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## To Preclude or Not to Preclude?: Section 1983 Claims Surviving Title IX's Onslaught

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# NOTES

## TO PRECLUDE OR NOT TO PRECLUDE?: SECTION 1983 CLAIMS SURVIVING TITLE IX'S ONSLAUGHT

### I. INTRODUCTION

“I was not the one who did wrong, but I was treated as if I was,” cried a thirteen-year-old female victim of sexual abuse to her school board.<sup>1</sup> Eve Bruneau, a twelve-year-old A-student, learned to dread attending school. Her male classmates’ relentless sexual harassment, and the school’s tolerance for such behavior, shackled Eve’s ability to succeed as a student. Her male classmates routinely snapped her bra straps, tugged at her clothing, poked and pinched her body, and called her “whore,” “bitch,” and “lesbian.”<sup>2</sup> Once, when Eve demanded an apology and her male harasser refused, Eve’s teacher told her, “You’ll be called names all your life—you’re just going to have to handle it.”<sup>3</sup> School authorities refused to transfer Eve to another sixth-grade class despite her parents’ repeated pleas to help their young, increasingly depressed, and withdrawn daughter. Eve’s teacher told her parents that “there was no problem—that these were just sixth-grade boys, and Eve was so good looking, the boys would be all over her in a few years.”<sup>4</sup>

Eve Bruneau’s narrative tells not an unusual, isolated incident, but rather a typical occurrence in an American girl’s education.<sup>5</sup> Sexual harassment, abuse, and other forms of sex discrimination pervade every grade level of the U.S. school system with immeasurable adverse consequences for our children and society.<sup>6</sup> Incidents of sexual harassment begin as early as

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1. Niraj Warikoo, *A Crusade Targets Sex Abuse in Schools*, NEWSDAY, Sept. 23, 1997, at A31.

2. David Behrens, *An Unwanted Lesson in the Law*, NEWSDAY, Nov. 18, 1996, at A05.

3. *Id.*

4. *Id.*

5. Of course, the type of sexually harassing and abusive conduct may vary with age, but in most cases school authorities tolerate and condone sexually harassing behavior harmful to women. *See infra* notes 6-8. The scope of this Note is not limited to women suffering from sex discrimination in school settings. The procedural problems addressed in this Note apply to both male and female victims of sex discrimination. However, because women constitute the vast majority of victims targeted by sex discriminators, my assessment of sexual discrimination in educational settings is disproportionately based upon women’s experiences. *See infra* notes 6-10 and accompanying text.

6. *See* Dawn A. Ellison, Comment, *Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX*, 75 N.C. L. REV. 2049, 2051-52 (1997) (noting several

kindergarten<sup>7</sup> and increase in frequency throughout elementary school.<sup>8</sup> Most notably, peers are responsible for a majority of the harassment at all levels of education.<sup>9</sup> This trend increases in high school with aggressive sexually harassing conduct occurring daily.<sup>10</sup> At the university level, women report startling numbers of unwelcome sexual attention.<sup>11</sup>

In each of these school settings, student victims of sexual harassment and other forms of sex discrimination<sup>12</sup> can find relief in the Constitution and

commentators' findings that sexual harassment is "disturbingly prevalent" in American schools and may be detrimental to a child's physical well-being, emotional health, or vocational and academic development); see also Alexandra A. Bodnar, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students By Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 559 (1996); Kirsten M. Eriksson, Note, *What Our Children are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1800 & n.12, 1801 & n.17 (1995) (describing statistical findings of two studies). One study reported "89% of girls surveyed, ages nine to nineteen, have received suggestive gestures, looks, comments, or jokes; 83% have been touched, pinched, or grabbed; and 39% reported that this harassment happened on a daily basis." *Id.* at 1800 n.12. Another study found that the effects of sexual harassment on a young female can result in headaches, stomachaches, depression, suicidal thoughts, cutting classes, nonparticipation in classroom discussion, lack of confidence and self-knowledge, and unhealthy relationships. *Id.* at 1801 & n.17.

After being repeatedly subjected to both lewd comments about her body organs and physical threats from boys on her school bus, Wcheltzie Hentz was the youngest person to win a claim of sexual harassment against the U.S. Department of Education. Bodnar, *supra*, at 554 (citing Karen Schneider, *Sexual Harassment-No Kidding*, CHI. TRIB., June 4, 1993, at C8). After enduring the harassment, she rhetorically asked her mother, "That must be the way boys talk to girls, huh, Mom?" *Id.* at 559.

7. See Ruth Shalit, *Romper Room: Sexual Harassment—By Tots*, NEW REPUBLIC, Mar. 29, 1993, at 13 (reporting that a five-year-old boy in kindergarten took a female classmate into an adjacent classroom, pulled down both of their pants, and simulated sexual intercourse).

8. AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (1993). This survey reported finding that approximately four out of five students (81%) in grades eight through eleven report have been the target of some incidence of sexual harassment in school. *Id.* Moreover, of this 81%, about one in four (31% of girls and 18% of boys) reported being targeted "often." *Id.* For a collection of statistics from this 1993 survey describing the types and degree of sexual harassment experienced by students, see Bodnar, *supra* note 6, at 556-58.

9. See Bodnar, *supra* note 6, at 557.

10. Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2128-29 (1993); see also, Bodnar, *supra* note 6, at 553 (writing that "[g]irls complain that boys grab their breasts, purposefully rub up against them, snap their bras, pull down their pants, catcall to them, make inappropriate remarks like 'Do me' and pass around lists with titles such as 'Piece of Ass of the Week'").

11. See Sherer, *supra* note 10, at 2121 n.13. See generally Louise Fitzgerald, *The Prevalence of Sexual Harassment*, in *COMBATING SEXUAL HARASSMENT IN HIGHER EDUCATION* 55 (Bernice Lott & Mary Ellen Reilly eds., 1996) (providing a collection of articles describing research findings of sexual harassment of students and female faculty in universities); *SEXUAL HARASSMENT ON COLLEGE CAMPUSES: ABUSING THE IVORY POWER* (Michele A. Paludi ed., 1996) (offering a variety of articles about sexual harassment in higher education).

12. This Note mainly focuses on the implications of Title IX's potential to preclude Section 1983 claims in the context of sexual harassment in school settings. It is important to note, however, that sexual harassment is only one form of sex discrimination actionable under Title IX and potentially

federal laws.<sup>13</sup> Victims most often invoke actions through two avenues: (1) Title IX of the Higher Education Amendments of 1972<sup>14</sup> and (2) 42 U.S.C. § 1983,<sup>15</sup> based on a constitutional privilege or as a claim predicated on the violation of Title IX itself.<sup>16</sup> However, Title IX and § 1983 differ in their potential to aid students harmed by sex discrimination in school settings. Understanding the distinction between Title IX and § 1983 elucidates the scope of vindication each statute provides victims. Moreover, these statutes' remedial differences highlight the importance of the topic of this Note. Currently, federal courts are split on whether a plaintiff asserting a Title IX claim may also assert a § 1983 claim based on a constitutional privilege or Title IX itself.<sup>17</sup> In many instances, a plaintiff's ability to assert a § 1983

actionable under § 1983. This Note focuses on cases of sexual harassment as opposed to other forms of discrimination, such as admissions policies, because cases of sexual harassment will more likely involve constitutional violations that must be asserted through § 1983 to implicate individual violators whom victims may want to sue in their individual and official capacities.

13. See Sherer, *supra* note 10, at 2143 (noting that because most schools do not have sexual harassment policies and procedures, and only two states have legislation regarding sexual harassment in educational settings, victims must seek recourse at the federal level). Federally protected rights that may be relevant for students suffering from sexual discrimination in school settings include the First Amendment right to free speech, the Fifth Amendment right to privacy, the Fourteenth Amendment right to equal protection and due process of the law, 42 U.S.C. § 1983 protection, and Title IX protection. See, e.g., Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997).

14. 20 U.S.C. §§ 1681-88 (1994). Title IX provides in part 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." *Id.* § 1681(a).

15. 42 U.S.C. § 1983 (1994). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*

16. The Supreme Court held that the "§ 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). The Supreme Court recently limited *Thiboutot*'s broad holding, stating that "[i]n order to seek redress through § 1983 . . . a plaintiff must assert the violation of a federal right, not merely a violation of federal law." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). Even before *Thiboutot*, the Supreme Court recognized that individuals have an implied private right of action under Title IX. *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979). For an overview of state claims that may be brought in the Title IX context, see Eriksson, *supra* note 6, at 1804-05.

17. When bringing an action for violation of Title IX, some courts preclude a plaintiff from asserting an additional claim under § 1983 for a violation of Title IX itself or other constitutional rights. See, e.g., *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7th Cir. 1996) (holding Title IX preempts a claim under § 1983 for a violation of the Fourteenth Amendment's Equal Protection Clause against school officials in their official and personal capacities); *Lakoski v. James*, 66 F.3d 751, 758 (5th Cir. 1995) (holding that individuals may not assert Title IX derivatively through § 1983 for sex-based employment discrimination because other civil rights remedial schemes, such as Title VII, provide a comprehensive remedy); *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 176 (3d

claim in addition to a Title IX claim is critical to the scope of vindication a plaintiff may seek for sexual harassment in a school setting.

First, a victim of sexual harassment may want to seek redress under

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Cir. 1993) (holding that Title IX precludes § 1983 claims based on the Fourteenth Amendment Equal Protection Clause against the school district); *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990) (holding that Title IX precludes Section 1983 claims based on the Fourteenth Amendment against the school district and its officials in both their official and personal capacity); *Kemether v. Pa. Interscholastic Athletic Ass'n, Inc.*, 15 F. Supp. 2d 740, 768 (E.D. Pa. 1998) (precluding claims brought under § 1983 for violating the Equal Protection Clause, but not similarly doing so for § 1983 claims based on violations of First Amendment rights); *Seneway v. Canon McMillan Sch. Dist.*, 969 F. Supp. 325, 330-31 (W.D. Pa. 1997), *appeal quashed*, 118 F.3d 1577 (3d Cir. 1997) (precluding constitutionally based claims brought under § 1983 against the school district, but allowing them to proceed against individuals in their personal capacities); *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 179 (N.D.N.Y. 1996) (holding that a plaintiff may not bring a § 1983 claim based upon the violation of Title IX itself); *Nelson v. Univ. of Me. Sys.*, 914 F. Supp. 643, 648 (D. Me. 1996) (holding that Title IX subsumes all statutorily and constitutionally based § 1983 claims in addition to a First Amendment constitutional claim); *Mennone v. Gordon*, 889 F. Supp. 53, 59 (D. Conn. 1995) (precluding § 1983 claims based on the Fourteenth Amendment against the school district and its officials in their official and individual capacities); *Mann v. Univ. of Cincinnati*, 864 F. Supp. 44, 47-48 (S.D. Ohio 1994) (dismissing § 1983 claims based on the Fourteenth Amendment Equal Protection and Due Process Clauses against the university and its officials in their official capacities but allowing them to proceed against the officials in their personal capacities); *Mabry v. State Bd. for Cmty. Colls. & Occupational Educ.*, 597 F. Supp. 1235, 1239 (D. Colo. 1984) (holding in dicta that it would have precluded § 1983 claims based on the Fourteenth Amendment Equal Protection and Due Process Clauses against the school and its officials in their official and individual capacities).

Other courts have held that Title IX does not preclude § 1983 claims predicated on constitutional or Title IX violations. *See, e.g.*, *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (holding that Title IX does not preclude claims brought under § 1983 for a violation of either the Fourteenth Amendment or Title IX itself against university officials in their official and individual capacities); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-24 (6th Cir. 1996) (holding that Title IX does not preclude § 1983 claims based on the Fourteenth Amendment's substantive Due Process Clause against state actors in their official and individual capacities and implying, in dicta, that Title IX would not preclude § 1983 claims based on Title IX itself); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1378-81, 1386-87 (N.D. Cal. 1997) (same); *Oona v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1462 (N.D. Cal. 1995) (holding that Fourteenth Amendment and Title IX violations may be asserted under § 1983 against individuals in their official and individual capacities).

