution-Specific Victimization Surveys: Addressing Legal and Practical Disincentives to Gender-Based Violence Reporting on College Campuses*, 15 *TRAUMA, VIOLENCE, & ABUSE* 227, 238 (2014) (explaining that the federal legal regimes create “serious disincentives for schools to encourage victim reporting and proactively address sexual violence on campus”).

<sup>15</sup> *Q&A on Title IX*, *supra* note 2, at 10-13. A school is required to respond if it has notice of alleged sexual harassment, even if it is not certain whether the harassment has occurred. *Id.* at 12. Actual knowledge refers to notice of conduct that could constitute sexual harassment. *Id.* A school must respond when it receives notice of alleged facts that, if true,

under Title IX regulations and guidance for the failure to respond to an assault, but they face no consequences for failing to reduce or prevent sexual assaults overall through any method, except indirectly through accountability for individual assaults.<sup>16</sup>

The “actual knowledge” standard is a key component of Title IX’s failure to create appropriate conditions for assault prevention. The Biden administration’s DOE has recently issued a proposed rulemaking that takes a small step toward improving this problematic “actual notice” standard.<sup>17</sup> While it would still require actual notice, it would increase the number of individuals within an educational institution whose actual knowledge of an assault would constitute notice.<sup>18</sup> But in the absence of a robust *constructive* notice standard drawn from agency principles of the sort used in Title VII, today’s Title IX contains a failure of force and logic that would drive universities to undertake aggressive prevention measures.

Instead, the existing DOE regulations and guidance address how universities should respond after they receive actual notice that an assault has happened. The DOE focuses on the disciplinary fact-finding and hearing process, as well as remedies available in response to findings of that process. Title IX regulations incentivize universities to expend their Title IX equality energy focusing on the post-assault procedures. If they do work to prevent sexual assault, universities may save themselves response headaches, but the DOE will not pressure them through its administrative enforcement powers to undertake rigorous, evidence-based prevention measures.

#### I. WHAT DOES PREVENTION LOOK LIKE? PUBLIC HEALTH APPROACHES TO EQUAL EDUCATIONAL OPPORTUNITY.

Equal opportunity in education should mean the chance to learn in an environment structured to eliminate sexual assault, using evidence-based public health approaches that draw on social science research.

Title IX disciplinary rules mimic a law enforcement concept: if you punish offenders, you will deter future offenders, and that is a form of prevention. The deterrence approach relies implicitly on an idea of individual agency in aggressive behaviors that is independent of environmental circumstances. Without minimizing the agency of those who commit assault, public health

---

could be considered harassment under the 2020 regulations. *Id.* However, “[i]mputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.” 34 C.F.R. § 106.30(a) (2021); Silbaugh, *Reactive to Proactive*, *supra* note 1, at 1063-64.

<sup>16</sup> Silbaugh, *Reactive to Proactive*, *supra* note 1, at 1055-56.

<sup>17</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

<sup>18</sup> *Id.* at 41397, 41436-40.

research indicates that social ecology plays a role as well.<sup>19</sup> For example, when we seek to prevent death by suicide, we focus on mental health interventions that may provide individuals with alternative tools in response to impulse to self-harm.<sup>20</sup> But we also seek to prevent death by suicide through environmental interventions: by reducing the availability of guns, for example, because that intervention has been clearly and repeatedly demonstrated to reduce the rates of death by suicide across a population.<sup>21</sup> We train bystanders and first responders on how to prevent the death of another by suicide.<sup>22</sup> All three approaches are evidence-based: mental health support, reduction of the means of death, and the training of bystanders. Focus on individual decision-making is essential, but if there is also evidence of environmental levers, a public health approach would seek to deploy them to reduce risk.

As important as accountability is to prevention, it is only one tool among many evidence-based tools to reduce the incidence of sexual assault. Well-lit campuses, semester-long programs led by coaches of sports teams, effective bartending and reduction of access to alcohol, and meaningful bystander training can reduce sexual assault rates, according to public health researchers.<sup>23</sup> These measures could be combined with attitudinal education about the meaning of consent designed to dismantle rape culture.

In 2014, the CDC published a summary of the public health research on sexual violence.<sup>24</sup> The CDC concluded that sexual violence is a “complex public health problem” and that it would focus on preventing sexual violence perpetration before it happens to achieve the greatest population level impact. The CDC explained that effective prevention needed to be comprehensive, to address all of the influences on sexual violence in the social ecology, including “*characteristics of individuals, their relationships, and their physical, social and cultural environments.*”<sup>25</sup> The CDC specifically singled out brief, one-session

---

<sup>19</sup> CDC, PREVENTING SEXUAL VIOLENCE, *supra* note 5, at 3 (“Effective prevention strategies are comprehensive—addressing the multiple levels of influence for sexual violence victimization and perpetration in the social ecology. These levels include characteristics of individuals, their relationships, and their physical, social and cultural environments.”).

<sup>20</sup> See, e.g., NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, SUICIDE PREVENTION RESOURCE FOR ACTION 49 (2022), <https://www.cdc.gov/suicide/pdf/preventionresource.pdf> [<https://perma.cc/WQ54-DCGU>].

<sup>21</sup> *Id.* at 29-30.

<sup>22</sup> *Id.* at 57-58.

