# The History of Title IX, How We Got to Today, and What Tomorrow May Hold


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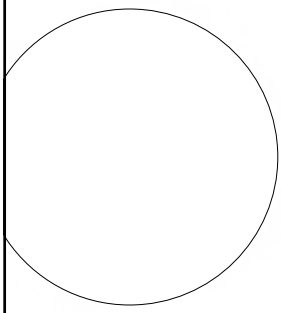
**Title IX**
**June 23, 1972**

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education programs or activity receiving federal financial assistance."

Female high school sports participation grew from less than 300,000 to 1.3 million in 1974 (within 2 years of passage)



**Cannon v. University of Chicago**
**441 U.S. 677 (1979)**

Supreme Court recognized a right to sue using Title IX

"Title IX presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present. We therefore conclude that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute."

***North Haven Board of Education v. Bell***
**456 U.S. 512 (1982)**

The Court upheld the ruling of the Court of Appeals that Title IX prohibited employment discrimination.

(nothing in the statute that excludes employment)

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***Grove City College v. Bell***
**465 U.S. 555 (1984)**

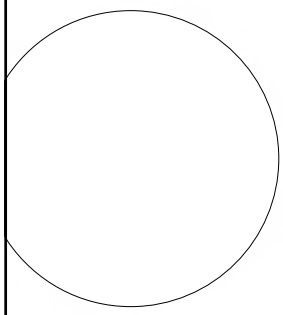
Supreme Court held that: (1) the college was the **recipient of federal financial assistance** and thus subject to the statute prohibiting sex discrimination where some of its students received basic education opportunity grants even though the **college did not receive any direct federal financial assistance**, and; (2) the **receipt of grants by some of the college's students did not trigger institution wide coverage but only coverage for its financial aid program**.

## 4 years later…Congress steps in

In 1988, Congress passed the **Civil Rights Restoration Act**, which in part reversed the Supreme Court's decision, mandating that any program in an institution that receives federal financial aid, no matter how specific the purpose or program for which that aid is given, must follow the guidelines of the Rehabilitation Act, ***meaning that once an institution accepts federal funds it falls within Title IX***.

## Shift

- Pre-1990's, Title IX was mostly challenges to following the law, as well as what the law covers.
- In the 1990's, people started using Title IX to sue for personal damages as the courts expanded its interpretation of types of causes of action that could be brought under Title IX.



***Franklin v. Gwinnet County Public Schools***
**503 U.S. 60 (1992)**

- Supreme Court declares that students can sue school for monetary damages for sexual harassment by a teacher.
- SIDENOTE: One cannot sue an employee under Title IX, only an institution.

***Doe v. Taylor ISD***
**15 F.3d 443 (5th Cir. 1994)**

1. The person learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing a student.
2. The person demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse.
3. Such a failure caused injury to the child.

## *Gebser v. Lago Vista Indep. Sch. Dist.*
## 524 U.S. 274 (1998)

- Gebser was a high school student having a sexual relationship with one of her teachers, and the school district had failed to implement a proper grievance procedure as provided in the guidance.
- The Supreme Court found that a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment, but that there is no *respondeat superior* in Title IX.

## The Test

- Actual Notice
- Deliberate Indifference

"Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference."

## What is *not* Deliberate Indifference

- "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference…."
- "Officials may avoid liability under a deliberate indifference standard by responding to a risk of harm, 'even if the harm ultimately was not averted'."
- *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998); Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380, 384 (5th Cir. 2000)

***Davis v. Monroe County Board of Ed.***
**526 U.S. 629 (1999)**

- Fifth grade student was repeatedly subjected to vulgar comments by fellow student.
- Told three different teachers repeatedly. Mother also complained to teachers.
- Was told by teacher the principal had been informed.
- Mother spoke to principal, who said "I guess I'll have to threaten him a little bit harder" (but student was never disciplined for misconduct)
- Student was refused ability to move seats away from harasser for three months. Grades went down; father found suicide note.
- Same student rubbed up against student, repeatedly tried to touch her. Other students also victim of same student
- Ended after six months when student pled guilty to sexual battery
- Principal refused to speak with complaining students

**The Test**
**(Student to Student)**

1. Actual knowledge
2. Deliberate indifference
3. If school knew and the response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances
4. Conduct by student must be so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

**What type of litigation do we need to be watching for in the future?**

Bullying? No liability under § 1983 (Covington), but under Title IX (if due to gender preference)

Transgender issues – dress, use of restroom and locker room (plus bullying plus sexual harassment)

## *G.G. v. Gloucester County Sch. Bd*
## 4th Circuit (4/19/16)

- G.G has gender dysphoria, had hormone treatment, living as a boy
- For 7 weeks no issue with him using HS boys restroom
- Community member raised issue
- Policy: restroom usage based on biological gender, "students with gender identity issues shall be provided an alternative appropriate private facility."

## *G.G.* CONTINUED

DOE'S regs:

- "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. § 106.33.

DOE Op. Ltr:

- "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."

## *G.G.* CONTINUED

**Majority**: "[w]e conclude that the Department's interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation."

**Dissent**: While G.G. challenges the definition and application of the term "sex" with respect to separate restrooms, acceptance of his argument would necessarily change the definition of "sex" for purposes of assigning separate living facilities, locker rooms, and shower facilities as well.

## Dear Colleague (May 13, 2016)

Paraphrase: Gender identification is how we should read the term sex in Title IX.

- Documents (Names?), Pronouns
- Activities
- Restrooms and Locker Rooms(have optional additional privacy)
- Athletics (UIL?)
- Single Sex Classes/Schools/Overnight accommodations

## TX, *Harrold ISD, et al., v. USA*

- U.S. did not go through notice-and-comment rulemaking as required under APA. Also "arbitrary and capricious," lack of notice
- 10th Amendment: "new rules … unlawfully attempt to preempt State law regarding rights of privacy because historic powers reserved to the States, such as civil privacy protections, cannot be superseded by federal act, 'unless that was the clear and manifest purpose of Congress.'"
- Equal Protection: "But if the right or ability to use the intimate facilities of one's choosing extends only to those who self-identify as the opposite sex then the new rules, regulations, guidance and interpretations treat unequally students and employees that require access to intimate areas."

**Next Stop?**

In fact…STOP, in the name of love!

8/3/16
Supreme Court issues stay on enforcing court of appeals decision.

**Supreme Court accepts *G.G.***

- 8/3/16
- Supreme Court issues stay on enforcing court of appeals decision.

# BUT THEN…

***G.G. v. Gloucester County Sch. Bd.***
**4th Circuit (8/26/20)**

- Court of Appeals affirmed trial court granting of summary judgment based upon the Fourteenth Amendment and equal protection and Title IX.
- On September 22, 2020, Court denied petition for en banc consideration
- Will it go to the Supremes? 90 days to "appeal"…
  **December 21, 2020**

**August 14, 2020**

**New Regulations from OCR take effect for Title IX**

**Contact Us**

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