A third line of cases holds that Title IX may bar a claim brought under § 1983 for a violation of Title IX itself, but does not absolutely bar claims brought under § 1983 for constitutional violations. *See Seamon v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996) (holding that constitutionally based § 1983 claims are not barred by Title IX, but § 1983 claims for violations of Title IX itself are precluded against individual officials in their individual or official capacities); *Carrol K. v. Fayette County Bd. of Educ.*, 19 F. Supp. 2d 618, 623 (S.D.W. Va. 1998) (holding that Title IX does not preclude § 1983 claim based on the Fourteenth Amendment right to due process against individuals in their official and personal capacities); *Alston v. Va. High Sch. League*, 176 F.R.D. 220, 223-24 (W.D. Va. 1997) (holding that Title IX does not preclude Section 1983 claims based on the Fourteenth Amendment right to equal protection against individuals in their official and personal capacities); *Does v. Covington County Sch. Bd. of Educ.*, 930 F. Supp. 554, 573-74 & n.15 (M.D. Ala. 1996) (holding that Title IX does not preempt § 1983 claims based on the Fourteenth Amendment right to substantive due process or Title IX itself but dismissing Title IX claim brought derivatively under § 1983 against individuals in their official capacities as duplicitous and unnecessary, and precluding § 1983 claims based on Title IX against individuals in their individual capacities).

§ 1983 for violation of Title IX because the burden of proof under § 1983 may be less onerous. Under Title IX, a plaintiff must prove that a defendant acted with actual knowledge and deliberate indifference.<sup>18</sup> Whereas under § 1983, a plaintiff who proves that a defendant acted with gross negligence may sufficiently create a prima facie case.<sup>19</sup>

Secondly, most courts agree that Title IX holds only governing entities and their officials responsible for sexual harassment in schools. Officials in their personal capacities are not liable under Title IX.<sup>20</sup> Section 1983, however, creates individual liability for violators acting under color of state law who infringe on either a constitutional privilege, such as the Fourteenth Amendment's right to equal protection, or a federal statute, such as Title IX itself.<sup>21</sup> The difference in whom plaintiffs can sue under Title IX versus § 1983 is important to victims. This is especially true in the context of sexual harassment, where victims often want to seek judgment against their

18. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91, (1998) (holding that school districts are not liable under Title IX for sexual harassment by teachers absent deliberate indifference to actual notice of a Title IX violation); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650-52 (1999) (holding that a student alleging a violation of Title IX for sexual harassment by other students must show that the educational institution actually knew of and deliberately ignored redressing the violation).

19. See 15 AM. JUR. 2D *Civil Rights* § 20 (1999). "In a suit under 42 USCS § 1983, the plaintiff need not prove that the defendant acted willfully or with a specific intent to deprive the plaintiff of a federal right." *Id.* Most courts hold that grossly or culpably negligent conduct depriving a plaintiff of a federal right supports an action under § 1983. *Id.* A few courts hold that merely negligent conduct, in appropriate circumstances, will support an action under the statute. *Id.*

20. Often, a student will want to sue several individual employees such as teachers, coaches, principals, superintendents, school board members, and governing entities such as a school district or municipality for sex discrimination. See *Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014, 1018-19 (7th Cir. 1997) (citing *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012 (5th Cir. 1996)); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 730 (6th Cir. 1996) (Nelson, J., concurring); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 884, 901 (1st Cir. 1988); *Burrow v. Postville Comm. Sch. Dist.*, 929 F. Supp. 1193, 1207 (N.D. Iowa 1996); *Nelson v. Temple Univ.*, 920 F. Supp. 633, 638 (E.D. Pa. 1996); *Clay v. Bd. of Trs. of Neosho County Cmt'y Coll.*, 905 F. Supp. 1488, 1495 (D. Kan. 1995); *Bowers v. Baylor Univ.*, 862 F. Supp. 142, 145-46 (W.D. Tex. 1994); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993) (finding that a "majority of the courts that considered the issue had concluded that only a grant recipient can violate Title IX," not individuals). *But see Mennone v. Gordon*, 889 F. Supp. 53, 56 (D. Conn. 1995) (contending that Title IX does not restrict the potential class of defendants to institutions and may be enforceable against "persons" who exercise sufficient control over a Title IX program or activity); *Mann v. Univ. of Cincinnati*, 864 F. Supp. 44, 45-46 (S.D. Ohio 1994) (same).

21. See *supra* Part III. Under § 1983, states or state officials in their official capacities are usually protected from damage claims by asserting their Eleventh Amendment immunity. Furthermore, political subdivisions may not be held vicariously liable for actions of their officers, agents, or employees. Thus, actions are most frequently brought against individual government officials acting "under color of state law." These state actors are usually protected by a qualified immunity to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." See *McDonald, infra* note 68, at 32.

harassers in their individual capacities.<sup>22</sup> Sexual harassment is extremely personal and victims often want to see the blame placed on the individual harasser rather than the abstract educational institution that condoned the behavior.

Part II of this Note details Title IX's legislative purpose, framework, and judicial development to the present day. Part III discusses § 1983's legislative purpose, framework, and relevant case law development, as well as the various claims that may arise under § 1983 in the context of a Title IX violation. Part IV describes how Title IX may preclude a plaintiff from also asserting violations of constitutional and statutory rights under § 1983. Part V provides an exposition of case law interpreting whether Title IX precludes constitutional or statutory § 1983 claims. Part VI analyzes the courts' inconsistent treatment of Title IX and § 1983 claims, presenting the strengths and weaknesses in the courts' rationales. Part VII proposes a comprehensive approach to solve the federal courts' inconsistency in this preclusion problem. This Note argues that Title IX should preclude a plaintiff from asserting a § 1983 claim based upon a Title IX violation, but should not preclude a plaintiff from asserting any type of constitutional violation under § 1983. This proposal maintains the integrity and goals of Title IX while also providing a victim of sex discrimination with the opportunity to seek vindication from her discriminators in their individual capacities.

## II. TITLE IX

### A. Statutory Overview

In response to the pervasive problems of sex discrimination in educational institutions and a then-existing gap in civil rights legislation,<sup>23</sup> Congress enacted Title IX of the Education Amendments of 1972.<sup>24</sup> The purpose of Title IX is to “avoid the use of federal resources to support discriminatory practices” and “provide individual citizens effective protection against those practices” in educational settings.<sup>25</sup>

Presently, courts interpret Title IX and federal regulations promulgated

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22. See, e.g., *supra* notes 17, 20.

23. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 n.16, 704-07 (1979); see also, Ericksson, *supra* note 6, at 1803. “The data presented to Congress during the Title IX debates clearly showed that women were being discriminated against in the field of education . . .” *Id.* Further, “Congress planned to fill the void left by Title VI . . .” *Id.*

24. 20 U.S.C. §§ 1681-88 (1994). See *supra* note 14.

25. *Cannon*, 441 U.S. at 704.

under Title IX to redress sex discrimination<sup>26</sup> in any educational institution<sup>27</sup> receiving federal funds<sup>28</sup> for any program or activity.<sup>29</sup> Additionally, Title IX and its supplementary regulations cover sex discrimination in any educational program or activity receiving federal funds that is not sponsored or offered by an educational institution.<sup>30</sup> Title IX excludes certain educational institutions with other purposes, such as military and religious entities.<sup>31</sup>

### *B. Administrative Enforcement and Relief*

Title IX's regulations establish two steps to protect against sex discrimination in educational institutions: voluntary compliance or federal funding termination.<sup>32</sup> The Office of Civil Rights (OCR), a division of the Department of Education (DOE), is responsible for the administrative enforcement of Title IX<sup>33</sup> as prescribed by the DOE regulations promulgated

26. The Office of Civil Rights (OCR) of the Department of Education (DOE) interprets sex discrimination to include unequal access to admission and employment based on one's sex in academia; unequal access to facilities in athletic programs based on one's sex; sexual harassment by teachers, students, and third parties; and any discrimination against pregnant or married students. 34 C.F.R. §§ 106.21 (employment provision), .41, .37(c) (harassment), .40 (1999); Department of Education, OCR, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,033, 12,039 (March 13, 1997). Judicial interpretations of sex discrimination in schools are similar. See Pamela W. Kernie, Comment, *Protecting Individuals from Sex Discrimination: Compensatory Relief Under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155, 158 (1992) (providing case examples where discrimination in parental or marital status, athletics, admission policies or employment, and sexual harassment are commonly litigated issues under Title IX). Moreover, courts have held that if Congress leaves a gap in legislation for an agency to fill, then courts should defer to agency regulations "unless they are arbitrary, capricious, or manifestly contrary to the statute." Paul Sweeney, *Abuse Misuse & Abrogation of the Use of Legislative History: Title IX and Peer Sexual Harassment*, 66 UMKC L. REV. 41, 68 (1997) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)).

27. An educational institution under Title IX is defined as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional or higher education." 20 U.S.C. § 1681(c) (1994).

28. Federal financial assistance includes student loans, scholarships, grants, money for construction and repair of buildings, sales or leases of federal property at reduced cost, provisions of federal personnel services, and on-the-job training programs. 45 C.F.R. § 86.2(g) (1990).

29. The Civil Rights Restoration Act of 1987 expressly mandated that the Title IX prohibition of sex discrimination applies to "all the operations" in an educational institution if "any part of" the institution "is extended federal financial assistance." Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1987 (1994)).

30. See Kernie, *supra* note 26, at 158.

31. 20 U.S.C. § 1681(a)(3) (1994); 34 C.F.R. § 106.12(a) (1999) (exempting religious institutions with organizational tenets that conflict with Title IX provisions); see also 20 U.S.C. § 1681(a)(4) (1994); 34 C.F.R. § 106.13 (1999) (exempting institutions devoted to training individuals for United States military service).

32. See 34 C.F.R. § 100.8 (1999).

33. See 20 U.S.C. § 3413 (1994); Kaiji Clark, Note, *School Liability and Compensation for Title*



under Title IX. The DOE regulations require schools<sup>34</sup> to create and publish grievance procedures that promptly address and redress sex discrimination complaints.<sup>35</sup> In addition, each school must designate a person to manage the school's Title IX compliance efforts.<sup>36</sup>

Any person who suffers a form of sex discrimination in a federally funded educational setting may file a complaint under the school's grievance procedure or with the DOE.<sup>37</sup> Complaints to the DOE must be filed within 180 days<sup>38</sup> of the Title IX violation. The complaint may include a substantive claim concerning incidents involving sexually discriminatory conduct and a procedural claim that the school failed to respond to complaints of sex discrimination.<sup>39</sup> After a complainant files a report with the DOE, the OCR reviews and investigates the complaint and determines whether the recipient violated Title IX or its enforcement regulations.<sup>40</sup> If the OCR finds that no violation occurred, then the DOE takes no further action on the complaint.<sup>41</sup> Alternatively, if the OCR finds that the school violated Title IX or its enforcement regulations, then the OCR seeks voluntary compliance from the school.<sup>42</sup>

When a school refuses to comply with Title IX after informal negotiations, the OCR can commence administrative proceedings against the school. These proceedings include a hearing, a review by the OCR's Civil Rights Reviewing Authority, and a final review by the Secretary of

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*IX Sexual Harassment Violations by Teachers and Peers*, 66 GEO. WASH. L. REV. 353, 356 (1998).

34. Although Title IX applies to educational programs that receive federal funds but are not necessarily sponsored by a school, most Title IX cases involve schools or other educational institutions. For the purposes of this Note, "schools" include all entities and programs covered under Title IX.

35. 34 C.F.R. § 106.8(b) (1996).

36. 34 C.F.R. § 106.8(a) provides in part:

Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

34 C.F.R. § 106.8(a) (1996).

37. 34 C.F.R. § 100.7(b) (1999). A complainant may immediately file a complaint with the DOE, regardless of any effort to redress her complaint through an educational institution's internal grievance procedure. *See Sherer, supra* note 10, at 2145 n.135.

38. *See Sherer, supra* note 10, at 2145 n.135 (noting that under 34 C.F.R. § 100.7(b), a DOE official may extend the statute of limitation).

39. *See Sherer, supra* note 10, at 2145.

40. 34 C.F.R. § 100.7(c),(d) (1999).

41. *Id.* § 100.7(d)(2).

42. *Id.* § 100.7(d)(1).