<sup>23</sup> NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTION STRATEGIES (last visited Jan. 6, 2023), <https://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> [<https://perma.cc/T3ZU-JBSZ>].

<sup>24</sup> CDC, PREVENTING SEXUAL VIOLENCE, *supra* note 5, at 2.

<sup>25</sup> *Id.* (emphasis added). Prevention strategies should be based on the best available evidence, with emphasis on rigorous evaluation that measures changes in behavior. Prevention strategies that are consistent with best practices—such as being theory-based and including multiple skill-based sessions—have the greatest potential in reducing rates of sexual

---

---

educational programs as ineffective, presumably due to the popularity of those programs at universities.<sup>26</sup>

Despite the multiple levels of influence on the prevalence of sexual assault, under Title IX, universities are not required to seek out evidence-based prevention. They may do so because it aligns with their values, but the infrastructure of Dear Colleague guidance letters and formally promulgated rulemaking do not put in place an accountability structure that would meaningfully incentivize the vigorous implementation of the best public health approaches to assault prevention.<sup>27</sup>

This is a lost opportunity. Universities have demonstrated that they would like to comply with Title IX. They have devoted substantial resources to fulfilling the DOE requirements of post-assault process. Imagine that same energy were leveraged toward meaningful cultural and environmental change aimed at *preventing* assault.

Colleges are effective at thinking in a public health framework. Residential colleges are the authors of unique living and social environments. They seek to create holistic experiences that transform students. They embrace that role through the admissions office, dormitory assignments, and roommate selection that forces interactions among students from different backgrounds. Some universities require community service. Some invest in themed housing to encourage changed behavior, attitudes, and learning. They design the college experience for growth.

If the DOE required universities to design interventions that reduce the incidence of sexual violence, the mandate would align with the expertise and capacities of institutions of higher education: change.

## II. CAN UNIVERSITIES DO THIS WORK?

There is reason for hope that universities could do this transformative work. When Title IX was originally implemented in the sports context, universities tried to argue that they could not fill slots with women athletes because they couldn't find women interested in playing. They argued there was no demand for those slots.<sup>28</sup> Instead of accepting that explanation for schools' failure to

---

violence. Other strategies hold some promise for changing related behaviors or modifying risk factors. These tactics include: building relationship skills; organizational policies or practices to improve safety or climate; addressing social norms and behavior with messages from trusted and influential voices; and training student bystanders to intervene or speak up against violence.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> Silbaugh, *Reactive to Proactive*, *supra* note 1, at 1066; *Q&A on Title IX*, *supra* note 2, at 4 (“The 2020 amendments focus on ‘setting forth requirements for [schools’] responses to sexual harassment.’ However . . . OCR encourages schools to undertake prevention efforts that best serve the needs, values, and environment of their own educational communities.”).

<sup>28</sup> Christina Nifong, *Brown U. Lawsuit Will Color the Future of Women’s Sports*, *CHRISTIAN SCI. MONITOR* (May 9, 1996), <https://www.csmonitor.com/1996/0509>

equalize opportunities despite their effort to offer programming for women athletes, courts and the DOE pressed universities to figure it out<sup>29</sup>: why were the slots not interesting to women?<sup>30</sup> What changes were needed to reformulate the culture around athletics such that women would enroll? A transformation in the culture of athletics followed.<sup>31</sup> Universities specialize in designing and problem-solving for cultural change.

#### CONCLUSION

When a sexual assault has occurred, equality necessitates an adequate response, including a sound fact-finding process and remedial steps. But this is just one aspect of offering educational opportunities that are not limited on the basis of sex. A better implementation of Title IX's goal of ensuring equality based on sex would focus at least as much on incentivizing schools to prevent sexual assaults as it does on addressing assaults that have already occurred.

The CDC and other public health authorities continue to develop evidence-based approaches to preventing sexual assault. Implementing this evidence-based work can shift us from ineffective attitudinal interventions to adaptations of environment and culture shown to reduce assault. Residential colleges and universities are uniquely well situated to the challenging work of overall change in social ecology, as demonstrated by their relatively successful Title IX work in improving athletic opportunities across their entire student body. There is no reason to constrain the meaning of Title IX through the historic framework of Title VII. The DOE could unleash forces of prevention within a natural understanding of the statutory language.

---

/050996.feat.sports.1.html [https://perma.cc/BQE6-ECMK]. A federal appellate court rejected Brown University's argument that there were not enough women interested in sports to meet the parity requirements in *Cohen v. Brown University*, 101 F. 3d 155 (1st Cir. 1996).

<sup>29</sup> *History of Title IX*, WOMEN'S SPORTS FOUND. (Aug. 13, 2019), <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/>

[https://perma.cc/6577-L3KC] (explaining that in *Cohen*, 101 F.3d at 178-79, both the district court and the court of appeals rejected Brown's argument that "it did not violate Title IX because women are less interested in sports than men").

<sup>30</sup> *Cohen*, 101 F. 3d at 179 ("Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities . . . Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The [DOE] interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports.").

<sup>31</sup> Maggie Mertens, *50 Years of Title IX: How One Law Changed Women's Sports Forever*, SPORTS ILLUSTRATED (May 19, 2022), <https://www.si.com/college/2022/05/19/title-ix-50th-anniversary-womens-sports-impact-daily-cover> [https://perma.cc/27GD-W8JH].