Education.<sup>43</sup> If administrative proceedings result in a finding that the school's conduct violated Title IX, the school's federal funding may be terminated.<sup>44</sup> However, an administrative proceeding under Title IX does not provide a victim with any personal compensation.<sup>45</sup>

### C. Judicial Enforcement and Relief

Unlike administrative proceedings,<sup>46</sup> federal courts allow victims to seek compensatory and punitive damages<sup>47</sup> and attorney fees<sup>48</sup> for violations of Title IX.<sup>49</sup> In *Cannon v. University of Chicago*,<sup>50</sup> the Supreme Court held that an individual can maintain a private right of action against an educational institution for a violation of Title IX.<sup>51</sup> In its rationale, the Court emphasized

43. *Id.* §§ 100.8(a), .10. In place of administrative enforcement proceedings, the DOE may relegate the case to the Department of Justice to seek enforcement of Title IX in the courts. *See* Sherer, *supra* note 10, at 2146.

44. *See* 20 U.S.C. § 1682 (1994); 34 C.F.R. § 100.8(a)-(c) (1999). It is important to note that "[n]o institution has ever lost its funding under Title IX, and only in a few cases has funding been delayed pending compliance." Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 116 (1992). One commentator reasons that withdrawing federal funds from schools further punishes the students who experienced discrimination by taking away funds that would be used to educate them. Additionally, the commentator points out that the government realizes the victim may seek redress through other remedies provided by case law. *See* Bodnar, *supra* note 6, at 571.

45. *See* Clark, *supra* note 33, at 357. Administrative remedies only provide equitable relief such as maintaining school compliance with Title IX by establishing effective grievance procedures or prohibiting discriminatory conduct by dismissing offenders. Further, the OCR and the school settle these disputes without the agreement or participation of the complainant. However, the federal government underwrites the DOE's investigation and enforcement efforts. *See* Sherer, *supra* note 10, at 2150-51. Lastly, students will often be denied the opportunity to experience vindication in seeing a change in the school's policy because the realization of benefits gained from administrative proceedings, such as school policy reforms, often occur after a student has left the institution. *See* Ellison, *supra* note 6, at 2059 n.51. For a good assessment of the benefits and disadvantages of the OCR, *see* Setty, *infra* note 46.

46. A victim may initiate proceedings administratively with the OCR or in federal court. One avenue is not exclusive of the other. *See* Sudha Setty, Note, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 336 (1999) (noting that Title IX plaintiffs do not have to exhaust administrative remedies with internal grievance or OCR procedures before filing a private lawsuit).

47. *See generally infra* notes 61-65 and accompanying text.

48. The Civil Rights Attorney's Fees Award Act of 1976 authorizes an award of fees to prevailing parties in actions to enforce Title IX. The Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended 42 U.S.C. § 1988 (1988)).

49. *See infra* note 65 and accompanying text.

50. 441 U.S. 677 (1979).

51. *See id.* at 709. In drawing its conclusion, the Court examined the legislative history and purpose in enacting Title IX. *Id.* at 694-96. The Court noted that Congressmen, particularly Senator Bayh, discussed that Title IX patterned itself on Title VI of the Civil Rights Act of 1964. *Id.* at 694 n.16. The Court then reasoned that Congress must have known that the judiciary recognized an implied right of action under Title VI and therefore intended for the same implied right of action to apply under Title IX. *Id.* at 696-98.

that a private right of action, as opposed to the severe remedy of terminating federal funding, would be more practical in redressing an isolated instance of sex discrimination in an educational institution.<sup>52</sup> The Court stated that in addition to the already existing administrative remedies, a private right of action would further enhance the possibility of achieving Title IX's goals to end sex discrimination in educational institutions.<sup>53</sup> It would not only "provide individual citizens [with] effective protection,"<sup>54</sup> but also ensure "orderly enforcement of the statute."<sup>55</sup>

After the Supreme Court's decision in *Cannon*, in which it found an implied private right of action under Title IX, Congress essentially ratified the Court's holding by subsequently enacting two legislative provisions that did not interfere with that implied right.<sup>56</sup> First, the Rehabilitation Act Amendments of 1986<sup>57</sup> abrogated state Eleventh Amendment immunity under Title IX without distinguishing between cases brought by the DOE and those brought by individual plaintiffs.<sup>58</sup> By abrogating Eleventh Amendment immunity to Title IX, Congress opened the door for Title IX plaintiffs to bring their cause of action in federal courts against state institutions, thus implicitly approving the implied private right of action.

Second, in the Civil Rights Restoration Act of 1987, Congress unequivocally mandated that the judiciary should give Title IX a "broad

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It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

*Id.* at 696-98.

52. *Id.* at 704-05.

53. *See id.* at 706 n.41.

54. *Id.* at 704.

55. *Id.* at 06.

56. *See* *Franklin v. Gwinett County Public Schools*, 503 U.S. 60, 72 (1992). "In the years after the announcement of *Cannon*'s holding . . . Congress was legislating with full cognizance of that decision. . . . This statute cannot be read except as a validation of *Cannon*'s holding." *Id.*

57. Pub. L. No. 99-506, § 1003, 100 Stat. 1845, 1845 (codified at 42 U.S.C. § 2000d-7 (1994)).

58. 42 U.S.C. § 2000d-7 (1988) provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of . . . Title IX . . . or the provisions of any other Federal Statute prohibiting discrimination by recipients of Federal financial assistance." *Id.* § 2000d-7(a)(1). Subsequent case law holds this statute constitutional. *See Thorpe v. Va. State Univ.*, 6 F. Supp. 2d 507, 516 (E.D. Va. 1998) (finding that Congress unequivocally expressed its intention to abrogate the States' Eleventh Amendment immunity and, in doing so, it "could have enacted Title IX under Section 5 of the Fourteenth Amendment"); *cf. Litman v. George Mason Univ.*, 5 F. Supp. 2d 366, 374, 376 (E.D. Va. 1998) (holding that Congress passed Title IX pursuant to its power under the Spending Clause and not pursuant to the Equal Protection Clause, because Title IX affords protection to "a greater range of defendants" from "a greater range of conduct" than the Equal Protection Clause and however, Congress may "require the States to waive their [Eleventh Amendment] immunity pursuant to a valid exercise of its spending power") *Id.*

application,” holding liable any program that discriminates on the basis of sex in an institution that receives federal funds, regardless of whether that particular discriminatory program receives federal funds.<sup>59</sup> These two subsequent enactments, both clarifying and expanding a plaintiff’s ability to sue educational institutions under Title IX, indicated to the Court that Congress approved of providing broad redress to victims and an implied private right of action under Title IX.<sup>60</sup>

In *Franklin v. Gwinnett County Public Schools*,<sup>61</sup> the Supreme Court further strengthened a victim’s redress under Title IX by unanimously holding that a person could receive both compensatory and punitive damages in a private action for sex discrimination.<sup>62</sup> The Court presumed that Congress knew of the longstanding general rule that federal courts may award any appropriate relief in a cause of action brought pursuant to a federal statute.<sup>63</sup> The Court noted that, when enacting the Rehabilitation Act Amendments of 1986 and the Civil Rights Restoration Act of 1987, Congress had ample opportunity to abrogate the implied private right of action found in *Cannon*. Instead, Congress remained silent and actually expanded the breadth of Title IX.<sup>64</sup> In this context, the Court concluded that implicit congressional approval of the implied right of action under Title IX mandated that courts provide all necessary and appropriate relief to enforce and redress Title IX violations.<sup>65</sup>

### III. SECTION 1983

#### A. Purpose, Framework, and Case Law Development

Section 1983,<sup>66</sup> otherwise known as the Ku Klux Klan Act of 1871,<sup>67</sup>

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59. 20 U.S.C. § 1687 (1988); Act of Mar. 22, 1988, Pub. L. No. 100-259, § 2, 1988 U.S.C.C.A.N. (102 Stat.) 28. For example, if a science center at a university receives federal funds for medical research, then any department or program in that university may be subject to liability under Title IX regardless of whether or not that particular department or program receives federal funding. The Civil Rights Restoration Act of 1987 expanded the scope of liability in federally funded institutions, signaling to the courts that Congress approved of providing a broad redress for Title IX victims. The Act also did not differentiate between cases where the DOE or an individual brought a cause of action to federal court.

60. See *supra* notes 58-59 and accompanying text.

61. 503 U.S. 60 (1992).

62. *Id.* at 76.

63. *Id.* at 66.

64. *Id.* at 70.

65. *Id.* at 69.

66. 42 U.S.C. § 1983 (1994).

67. For a discussion regarding the Act’s enactment, see *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

provides a vehicle for individuals to vindicate rights secured by the Constitution or laws of the United States.<sup>68</sup> During the Reconstruction Era, Congress enacted § 1983 to provide a federal remedy in an impartial forum for state violations of the constitutional rights guaranteed to U.S. citizens.<sup>69</sup> At that time, Congress hoped that § 1983 would protect individuals of color from violence in the South and guarantee protection of their rights secured by the Fourteenth Amendment.

Section 1983 does not contain substantive rights like Title IX.<sup>70</sup> Title IX specifies a substantive right for U.S. citizens to be free from sex discrimination in educational settings.<sup>71</sup> On the other hand, § 1983 provides citizens with a method to vindicate constitutional<sup>72</sup> and other federal rights.<sup>73</sup> To assert a constitutional or federal law violation under § 1983, a plaintiff must establish two elements: (1) the violator acted under the color of state law,<sup>74</sup> and (2) the violator's action deprived the victim of a right, privilege, or immunity secured by the Constitution or laws of the United States.<sup>75</sup> To prove the second prong, a plaintiff must allege all of the elements of the constitutional or federal right.<sup>76</sup>

### *B. The Use of § 1983 in Title IX Cases*

Plaintiffs commonly frame their allegations of sexual harassment and discrimination in educational settings as constitutional and federal law violations under § 1983. They often base their § 1983 claims on the Fourteenth Amendment's Equal Protection<sup>77</sup> and Due Process Clauses,<sup>78</sup> the

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68. See Daniel J. McDonald, *A Primer on 42 U.S.C. § 1983*, UTAH B.J., May 1999, at 29; see also *Thiboutot*, 448 U.S. at 4 (holding that the § 1983 remedy encompasses violations of federal statutory as well as constitutional rights).

69. See *Thiboutot*, 400 U.S. at 4.

70. See McDonald, *supra* note 68, at 30.

71. See *supra* Part II.A.

72. See *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (holding that no claim is cognizable under § 1983 unless there is a violation of a right secured by the U.S. Constitution).

73. See *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (holding that a plaintiff must assert a violation of a federal right, not merely a violation of federal law).

74. Action taken under the color of state law refers to conduct by a person acting within the authority conferred by state law. 15 AM. JUR. 2D *Civil Rights* § 18 (1999).

75. See McDonald, *supra* note 68, at 30.

76. For instance, to assert a violation of Title IX under § 1983 against a political subdivision, a plaintiff must establish that (1) an institution of an educational nature, (2) receiving federal funds, (3) discriminated on the basis of sex, (4) with actual notice of and deliberate indifference to such conduct. See *supra* notes 18, 26-30 and accompanying text. On the other hand, to assert a violation of the Fourteenth Amendment's Equal Protection Clause under § 1983 for sexual harassment, a plaintiff must show intentional discrimination. See *supra* note 19; *infra* note 77.

77. A plaintiff asserting a violation of the Fourteenth Amendment's guarantee of equal protection under the law essentially duplicates her claim under Title IX, by alleging that she has a right to be free

from sex discrimination in state-operated educational institutions. See Zwibelman, *infra* note 83, at 1480. To prove a Fourteenth Amendment Equal Protection Clause violation against a state educational institution or its supervisory officials in their official capacities, a plaintiff must establish the institution's culpability. This burden can be met if the actions of a final policymaker caused the violation, or if a final policymaker sanctioned a state actor's conduct or if a state actor's conduct was part of a broader policy of conduct condoned against the plaintiff. This policy must constitute a "custom or usage with the force of law." See *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997) (holding that the plaintiff must demonstrate that the municipality was the "moving force" behind the alleged injury); McDonald, *supra* note 68, at 31. See also Connie C. Flores, Comment, *The Fourteenth Amendment and Title IX: A Solution to Peer Sexual Harassment*, 29 ST. MARY'S L.J. 153, 177-78 (1997). Further, the Equal Protection Clause is not a remedy for sexual harassment itself, but it requires institutions to investigate claims on an equal basis regardless of gender. Thus, most often a plaintiff will assert that the institution's failure to investigate and address the plaintiff's complaints of sexual harassment violates the Equal Protection Clause. See Trudy Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107, 1110 (1998). Thus, a plaintiff will often have to show that an educational institution administered a facially neutral school policy in an intentionally discriminatory manner by relying on hard found evidence such as the legislative history of school policies and patterns of administrative behavior. See Flores, *supra* note 77, at 179. By contrast, to prove an equal protection violation by a supervisory official in his individual capacity (a right a majority of the courts believe is not protected under Title IX), a plaintiff must establish that the state actor's failure to investigate the plaintiff's claim of sexual harassment amounted to gross negligence. In this context, gross negligence may be equated with deliberate indifference to a right that the state actor "knew or should have known." Therefore, in contrast to Title IX's requirement of actual notice in addition to deliberate indifference to establish a Title IX violation, to prove a violation of the Equal Protection Clause, a plaintiff need only prove deliberate indifference. See Zwibelman, *infra* note 83, at 1466-67; see also *supra* notes 18, 19, 77 and accompanying text. For cases asserting both a Title IX and Equal Protection claim, see *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1990); *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 170 (3d Cir. 1993); *Pfeiffer v. Marion Ctr. Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990); *Kemeth v. Pa. Interscholastic Athletic Ass'n, Inc.* 15 F. Supp. 2d 740 (E.D. Pa. 1998); *Seneway v. Canon McMillan Sch. Dist.*, 969 F. Supp. 325, 330; *Alston v. Va. High Sch. League*, 176 F.R.D. 220, 223 (W.D. Va. 1997); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1382-84 (N.D. Cal. 1997); *Oona v. Santa Rosa City Sch.*, 890 F. Supp. 1452 (N.D. Cal. 1995); *Mennone v. Gordon*, 889 F. Supp. 53 (D. Conn. 1995).

78. Plaintiffs may allege violations of their right to due process, such as a fair hearing, or violations of their right to substantive due process, for example, a deprivation of education, privacy, or bodily integrity. See Zwibelman, *infra* note 83, at 1479; Flores, *supra* note 77, at 180-82. To establish a violation under procedural or substantive due process, a plaintiff must prove that the state actor knew or should have known that his conduct deprived a student from a protected constitutional right. See Adam Greenfield, Note, *Annie Get Your Gun 'Cause Help Ain't Coming': The Need for Constitutional Protection From Peer Abuse in Public Schools*, 43 DUKE L.J. 588, 595 (1993). The word "deprive" involves more than negligence, it also implies a deliberate decision of a government official. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Most courts agree that sexual abuse by a state actor violates a student's bodily integrity under the Due Process Clause. See, e.g., *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 143 (5th Cir. 1992), *vacated en banc*, 15 F.3d 443 (5th Cir. 1994) (holding "[b]odily integrity is necessarily compromised when a state actor sexually assaults a schoolchild"); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3d Cir. 1989) (holding "[r]easonable officials would have understood the 'contours' of a student's right to bodily integrity, under the Due Process Clause, to encompass a student's right to be free from sexual assault by his or her teachers"). However, claims that schools deprive students of their bodily integrity when such students are sexually abused by other students are not considered violations of the students' right to due process. See *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1376 (3rd Cir. 1992) (holding that § 1983 does not apply where underlying wrongful acts are committed by students and not state actors).

First Amendment,<sup>79</sup> and Title IX.<sup>80</sup> Plaintiffs may bring § 1983 claims against political subdivisions, officials of a political subdivision in their official capacities (officials), or officials of a political subdivision in their individual capacities (individuals).<sup>81</sup> Most often, victims of sexual abuse or

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Moreover, it is unclear whether a plaintiff claiming a deprivation of the liberty interest to be free from constant sexual harassment, without sexual assault or abuse, will be successful. Whether it deprives a student from a sufficient liberty or property interest has not been greatly litigated in federal courts or heard by the Supreme Court. See *Sherer*, *supra* note 10, at 2143 n. 130. For cases asserting Title IX and due process violations, see *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 724-26; *Seneway*, 969 F. Supp. at 331-35; *Carroll K. v. Fayette County Bd. of Edu.*, 19 F. Supp. 2d 618, 622 (S.D.W. Va. 1998); and *Mennone*, 889 F. Supp. 53.

79. In order to prove a violation of First Amendment rights, a plaintiff must first establish that a First Amendment violation has occurred. To accommodate First Amendment rights in a school setting, the Supreme Court has held that a student's expression may be restricted when the conduct "in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . [However], mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" does not justify suppression of a particular opinion. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509, 513 (1969). A plaintiff must show that the First Amendment right was clearly established at the time of the defendant's actions. The Tenth Circuit has held that for a law to be "clearly established" that "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Seamons*, 84 F.3d at 1238 (citing *Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)). One commentator has pointed out that in "emerging, complex, or confused areas of the law, like the First Amendment, where . . . not even members of the Supreme Court are sure what the law is," proving that a First Amendment violation was "clearly established" is a daunting task. See *McDonald*, *supra* note 68, at 32. For cases asserting Title IX and First Amendment violations, see *Seamons*, 84 F.3d at 1236-37; *Lillard*, 76 F.3d at 716; *Kemether*, 15 F. Supp. 2d at 768; and *Nelson v. Univ. of Me.*, 914 F. Supp. 643, 647-48 (D. Me. 1996).

80. To establish a § 1983 claim based on Title IX, a plaintiff must prove that the state actor "knew or should have known" that he violated a "clearly established" right under Title IX for the plaintiff to be free from sex discrimination in a federally funded educational program. See *McDonald*, *supra* note 68, at 32; see also *supra* notes 26-30 and accompanying text. This standard lowers the burden a plaintiff must prove under Title IX against educational institutions and state actors in their official capacities. Under Title IX, a plaintiff must prove that the defendant had "actual notice" of the violation and that he was "deliberately indifferent" to the wrongful conduct. See *supra* note 18 and accompanying text. For cases asserting claims under Title IX and § 1983 based upon Title IX violations, see *Crawford*, 109 F.3d at 1284; *Lakoski v. James*, 66 F.3d 751, 754-55 (5th Cir. 1995); *Bruneau v. S. Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 178 (N.D.N.Y. 1996); *Mann v. Univ. of Cincinnati*, 864 F. Supp. 44, 47-48 (S.D. Ohio 1994); *Nicole M.*, 964 F. Supp. at 1385-86; *Does v. Covington County Sch. Bd.*, 930 F. Supp. 554, 572-74 (M.D. Ala. 1996); *Oona*, 890 F. Supp. at 1459-62; and *Mabry v. State Bd. for Cmty. Coll. & Occupational Edu.*, 597 F. Supp. 1235, 1239 (D.C. Colo. 1984).

81. See *Crawford*, 109 F.3d at 1284 (suing state actors in their official and individual capacities); *Seamons*, 84 F.3d at 1236-37 (suing school district and state employees in their official and individual capacities); *Lillard*, 76 F.3d at 716 (suing board of education and the principal, teacher, and coach in their individual and official capacities); *Lakoski*, 66 F.3d at 754-55 (suing the institution and its actors as individuals); *Waid*, 91 F.3d at 862 (suing school officials as individuals); *Williams*, 998 F.2d at 170 (suing school district); *Pfeiffer*, 917 F.2d at 789 (suing the school district, board of school directors, and school officials in their official capacities); *Carroll K.*, 19 F. Supp. 2d at 622 (suing board of education and school officials in their official capacities); *Kemether*, 15 F. Supp. 2d at 768 (suing the

harassment in school settings want to sue individuals, rather than political subdivisions, under § 1983 because § 1983 cases against political subdivisions are difficult to win<sup>82</sup> and because those entities are often liable as recipients under Title IX. Thus, a victim typically chooses to sue a school and its officials under Title IX and individuals or officials under § 1983 for violations of Title IX and other constitutional rights.

#### IV. STATUTORY PRECLUSION OF CONSTITUTIONAL AND FEDERAL VIOLATIONS UNDER § 1983

The Supreme Court determines whether a federal statute such as Title IX precludes a plaintiff from bringing a separate constitutional or statutory claim under § 1983 according to the underlying violation asserted.<sup>83</sup> First, the test from *Sea Clammers*<sup>84</sup> evaluates whether a federal statute precludes a plaintiff from suing indirectly, under § 1983, for a violation of that same federal statute.<sup>85</sup> Second, the test from *Smith*<sup>86</sup> examines whether a federal statute precludes a plaintiff from bringing a claim under § 1983 based on a constitutional violation.<sup>87</sup>

##### A. Preclusion of a Federal Statutory Claim Under § 1983

A plaintiff may be precluded from bringing a § 1983 claim for a violation of a statute if:<sup>88</sup> (1) the statute at issue does not create an enforceable “right” within the meaning of “rights, privileges, or immunities” under § 1983, or (2)

statewide athletic association); *Seneway*, 969 F. Supp. at 331-35 (suing school district and its administrators in their individual capacities); *Nicole M.*, 964 F. Supp. at 1385-86 (suing school district and state actors in their official and individual capacities); *Alston*, 176 F.R.D. at 223 (suing state school athletic league); *Covington*, 930 F. Supp. at 572-74 (suing board of education and school officials in their individual capacities); *Bruneau*, 935 F. Supp. at 178 (suing school, school board, and school officials as individuals); *Nelson*, 914 F. Supp. at 647-48 (suing the university); *Oona*, 890 F. Supp. at 1459-62 (suing school district and state actors in their individual capacities); *Mennone*, 889 F. Supp. 53 (suing the school board, superintendent, and teacher in his individual capacity); *Mann*, 864 F. Supp. at 47-48 (suing university and university employees in their official and individual capacities); *Mabry*, 597 F. Supp. at 1239 (suing institution and its actors in their official capacities).

82. See McDonald, *supra* note 68, at 31.

83. See Michael A. Zwiabman, Note, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1466 (1998).

84. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981). For a discussion of *Sea Clammers*, see *infra* notes 90-97 and accompanying text.

85. See generally *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

86. *Smith v. Robinson*, 468 U.S. 992 (1984). For a discussion of *Smith*, see *infra* notes 99-111 and accompanying text.

87. See generally *Smith v. Robinson*, 468 U.S. 992 (1984).

88. *Id.*



if Congress foreclosed private enforcement of the federal statute in the enactment itself.<sup>89</sup>

In *Sea Clammers*,<sup>90</sup> the plaintiffs brought claims for injunctive and monetary relief under § 1983, alleging that various governmental entities and officials from New York, New Jersey, and the federal government discharged pollutants in violation of two federal environmental statutes.<sup>91</sup> The Court held that the statute in question precluded § 1983 claims based upon violations of the statute.

The Court examined the statute's plain language,<sup>92</sup> the comprehensiveness of judicial and administrative remedies,<sup>93</sup> and the relevant legislative history<sup>94</sup> to conclude that the statute in question precluded private enforcement through § 1983. The Court determined that given the "unusually elaborate enforcement provisions," including both private suits by citizens and enforcement by government agencies, Congress intended to supplant any other private remedy available under § 1983.<sup>95</sup> The Court emphasized that when a state official violates a federal statute that provides its own comprehensive enforcement scheme, "the requirements of that enforcement scheme may not be bypassed by bringing suit directly under § 1983."<sup>96</sup> Since *Sea Clammers*, the Court has consistently applied the *Sea Clammers* holding and rationale to decide whether a federal statute precludes a plaintiff indirectly asserting violations of that statute under § 1983.<sup>97</sup>

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89. *Id.* at 19.

90. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

91. *Id.* at 4-5. The plaintiffs asserted violations of the National Environmental Policy Act of 1969 and the Federal Water Pollution Control Act. *Id.* at 1. The plaintiffs further alleged that New Jersey and New York violated the terms of the permits issued under those statutes. *Id.*

92. *Id.* at 27 n.11.

93. *Id.* at 20.

94. *Id.* at 27 n.11, 28.

95. *Id.* at 21. The "existence of these express remedies . . . demonstrates . . . that Congress intended to . . . supplant any remedy that otherwise would be available under § 1983." *Id.* The Court declined to comment on whether the environmental statutes created a "right" as recognized by § 1983 because Congress expressly foreclosed private enforcement of the acts when it enacted them. *Id.* at 19. The Court also found that the existence of the statute's express remedies also foreclosed implied private actions under the statute itself. *Id.* at 21; *see also* *Smith v. Robinson*, 468 U.S. 992, 1003, 1005 (1984). Discussing the *Sea Clammers* holding, that Court stated:

Where Congress provided comprehensive enforcement mechanisms for protection of a federal right and those mechanisms did not include a private right to action, a litigant could not obtain a private right to action by asserting a claim under § 1983 . . . . *Sea Clammers* had to do only with an effort to enlarge a statutory remedy by asserting a claim based on that statute under the "and laws" provision of Section 1983.

*Id.*

96. *Sea Clammers*, 453 U.S. at 20.

97. *See* *Wright v. City of Roanoke Redevel. & Hous. Auth.*, 479 U.S. 418, 423 (1987) (stating that § 1983 provides a cause of action for violations of federal statutory rights unless "express provision or

*B. Preclusion of a Constitutional Claim Under § 1983*

In *Smith v. Robinson*,<sup>98</sup> the Supreme Court adopted a two-prong test to determine whether a federal statute precludes a plaintiff from asserting constitutional violations under § 1983 against a state entity.<sup>99</sup> The petitioner in *Smith*,<sup>100</sup> an eight-year-old boy with cerebral palsy, filed a complaint asserting violations of the Education of the Handicapped Act (EHA), Section 504 of the Rehabilitation Act of 1973, and the Fourteenth Amendment's Due Process and Equal Protection Clauses under § 1983.<sup>101</sup> The petitioner claimed that the school committee's decision to remove him from a day program at the hospital violated his right to due process and to a free and appropriate education.<sup>102</sup> The petitioner used the same set of facts to assert a claim under both § 1983 and the EHA against the school committee and some of its officials.<sup>103</sup> The Court stated that if the constitutional violation asserted is "virtually identical" to the plaintiff's statutory right, and Congress intended the statute to be the exclusive avenue through which a plaintiff should find redress, then the remedy provided under the statute subsumes the remedy for a constitutional violation under § 1983.<sup>104</sup> Furthermore, the Court noted that preclusion of a citizen's reliance on § 1983 as a remedy for equal protection or due process would be grave decision.<sup>105</sup>

The Court found that the constitutional claims asserted by the petitioner in *Smith* were virtually identical to the statutory EHA claims.<sup>106</sup> Additionally, the Court found that the legislative history of the EHA indicated Congress's intent to design the EHA as the "exclusive avenue through which a plaintiff may assert an equal protection claim to a free and appropriate education."<sup>107</sup> The Court reasoned that the carefully tailored administrative and judicial

other specific evidence from the statute itself [shows] that Congress intended to foreclose such private enforcement itself"); see also *Suter v. Artist M.*, 503 U.S. 347, 355-56 (1992) (stating that § 1983 may not enforce a violation of a federal statute "where Congress has foreclosed such enforcement of the statute in the enactment itself") (citing *Wright*, 479 U.S. at 423).

98. *Smith v. Robinson*, 468 U.S. 992 (1984).

99. See Zwibelman, *supra* note 83, at 1466.

100. See *Smith v. Robinson*, 468 U.S. 992 (1984).

101. *Id.* at 994.

102. *Id.* at 998.

103. *Id.* at 1009.

104. *Id.*

105. *Id.* at 1012.

106. The plaintiff's due process and equal protection claims against the school committee and state officials in their official capacities arose out of the same set of facts leading to the plaintiff's claims against the same parties under the Education of the Handicapped Act. The Education of the Handicapped Act also grants the right to due process and a free and appropriate education. *Smith*, 468 U.S. at 992, 1009.

107. *Id.* at 1009, 1013 & n.16.

mechanisms in the statute expressly communicated Congress's intent to preclude reliance on § 1983.<sup>108</sup> The Court emphasized that EHA administrative hearings "effect[ed] Congress'[s] intent that each child's individual education needs be worked out through a process that begins on the local level and includes ongoing parent involvement, detailed procedural safeguards, and a right to judicial review."<sup>109</sup> The Court concluded that allowing a plaintiff to bring a § 1983 claim based on violations of the Fourteenth Amendment would permit a plaintiff to circumvent the procedures Congress believed would best aid the States in their compliance with constitutional obligations to provide a "free and appropriate" education for handicapped children.<sup>110</sup>

### C. Conclusion

The federal statutes in both *Sea Clammers* and *Smith* did not implicate the most serious problem that arises when plaintiffs use § 1983 to assert a violation of Title IX. Plaintiffs often try to sue individuals under § 1983 for a violation of Title IX because Title IX itself does not permit claims against individuals. Therefore, although courts should apply the *Sea Clammers* and *Smith* tests to decide preclusion, there are additional considerations the courts should evaluate as well.

## V. CASE LAW INTERPRETING WHETHER TITLE IX PRECLUDES § 1983 CLAIMS

### A. Five Circuits, Three Ways

Case law addressing whether Title IX precludes § 1983 claims falls into three categories. First, the Court of Appeals for the Eighth Circuit holds that Title IX precludes neither constitutionally nor statutorily based § 1983 claims.<sup>111</sup> Second, the Courts of Appeals for the Sixth and Tenth Circuits find

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108. *Id.* at 1009-10. *See also infra* text accompanying note 109.

109. *Id.* at 1011. The Court determined that if a plaintiff's EHA statutory rights did not subsume the constitutional rights asserted by the petitioner, then the petitioner could effectively curtail the "detailed procedural protections outlined in the statute" and avoid Congress's "view that the needs of the handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." *Id.* at 1012. Congress perceived the EHA's "administrative remedies . . . as the most effective vehicle for protecting the constitutional right of a handicapped child to public education." *Id.* at 1013.

110. *Id.* at 1012.

111. *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997). In *Crawford*, a student, Michelle Crawford, turned to several instructors at the University of Central Arkansas for help regarding several incidents that she believed constituted sexual harassment by her instructor, Michael Davis. Ms.

that Title IX precludes statutorily based but not constitutionally based § 1983 claims.<sup>112</sup> Third, the Courts of Appeals for the Third and Seventh Circuits

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Crawford then filed a formal complaint citing the university's sexual harassment policy. The university heard Ms. Crawford's grievance and recommended that Mr. Davis be fired. The university fired the instructor, but Ms. Crawford remained unsatisfied with the school's resolution. Ms. Crawford then filed suit under Title IX and § 1983 for violation of the Fourteenth Amendment's Equal Protection Clause. She sued the university, the university president in his official capacity, the university president's assistant in his official and individual capacities, and Mr. Davis in his individual and official capacities for inadequately responding to her complaints of sexual harassment. *Id.* at 1282.

In the district court, the defendants moved for summary judgment asserting Eleventh Amendment qualified immunity. The district court granted defendants' motion in part and denied it in part, leaving three sets of claims: (1) § 1983 claim for injunctive relief against the university and defendants Williams and Thompson in their official capacities, (2) § 1983 claim for damages against defendants Williams and Davis in their individual capacities, and (3) a Title IX claim against the university and defendants Williams, Thompson, and Davis in their official capacities. The university and defendants Williams and Thompson in their official capacities appealed the denial of their Eleventh Amendment qualified immunity. *Id.* at 1282. On appeal, the defendants argued that under *Sea Clammers*, Ms. Crawford's Title IX claims subsumed her § 1983 claims. *Id.* at 1283. More specifically, the defendants asserted that the *Sea Clammers* holding precluded most of Ms. Crawford's § 1983 claims based on Title IX and the Equal Protection Clause, except for her Title IX claims against the university and defendants Williams, Thompson, and Davis in their official capacities. *Id.*

The Court of Appeals for the Eighth Circuit held that *Sea Clammers* "in no way restricts a plaintiff's ability to seek redress via § 1983 for violations of independently existing constitutional rights, even if the same set of facts gives rise to a cause of action [under Title IX]." *See id.* at 1284. In this case, the Eighth Circuit distinguished between constitutional rights and Title IX rights, both of which can be asserted under § 1983. The court further determined that even if the plaintiff's § 1983 claims were based on Title IX itself, the *Sea Clammers* doctrine would not preclude a § 1983 claim based on Title IX because Title IX is not a "sufficiently comprehensive" statute within the meaning of the *Sea Clammers* doctrine. *Id.* at 1284. *But see* *Does v. Covington County School Bd.*, 930 F. Supp. 554, 573-74 & n.15 (M.D. Ala. 1996) (holding that (1) Title IX does not preempt § 1983 claims based on Title IX against individuals in their official capacities but opining those claims would be dismissed as duplicious, and (2) § 1983 claims based on Title IX against individuals in their individual capacities would be barred because such claims would "allow plaintiffs to gain remedies not available under Title IX and to circumvent congressional intent to foreclose such Title IX actions"); *cf.* *Seneway v. Canon McMillan School Dist.*, 969 F. Supp. at 325, 330 (W.D. Pa. 1997) (dismissing § 1983 claims based on Fourteenth Amendment violations against the university and its officials in their official capacities because Title IX sufficiently addresses those claims, but allowing such constitutionally based § 1983 claims to proceed against state actors in their personal capacities); *Mann v. Univ. of Cincinnati*, 864 F. Supp. 44, 47-48 (S.D. Ohio 1994) (same).

The *Crawford* court emphasized that the statute only provided a procedure to terminate federal funding, not an "unusually elaborate enforcement provision" that expressly provided for citizen suits and administrative enforcement procedures like the statute at issue in *Sea Clammers*. *Crawford*, 109 F.3d at 1284. Lastly, the court pointed out that the Supreme Court's judicial holdings in *Cannon* and *Franklin* expanding the remedies provided by Title IX, indicated that Title IX's statutory remedial mechanism is not exclusive. *Id.* *See also* *Oona v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1461 (N.D. Cal. 1995) (citing to language in the Supreme Court's *Cannon* opinion describing Title IX's lack of comprehensiveness and reasoning that the Court's holding in *Franklin*, allowing monetary damages for Title IX violations implicitly rejected the assertion that Title IX's remedial mechanisms are so comprehensive that they preclude other remedies); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1380 (N.D. Cal. 1997) (same). *Crawford* is controlling in the Eighth Circuit, which remains the only circuit to find that Title IX does not preclude constitutionally or statutorily based § 1983 claims, stands alone in its evaluation of the relationship between Title IX and Section 1983.

112. *See* *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996); *Lillard v. Shelby*, 76 F.3d 716 (6th Cir.

1996). In *Seamons*, five upper-class teammates grabbed the plaintiff as he came out of the shower, forcibly restrained and bound him to a towel rack with adhesive tape, and then brought in a girl he had dated to view him. 84 F.3d at 1230. All the other teammates watched this episode happen to the plaintiff. *Id.* When the plaintiff reported the incident to school administrators, the football coach scolded the plaintiff before the entire football team for reporting the incident. The coach then asked the plaintiff to apologize to the team for his behavior. When the plaintiff refused, the coach dismissed the plaintiff from the team. In addition, the football players who had assaulted the plaintiff played in the next game. The plaintiff contended that both the school's and its officials' response to the incident required him to conform to a macho male stereotype—that he “should have taken it like a man.” *Id.* The plaintiff alleged that the coach told him “boys will be boys” and described the incident as merely peer “hazing.” Further, when the school cancelled the state playoff games in response to the coach's conduct, the plaintiff asserted that the response created a “hostile environment” because the plaintiff “was branded as the football team's demise.” The principal eventually suggested that the plaintiff leave school and enroll in a distant county. *Id.* The plaintiff felt that the school's response to the incident was sexually discriminatory and harassing. The plaintiff brought an action under Title IX and § 1983 for violations of the Fourteenth Amendment's Equal Protection and Due Process Clauses and the First Amendment. Plaintiff sought injunctive relief, attorney's fees, and compensatory and punitive damages. The plaintiff alleged that the high school and school district created and tolerated a hostile environment violating Title IX. The plaintiff also alleged that the defendants, including the school, the school district, and its employees in their official and individual capacities, violated the plaintiff's constitutional rights to equal protection and equal education, procedural due process, substantive due process, freedom of association, freedom of speech, and familial association under § 1983. *Id.* at 1230.

The district court granted the defendant's motion to dismiss holding that the plaintiff failed to prove a prima facie case under Title IX and § 1983. 84 F.3d at 1230-31. The plaintiff then appealed the district court's judgment regarding his Title IX, substantive and procedural due process, First Amendment, and injunctive relief claims. *Id.* at 1232. On appeal, the defendants argued that under *Sea Clammers*, Title IX precluded the plaintiff's § 1983 claims. *Id.* at 1233. The Court of Appeals for the Tenth Circuit held that Title IX does not supplant § 1983 constitutional claims. *Id.* See also *Carroll K. v. Fayette County Bd. of Educ.*, 19 F. Supp. 2d 618, 623 (S.D.W. Va. 1998) (holding Title IX subsumes § 1983 claims “when the underlying set of facts not only violates Title IX but also violates independent constitutional rights”); *Alston*, 176 F.R.D. at 223 (W.D. Va. 1997) (same). First, the court pointed out that *Sea Clammers* does not apply to constitutionally based § 1983 claims. *Seamons*, 84 F.3d at 1234. It noted that *Sea Clammers* “speaks only to whether federal statutory rights can be enforced both through the statute itself and through § 1983;” it does not “stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claim.” *Id.* at 1233 (quoting *Lillard v. Shelby*, 76 F.3d 716, 723 (6th Cir. 1996)). The court also stated that in contrast to *Sea Clammers* “Title IX plaintiffs who bring a § 1983 action predicated on constitutional provisions do not circumvent Title IX procedures or gain access to remedies not available under Title IX.” *Id.* at 1233 (quoting *Lillard*, 76 F.3d at 723).

Then, the court relied on the Court of Appeals for the Sixth Circuit's analysis in *Lillard v. Shelby*, which used the test in *Smith*, to hold that Title IX does not preclude constitutionally based § 1983 claims that are not “virtually identical” to each other. *Seamons*, 84 F.3d at 1233 (“[I]t does not ‘stand for the proposition that a federal scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claims.’”) (quoting *Lillard*, 76 F.3d at 723). The Tenth Circuit found, as the Sixth Circuit did in *Lillard*, that Congress could not have intended to foreclose a Title IX plaintiff from bringing a constitutionally based § 1983 claim. *Id.* at 1234. Title IX did not preclude constitutionally based § 1983 claims because the court found that Title IX's statutory scheme was not comprehensive.

The *Seamons* court did not analyze separately whether each constitutional claim asserted by the plaintiff was “virtually identical” to the plaintiff's Title IX claim as required by the *Smith* test. The court combined the constitutional claims and summarily decided that they had “contours distinct from the statutory claim.” *Id.* It could be argued that the plaintiff's Fourteenth Amendment Equal Protection claim in *Seamons* is virtually identical to the plaintiff's Title IX claim. For other cases that combine

find that Title IX precludes both constitutionally based and statutorily based § 1983 claims.<sup>113</sup>

the constitutionally based § 1983 claims in this preclusion context, see *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 176 (3d Cir. 1993); *Nelson v. Univ. of Me.*, 914 F. Supp. 643, 648 (D. Me. 1976); *Mann v. Univ. of Cincinnati*, 864 F. Supp. 44, 47-48 (S.D. Ohio 1994); *Mabry v. State Bd. for Cmty. Coll.*, 597 F. Supp. 1235, 1238 (D.C. Colo. 1984).

The court weighed heavily Title IX's express statutory enforcement mechanism and its sole remedial provisions to terminate federal funds, finding its right to a private cause of action only implied. *Seamans*, 84 F.3d at 1234. However, unlike the Eighth Circuit in *Crawford*, the Tenth Circuit noted that it would bar a § 1983 claim brought on a Title IX claim. *Id.* at 1234 n.8. The court stated that allowing both claims creates a "duplicative effort." *Id.* See also *Does v. Covington County Sch. Bd. of Educ.*, 930 F. Supp. 554, 573-74, 574 n.15 (M.D. Ala. 1996) (dismissing a § 1983 claim based upon Title IX against the Board of Education as duplicitous and unnecessary because no additional remedies, legal or equitable, are available to the plaintiffs under § 1983, and allowing a Title IX plaintiff to pursue constitutionally based § 1983 claims). Furthermore, the court in *Covington* found that a plaintiff may not bring a § 1983 claim based upon Title IX against individual defendants because such action would effectively allow plaintiffs to gain remedies unavailable under Title IX and circumvent congressional intent to foreclose such Title IX actions. *Id.* at 574.

113. See *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990); *Waid v. Merrill*, 91 F.3d 857 (7th Cir. 1996). In *Pfeiffer* a school dismissed Arlene Pfeiffer from her high school's chapter of the National Honors Society because of her premarital sexual activity and pregnancy. 917 F.2d at 780-82. The National Honor Society selects its members based on scholarship, service, leadership, and character. The National Honor Society's handbook describes one of the qualities of leadership as whether a student exerts the type of leadership which directly influences others for good conduct. Under the heading "Character," the handbook places importance on whether a student upholds principles of morality and ethics. The faculty council believed that Pfeiffer's premarital sex was contrary to the qualities of leadership and character required for National Honor Society membership. Pfeiffer appealed the faculty's decision to the school board, which unanimously affirmed the faculty council's decision. *Id.*

Pfeiffer brought suit for injunctive relief and damages under Title IX alleging gender discrimination and under § 1983 based on the Fourteenth Amendment's Equal Protection Clause. *Id.* at 783. She sued the school district, the school board, and faculty council members in their official and individual capacities, and the superintendent in his official and individual capacities. *Id.*

The district court held that Pfeiffer's Title IX claim subsumed her constitutional claims. *Id.* at 783. On appeal, the Court of Appeals for the Third Circuit agreed. The Third Circuit reasoned that under *Sea Clammers*, a sufficiently comprehensive statute like Title IX does not allow "the requirements of that enforcement procedure [to be] bypassed by bringing suit directly under § 1983" on the same set of facts leading to the federal violation. *Id.* (citing *Sea Clammers*, 453 U.S. at 20 (1981), and quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting)). For a discussion of cases finding Title IX sufficiently comprehensive, see *Williams*, 998 F.2d at 176 (holding constitutional claims under § 1983 for the same instance of intentional discrimination are precluded because Title IX's comprehensive scheme fully addresses such matters); *Kemether*, 15 F. Supp. 2d at 756 (holding that § 1983 claims are subsumed by Title IX under *Sea Clammers*); *Nelson*, 914 F. Supp. at 648 (holding that Title IX's enforcement scheme is comprehensive); *Mennone*, 889 F. Supp. at 59 ("Since there is no Second Circuit authority on the issue, we will apply *Sea Clammers*' test . . . [and] conclude that Title IX has a sufficiently comprehensive enforcement scheme to foreclose enforcement through § 1983."); *Bougher*, 713 F. Supp. at 145 (same); *Mabry*, 597 F. Supp. at 1239 (same); cf. *Seneway*, 969 F. Supp. at 331 (holding "Title IX establishes a comprehensive enforcement scheme and . . . § 1983 claims are subsumed within Title IX claims" but still allowing them to proceed against individuals in their personal capacities); *Mann*, 864 F. Supp. at 47-48 (dismissing § 1983 claims based on violations of the Fourteenth Amendment's right to equal protection against the University and teachers in their official capacities because Title IX provides its own comprehensive enforcement scheme, but allowing plaintiff's § 1983 claims to proceed against teachers in their

personal capacities).

For cases relying on claims based on a single set of facts for preclusion, see *Waid*, 91 F.3d at 862 (“[A] plaintiff may not claim that a single set of facts leads to causes of action under both Title IX and § 1983.”); *Kemether*, 15 F. Supp. 2d at 756 (“A single set of facts cannot lead to causes of action under both Title IX and § 1983 . . . .”); *Nelson*, 914 F. Supp. at 648 (holding that Title IX subsumes plaintiff’s § 1983 and First Amendment claims because they arise from the same underlying facts); *Mennone*, 889 F. Supp. at 59 (“The Third Circuit has held that constitutional claims grounded on the same underlying facts as a Title IX claim are ‘subsumed’ . . .”).

Without further explanation, the Third Circuit then cited to several other cases where courts similarly apply *Sea Clammers* to preclude § 1983 claims when a comprehensive federal statute exists. *Pfeiffer*, 917 F.2d at 789. For support, the Third Circuit cited *Smith v. Robinson*, among other cases, and noted that the Supreme Court held that the “Education of the Handicapped Act, 20 U.S.C. §§ 1400, *et seq.*, with its comprehensive enforcement scheme, precluded the plaintiffs’ claim of handicap discrimination in violation of the equal protection clause.” *Id.* (citing *Smith v. Robinson*, 468 U.S. 992 (1984)).

The Court of Appeals for the Seventh Circuit reached the same conclusion and provided a more thorough analysis in *Waid v. Merrill*. 91 F.3d 857 (7th Cir. 1996). In the fall of 1990, the Merrill Area Public Schools (MAPS) hired Tina Waid as a substitute teacher for its Junior High School. Shortly thereafter, a member of the faculty died, and Waid took over that teacher’s duties for the remainder of the school year. The next summer MAPS looked for a replacement and hired Richard Bonnell for the position, despite the fact that Waid had previously been selected over Bonnell for the substitute teaching position. *Id.* at 859-60.

Ms. Waid sued under Title IX, alleging that MAPS intentionally discriminated against her on the basis of her sex. *Id.* at 860. She also sued under § 1983, alleging that the principal of the school and the director of the school’s curriculum in their individual capacities violated her right to equal protection under the Fourteenth Amendment. *Id.* at 860. The defendants argued that *Sea Clammers* barred Ms. Waid’s § 1983 claims. *Id.* at 860. The district court agreed and entered summary judgment for the defendants. *Id.*

On appeal, the Seventh Circuit held that Title IX precluded Ms. Waid’s constitutionally based § 1983 claim. *Id.* at 863. *Cf. Lakoski*, 66 F.3d at 758 (holding that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded institutions and prohibits filing an employment discrimination charge for monetary damages under Title IX directly or derivatively through § 1983). The court reasoned that Title IX and an equal protection claim were essentially identical. “Both statutes prohibit the same kind of conduct and provide compensatory and punitive damages as remedies for that conduct. . . . Therefore, a plaintiff may not claim that a single set of facts leads to causes of action under both Title IX and Section 1983.” *Waid*, 91 F.3d at 862. For other cases adhering to the same reasoning, see *infra* note 143 and accompanying text.

Additionally, the court found that Title IX’s statutory scheme provided for the termination of federal funds and an implied right to equitable and monetary damages. 91 F.3d at 862. “[T]itle IX gives plaintiffs access to the full panoply of judicial remedies.” *Id.* at 862-63. *See also Bruneau*, 935 F. Supp. at 178-79 (holding that Congress’s implicit acceptance of *Cannon*’s finding of an implied private right of action under Title IX, combined with the judicial rule that a plaintiff may receive all judicially cognizable remedies under recognized rights of action, is significant evidence of congressional intent to supplant § 1983); *Mennone*, 889 F. Supp. at 59-60 (detailing Title IX’s administrative enforcement scheme which requires voluntary compliance or denial of federal funding, noting a private plaintiff’s ability to seek equitable and compensatory relief and reasonable attorney’s fees for intentional violations of the statute, and holding Title IX has “a sufficiently comprehensive enforcement scheme to demonstrate that Congress intended to foreclose enforcement through § 1983”).

Finding that Title IX provided substantial remedies, the Seventh Circuit reasoned that Congress created a “strong incentive for schools to adopt policies” safeguarding the civil rights of its students and employees and implicitly expressed that Title IX should be exclusive. “Congress saw Title IX as

### B. *Hard Cases Can Make Bad Law*

Because the facts in each case of sex discrimination under Title IX are unique, the substantive claims asserted under Title IX and § 1983 vary in each case.<sup>114</sup> This lack of consistency makes comparison among cases difficult. In addition, courts are continually reinterpreting the impact of developing civil rights legislation and case law.<sup>115</sup> However, several obvious and recurring problems arise in the courts' analyses of whether Title IX precludes § 1983 claims.

These problems separate into four categories. First, some courts mistakenly apply *Sea Clammers*, instead of *Smith*, to determine whether Title IX precludes constitutionally based § 1983 claims.<sup>116</sup> Second, courts are split on which criteria to rely upon in determining whether Title IX provides the "exclusive avenue" to redress sex discrimination in educational settings under the *Smith* test or whether Congress foreclosed private enforcement of the federal statute in the enactment itself under *Sea Clammers*. Within this split, a majority of the courts apply an "express language approach," and a minority of the courts apply a "contextual approach."<sup>117</sup> Third, courts fail to apply correctly the "virtually identical" prong of the *Smith* test.<sup>118</sup> Fourth, a majority of the courts ignore the significance of plaintiffs suing individuals in the context of Title IX.<sup>119</sup>

#### 1. *Inappropriate Expansion of Sea Clammer's Application*

The first common problem courts create in determining Title IX's preclusion of § 1983 claims is to apply mistakenly the *Sea Clammers* doctrine to assess whether Title IX precludes a constitutionally based § 1983

the device for redressing any grievance arising from a violation of federal civil rights by an educational institution." *Waid*, 91 F.3d at 862-63. *See also Bruneau*, 935 F. Supp. at 178 (reasoning "a private right of action is significant evidence of congressional intent to supplant a [§ 1983] remedy") (citing *Wright v. City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 427 (1987)).

Moreover, the burden of complying with federal civil rights law was better placed on the educational institution rather than the individuals associated with that institution. *Waid*, 91 F.3d at 862. For these reasons, the court concluded that with Title IX, Congress "effectively superseded" a cause of action under § 1983 based on violation of the Fourteenth Amendment's Equal Protection Clause. *Id.* at 863.

114. *See supra* note 17 and accompanying text.

115. *See generally supra* notes 23-26, 46-65 and accompanying text.

116. *See infra* Part V.B.1.

117. *See infra* Part V.B.2.

118. *See infra* Part V.B.3.

119. *See infra* Part V.B.4.



claim.<sup>120</sup> This is incorrect because the *Sea Clammers* doctrine applies only when a federal statute precludes a plaintiff from asserting a § 1983 claim based upon that same federal statute.<sup>121</sup> Applying *Sea Clammers* to determine whether a statute precludes a constitutionally based claim is inapposite.<sup>122</sup>

## 2. Is Title IX the “Exclusive Avenue”?

The second problem is the inconsistent interpretation of the Supreme Court’s two tests (*Smith* and *Sea Clammers*) to determine whether Title IX precludes § 1983 claims. The courts are split on what criteria to use when examining whether Title IX provides the “exclusive avenue” through which Congress intended to redress sex discrimination in schools under the *Smith* test<sup>123</sup> or whether Congress “foreclosed private enforcement of the federal statute within the enactment itself under *Sea Clammers*.”<sup>124</sup> The majority of courts look at only the express language. This express language approach concludes that courts should consider the express language within the statute in isolation to determine under *Sea Clammers* whether Congress intended to foreclose all remedies other than those in Title IX.<sup>125</sup> Courts following the express language approach interpret Title IX to provide for either voluntary compliance or termination of federal funding. This express-language interpretation does not provide “unusually elaborate enforcement” measures, such as private citizen suits, like the statute at issue in *Sea Clammers*.<sup>126</sup> Thus, express-language courts conclude that Congress did not intend for Title IX to be the exclusive avenue for a plaintiff to vindicate identical constitutional violations.<sup>127</sup> Additionally, under the express-language approach, the implied private right of action found under *Cannon* is not part of Congress’s express Title IX remedies.<sup>128</sup> The Supreme Court’s holdings in *Cannon* and *Franklin*, expanding Title IX’s remedial scheme, only signals to these express-language courts that Title IX’s remedial scheme was not

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120. See *Waid*, 91 F.3d at 862; *Pfeiffer*, 917 F.2d at 789; *Williams*, 998 F.2d at 176; *Kemether*, 15 F. Supp. 2d at 756; *Seneway*, 969 F. Supp. at 330-31; *Mennone*, 889 F. Supp. at 59; *Oona*, 890 F. Supp. at 1459-62; *Mann*, 864 F. Supp. at 47-48; *Mabry*, 597 F. Supp. at 1239.

121. For a discussion of *Sea Clammers*, see *supra* Part IV.A.

122. See *supra* note 83.

123. See *supra* notes 87, 104 and accompanying text.

124. See *supra* notes 85, 88-89 and accompanying text.

125. See *supra* notes 111-12 and accompanying text; see also *Zwibelman*, *supra* note 83, at 1475-76.

126. See *supra* notes 111-12 and accompanying text.

127. See *id.*

128. See *id.*

intended to be exclusive or to foreclose private enforcement in the enactment itself as required under *Smith* and *Sea Clammers*.<sup>129</sup>

These express-language cases rely heavily on the literal meaning of Title IX's language, just as the Supreme Court limited itself to the express language of the federal statute at issue in *Sea Clammers* to establish the *Sea Clammers* test for preclusion.<sup>130</sup> In contrast, the Court in *Smith* did limit itself to the Education of the Handicapped Act's express language.<sup>131</sup> Nevertheless, express-language courts that find Title IX not comprehensive under the *Sea Clammers* doctrine also consistently limit their analysis of Title IX under the *Smith* test to the express language of Title IX.<sup>132</sup>

A minority of courts apply a contextual approach that considers the implied right of action found under *Cannon* to be implicitly expressed within Title IX.<sup>133</sup> Contextual courts find that Title IX's implied right of action and explicit remedies involving termination of federal funding and voluntary compliance create a sufficiently comprehensive remedial scheme to foreclose private enforcement under *Sea Clammers*<sup>134</sup> and serve as the exclusive avenue to assert "virtually identical" constitutionally based claims.<sup>135</sup>

Despite the difference in the express language and contextual courts' approaches to interpreting the remedial scope of Title IX, both approaches use the same analysis of Title IX to determine whether the statute precludes § 1983 claims under the *Smith* test or under the *Sea Clammers* doctrine. Using the same analysis for both tests is inappropriate.

The Supreme Court's reasoning in *Smith*—that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert a virtually identical constitutional claim—differed from its reasoning in *Sea Clammers*—that Congress intended to foreclose § 1983 claims based on the federal statute.<sup>136</sup> In *Sea Clammers*, the Court did not want to allow a plaintiff to gain remedies not available under an already comprehensive statute by asserting violations of that same statute under § 1983.<sup>137</sup> Under this reasoning, the "comprehensiveness" of the federal statute was a key

129. *See id.*

130. *See* Zwibelman, *supra* note 83, at 1476.

131. *See supra* note 104 and accompanying text.

132. *Cf. supra* notes 111-12 and accompanying text.

133. *See generally supra* note 113 and accompanying text.

134. *See id.*; *see, e.g.*, Breneau v. Kortright Cent. Sch. Dist., 935 F. Supp. 162, 178-79 (N.D.N.Y. 1996).

135. None of the courts that have precluded constitutionally based § 1983 claims in the context of a Title IX violation appear to have properly applied the "virtually identical" prong of the *Smith* test. *See infra* Part V.B.3.

136. *Cf. supra* notes 92-97, 105-10 and accompanying text.

137. *See supra* note 96 and accompanying text.

determinant in the preclusion analysis. Under the *Smith* test, Title IX's comprehensiveness may have played a role in the Court's analysis, but the Court's main concern was whether the virtually identical constitutional claims would bypass important legislative policies captured in the federal statute.<sup>138</sup>

### 3. Which Claims Are Virtually Identical?

Third, courts fail to apply properly the "virtually identical" prong of the *Smith* test in two ways. In some cases, courts combine all the alleged constitutional violations without analyzing each claim separately under the *Smith* test.<sup>139</sup> For example, in *Seamons*<sup>140</sup> the court held that under the *Smith* test Title IX did not preclude constitutionally based § 1983 claims.<sup>141</sup> Without analyzing the plaintiff's First Amendment and Fourteenth Amendment Equal Protection and Due Process claims separately, the court incorrectly combined all the plaintiff's constitutional claims together and held that none were virtually identical.<sup>142</sup> Rather than following the *Seamons* court's method for applying the *Smith* test, courts should apply the "virtually identical" test by separately comparing the plaintiff's Title IX claim to each asserted constitutionally based § 1983 claim.

In other cases, courts interpret the "virtually identical" language used in *Smith* to mean that any constitutional claim grounded in the same underlying set of facts leading to the Title IX violation is virtually identical to the right granted by Title IX.<sup>143</sup> This interpretation leads to illogical results. One event of sexual harassment against a student in a school setting may lead to more than one cause of action. By inappropriately touching a student, a school official may violate both a student's right to be free from sex discrimination and right to bodily integrity.<sup>144</sup> If a school official discourages a student from reporting a discriminatory occurrence, he or she may simultaneously violate a student's rights to free speech, to be free from sex discrimination, and to receive a fair and impartial hearing.<sup>145</sup>

Although the same set of underlying facts is an important factor in

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138. See *supra* notes 108-10 and accompanying text.

139. See *supra* note 112 and accompanying text.

140. *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996). For a discussion of *Seamons*, see *supra* note 112.

141. See *id.*

142. See *id.*

143. See *supra* note 113 and accompanying text.

144. See, e.g., *supra* note 111 and accompanying text.

145. See *id.*

assessing whether a constitutional claim is virtually identical to a Title IX claim, courts must recognize that it is not the only determinant. To apply the “virtually identical” prong of the *Smith* test, courts should compare whether the substantive rights, parties alleged, and set of facts leading to each and every constitutional violation asserted, is virtually identical to the substantive rights, parties alleged, and set of facts leading to the federal statutory violation.<sup>146</sup>

#### 4. *Victims Want Individuals to Be Held Responsible—Should They Be?*

Many courts fail to place importance on whether a plaintiff bringing a suit under § 1983 is suing state actors in their official or individual capacities and what impact, if any, that difference may have on an analysis under *Sea Clammers* or *Smith*.<sup>147</sup> Courts concluding that Title IX does not foreclose a remedy under § 1983 based on Title IX itself must recognize that plaintiffs suing individuals for a Title IX violation, albeit under § 1983, will be enlarging Title IX’s mandate beyond Congress’s intent.<sup>148</sup> Because most courts find that Title IX does not create liability on the part of individual defendants, allowing a remedy for a violation of Title IX under § 1983 against individuals will enlarge Title IX’s remedial scheme.<sup>149</sup> This result turns *Sea Clammers* on its face, allowing a plaintiff to gain access to remedies unavailable directly under Title IX and to circumvent congressional intent to foreclose such actions.<sup>150</sup> Moreover, courts that hold equal protection claims against individuals are virtually identical to Title IX claims ignore the current consensus that individuals cannot be sued under Title IX.<sup>151</sup> If individuals cannot be sued under Title IX, an equal protection claim asserted against individuals cannot be virtually identical to a Title IX claim. These considerations should play a part in resolving whether Title IX precludes statutorily or constitutionally based § 1983 claims and will be discussed further in my proposal to this preclusion problem.

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146. See *infra* Part VI.B.

147. See *infra* notes 156-59 and accompanying text.

148. See, e.g., *Covington*, 930 F. Supp. at 573-74.

149. See *supra* notes 20, 26-30 and accompanying text.

150. See *supra* note 96 and accompanying text.

151. See *supra* note 20 and accompanying text.

## VI. RESOLVED: A CONSISTENT AND COMPREHENSIVE APPROACH TO TITLE IX PRECLUSION LAW

This proposal first argues that Title IX precludes § 1983 claims based on Title IX under the *Sea Clammers* test. Secondly, the proposal proffers that under the *Smith* test, the only constitutional claim that is virtually identical to a Title IX claim is an equal protection violation by a governing entity and its officials. Even so, this section will explain why Title IX does not preclude any constitutionally based § 1983 claim under the *Smith* test.

### A. Title IX and Its Derivatives Asserted Under § 1983

When courts are faced with whether a federal statute preempts a § 1983 claim based on that statute, courts must apply the *Sea Clammers* test to determine whether in that case the statute: (1) creates an enforceable right within the meaning of “rights, privileges, and immunities” and (2) is sufficiently comprehensive to foreclose private enforcement in the enactment itself.<sup>152</sup> It is undisputed that Title IX creates a “right” as recognized under § 1983. Therefore, the first prong of the *Sea Clammers* test does not preclude § 1983 claims.<sup>153</sup> The more contentious issue is whether Congress intended to foreclose private enforcement in the enactment itself.

The express language courts rely on the “enactment itself” under the *Sea Clammers* test. The courts’ interpretation of Title IX’s remedial scheme, then, is limited to that which is explicitly expressed in the original enactment and regulations (for example, federal funding termination or voluntary compliance).<sup>154</sup> However, in applying the contextual approach, courts find that the Civil Rights Amendments of 1991, the Rehabilitation Act Amendments of 1986, and the implied right of action are part of Title IX’s mandate because they are expressed in the “enactment itself.”<sup>155</sup> The best way to effectuate Congress’s intent for Title IX enforcement is through the contextual approach. Although this is currently the minority approach, adoption of this approach will preserve the integrity of Title IX and motivate schools to take responsibility for and prevent discrimination within their classrooms.

Express language courts findng Title IX’s provisions insufficient to

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152. See *supra* notes 88-89 and accompanying text.

153. See *supra* note 51 (finding an implied right of action under Title IX).

154. See *supra* Part V.B.2; see also Zwibelman, *supra* note 83, at 1476 (arguing that courts must adhere to the “enactment itself” language used in *Sea Clammers* and, therefore, find that Title IX is not comprehensive because it only provides for federal funding termination).

155. See *supra* Part V.B.2.

preclude § 1983 claims based upon Title IX itself face the predicament of allowing plaintiffs to sue individuals under § 1983 for violating Title IX, even though most courts agree individuals should not be liable under Title IX. Most courts agree that to enforce Title IX Congress intended to place responsibility on educational institutions receiving federal funds and their actors in their official capacities.<sup>156</sup> As discussed above in Part V.B.4, permitting § 1983 claims based on Title IX to proceed against individuals circumvents Congress's intent when it enacted Title IX.<sup>157</sup> Ironically, *Sea Clammers* expressly prohibits this type of back door litigation.<sup>158</sup> To avoid frustrating congressional intent, an express-language court could permit § 1983 claims based on Title IX, but not those directed against individuals in their individual capacity. However, this conclusion limits § 1983 claims in a manner unrecognized by the statute's language or in its judicial history.<sup>159</sup> The contextual approach, unlike the express-language approach, finds Title IX sufficiently comprehensive to foreclose private enforcement in the enactment itself and avoids frustrating congressional intent in enacting Title IX or § 1983.

Lastly, having concluded that Title IX precludes § 1983 claims based upon violations of Title IX, it is important to note that this conclusion comports with similar findings of other courts in the context of Title VII of the Civil Rights Act of 1964,<sup>160</sup> which provides similar administrative and

156. See *supra* note 20 and accompanying text.

157. See *id.*

158. See *Smith*, 468 U.S. at 1004 (“*Sea Clammers* had to do only with an effort to enlarge a statutory remedy by asserting a claim based on that statute under the ‘and laws’ provision of § 1983.”).

159. See *Covington*, 930 F. Supp. at 573-74. Some other courts have held that Title IX was sufficiently comprehensive and precluded § 1983 claims based on Title IX and Fourteenth Amendment violations against governing entities and officials in their official capacities, but, nevertheless, allowed § 1983 claims to proceed against individuals in their individual capacities. See *Seneway*, 969 F. Supp. at 330; *Mann*, 864 F. Supp. at 47-48.

160. 42 U.S.C. § 2000e-2(a) (1994). See Cheryl L. Anderson, “*Nothing Personal*”: *Individual Liability Under 42 U.S.C. § 1983 for Sexual Harassment as an Equal Protection Claim*, 19 BERKELEY J. EMPLOYMENT & LAB. L. 60, 64 & n.19, 69 & nn.48-49 (1998). Anderson argues, however, the following:

[T]he language of § 1983 on its face suggests that the defendant's acts in violating Title VII should support a claim under § 1983. The statute allows suit against a “person” who violates not only the Constitution, but also the “laws” of the United States. In recognizing individual liability in the first place, the Supreme Court has indicated that such liability is analytically separate from the “official” actions of the government entity or the individual state actor.

*Id.* at 71.

On a general level, Anderson's argument is persuasive. However, it ignores the fact that when Congress creates a right, the legislative body may purposefully design a statute to allocate the burden of liability on some actors but not others. Congress may create an avenue of redress in a way that it believes will best serve the interests of the victim and eradicate the problem. Holding individuals liable for federal statutory violations may not have been Congress's intent.

judicial remedies.<sup>161</sup> In designing Title VII, Congress did not intend to create a federal cause of action against individuals.<sup>162</sup> Instead, Congress intended to force employers to create workplaces that comply with a national policy of equal employment opportunity.<sup>163</sup>

Similarly, Congress did not intend for Title IX to create a federal cause of action against individual discriminators, but against educational institutions and their officials who discriminate on the basis of sex.<sup>164</sup> Congress intended to bring school systems in compliance with a national policy of equal educational opportunity.<sup>165</sup> As the Court states in *Cannon*, Title IX's goals are to end sex discrimination in educational institutions, to "provide individual citizens with effective protection," and to further ensure "orderly enforcement of the statute."<sup>166</sup>

### *B. Which Claims Are Not "Virtually Identical"?*

To determine whether Title IX precludes a constitutionally based § 1983 claim, courts must apply the *Smith* test to examine whether: (1) the constitutional violation is virtually identical to the asserted statutory right, and (2) Congress intended the statute to be the exclusive avenue for redress.<sup>167</sup> Under the first prong of the *Smith* test, if a constitutional claim asserted under § 1983 is not virtually identical to the federal statutory claim, then courts may not preclude the constitutional claim.<sup>168</sup> The *Smith* Court did not define the meaning of "virtually identical," nor has the Court applied the *Smith* test to a constitutionally based § 1983 claim since.<sup>169</sup> Thus, according to traditional rules of statutory construction, the plain meaning of "virtually identical" should prevail.<sup>170</sup> The plain meaning of "virtually identical" translates to something that is "in essence or effect but not in fact" the same.<sup>171</sup> Under this interpretation, no constitutional claim asserted under § 1983, except for an equal protection violation against governing entities or state officials, is virtually identical to a Title IX claim.

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161. See 42 U.S.C. § 2000e (1994) (describing Title VII's administrative and judicial enforcement provisions).

162. See *Anderson*, *supra* note 160.

163. See *id.*

164. See *supra* notes 20, 26-30 and accompanying text.

165. See *supra* notes 23-25 and accompanying text.

166. See *supra* notes 53-55 and accompanying text.

167. See *supra* notes 99, 104 and accompanying text.

168. See *supra* notes 104 and accompanying text.

169. See Zwibelman, *supra* note 83, at 1479.

170. See *id.*

171. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 413, 994 (7th ed. 1973).

Clearly, substantive due process claims under the Fourteenth Amendment are not virtually identical to a Title IX violation. Although Title IX involves the right to be free from sex discrimination in federally funded institutions, substantive due process grants a person the right to bodily integrity against any person acting under color of law.<sup>172</sup> Furthermore, procedural due process rights are not virtually identical to Title IX violations either.<sup>173</sup>

Finally, an equal protection claim<sup>174</sup> against individuals<sup>175</sup> also differs from a claim under Title IX.<sup>176</sup> The law of claim preclusion supports this reasoning: to preclude a claim in a trial, the plaintiff must prove that the plaintiff previously asserted and fully litigated the same claim in another trial. Each claim must address the same substantive rights, be asserted against the same party, and arise out of the same underlying set of facts.<sup>177</sup> In an equal protection claim against an individual, a Title IX violation may address the same substantive right and arise out of the same set of underlying facts. However, the plaintiff does not assert, nor could the plaintiff assert, the claim against the same party.<sup>178</sup> Therefore, claims under § 1983 for a violation of the Fourteenth Amendment's Equal Protection Clause against individuals are not virtually identical to Title IX claims and therefore can be maintained in the same lawsuit under the *Smith* test.

### C. "Virtually Identical" Claims Cannot Coexist

The only constitutional privilege virtually identical to any right granted under Title IX is a claim asserting a violation of the Fourteenth Amendment's Equal Protection Clause against federally funded governing entities and their officials. Both Title IX and such Equal Protection claims address the same substantive rights.<sup>179</sup> If asserted against the same parties and arising out of the same facts, the constitutional privilege and the federal statute meet the "virtually identical" prong of the *Smith* preclusion test.

172. See *supra* note 77 and accompanying text. See also Zwibelman, *supra* note 83, at 1480.

173. See *supra* note 74.

174. See *supra* note 77 and accompanying text.

175. See *supra* notes 81-82 and accompanying text.

176. Most courts hold that Title IX does not create a right to sue individuals. See *supra* note 20 and accompanying text.

177. See generally 18 WRIGHT, MILLER & COOPER, *Federal Practice and Procedure: Jurisdiction and Related Matters* §§ 4406-15. (1981).

178. See *supra* notes 175-77 and accompanying text. Furthermore, one commentator notes that, in the Title VII context, "the growing consensus is that there is no remedy against the individual defendant under Title VII or related statutes. Under these circumstances, the § 1983 claim can be perceived as 'independent.' It is not only independent, it is the only claim available." Anderson, *supra* note 160, at 70.

179. See *supra* notes 26-30, 77 and accompanying text.



Courts must then determine whether Congress intended Title IX to be the exclusive avenue through which a plaintiff may find redress for that violation under the second prong of the *Smith* test.<sup>180</sup>

For three persuasive reasons, the administrative remedies under Title IX are not critical in Congress's effort to aid educational institutions in complying with their obligation to "provide citizens effective protection against discriminatory practices." Therefore, Title IX does not provide the exclusive avenue through which a plaintiff may bring a claim involving a Title IX violation. First, Title IX does not require a plaintiff to exhaust any administrative remedies before bringing an action in federal court.<sup>181</sup> Second, a complainant need not attempt to find redress through an educational institution's internal grievance procedure before filing a complaint with the DOE.<sup>182</sup> Third, under the administrative enforcement scheme, a plaintiff receives no personal compensation.<sup>183</sup>

Allowing a plaintiff to assert both an Equal Protection claim under § 1983 and a Title IX violation in federal court may be duplicitous, but would not curtail the detailed procedural protections in Title IX. Thus, avoiding Title IX's administrative procedures does not circumvent Congress's effort to allocate responsibility to the schools to eliminate sex discrimination in education and provide effective protection for citizens.<sup>184</sup> Furthermore, this reasoning comports with other courts' examinations of Title VII and virtually identical § 1983 claims based on the Fourteenth Amendment's Equal Protection Clause.<sup>185</sup> Therefore, equal protection claims brought under § 1983 against federally funded government entities and their officials that are virtually identical to Title IX remedial actions can be maintained in the same lawsuit, but may likely be dismissed as duplicitous.

## VI. CONCLUSION

In concluding that Title IX precludes § 1983 claims based upon Title IX itself because the statute is sufficiently comprehensive, courts can recognize

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180. See *supra* note 104 and accompanying text.

181. See *supra* note 46.

182. See *supra* note 37 and accompanying text.

183. See *supra* note 45 and accompanying text.

184. See *supra* notes 23-25.

185. See Anderson, *supra* note 160, at 69 & n.50. However, Equal Protection claims asserted against governing entities and their actors along with Title IX claims will often be dismissed as duplicitous and unnecessary. See *Mann*, 864 F. Supp. at 47 ("The Supreme Court has made clear that when a federal statute provides its own comprehensive enforcement scheme, courts should follow it and exercise substantial restraint before unnecessarily reaching constitutional claims.") (citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981)).

the full breadth of Title IX and its potential to redress sex discrimination in educational settings. The contextual approach preserves the integrity of Title IX. Section 1983 claims based on Title IX only frustrate congressional intent to place liability on schools rather than individuals. On the other hand, allowing independently existing constitutional rights to proceed under § 1983 in the context of a Title IX case in no way frustrates the integrity of Title IX, and it also preserves an avenue for victims in educational settings to seek vindication from offenders in their individual capacities. This proposal takes into account both sides of the argument for and against precluding § 1983 claims and finds a middle of the road approach that comports with Congress's intent to "provide individual citizens with effective protection" and further ensure "orderly enforcement of the statute."<sup>186</sup>

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186. *Cannon*, 441 U.S. at 704-706.

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