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## Understanding Noncompliance: A Qualitative Content Analysis of Title IX Sexual Misconduct Violations Using the Office for Civil Rights Investigative Findings

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UNDERSTANDING NONCOMPLIANCE: A QUALITATIVE CONTENT ANALYSIS  
OF TITLE IX SEXUAL MISCONDUCT VIOLATIONS USING THE OFFICE FOR  
CIVIL RIGHTS INVESTIGATIVE FINDINGS

by

Lenore Schaffer nee Malone

A Dissertation  
Submitted to the Graduate School  
and the Department of Educational Research and Administration  
at The University of Southern Mississippi  
in Partial Fulfillment of the Requirements  
for the Degree of Doctor of Philosophy

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## ABSTRACT

# UNDERSTANDING NONCOMPLIANCE: A QUALITATIVE CONTENT ANALYSIS OF TITLE IX SEXUAL MISCONDUCT VIOLATIONS USING THE OFFICE FOR CIVIL RIGHTS INVESTIGATIVE FINDINGS

by Lenore Schaffer nee Malone

May 2017

On April 4, 2011, the U.S. Department of Education's Office for Civil Rights (OCR) released a Dear Colleague Letter (DCL) reminding higher education institutions (HEIs) of their obligations under Title IX to respond to complaints of sexual misconduct. The 2011 DCL was meant to be a guidance document to assist HEIs in complying with Title IX, but many higher education administrators expressed frustrations concerning some of OCR's requirements. Since releasing the 2011 DCL, OCR has opened more than 200 Title IX investigations at HEIs across the nation. When OCR concludes that a HEI has failed to comply with Title IX, OCR prepares a Letter of Findings (LOFs). This letter outlines OCR's investigative approach and explains the reason behind their determination of Title IX noncompliance.

This qualitative study examined OCR's construction of Title IX noncompliance concerning how HEIs responded to sexual misconduct complaints. This study explored the following research questions 1) What discernable trends of Title IX noncompliance are identified in OCR's published LOFs since the issuing of the 2011 Dear Colleague Letter? 2) How does OCR respond to HEIs regarding how sexual misconduct complaints are handled under Title IX? and 3) How does the information found in letters of findings (LOFs) between April 2011 and September 2016 overlap with or add to previous

guidance documents provided by OCR? Analyzing LOFs using a social constructionist framework resulted in 9 themes and ancillary findings. Findings demonstrated OCR's emphasis on social context, identifying trends, and victims. HEIs generally implemented Title IX guidelines but failed to comply because OCR determined that they did not do enough for victims and the broader campus community. During complaint investigations, OCR is engaging in a comprehensive review of HEIs policies and practices unaffiliated with the original complaint. Lastly, findings also revealed that Title IX noncompliance is a social construct, as OCR's determination of noncompliance varies. Implications for HEIs and future research are discussed.

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## DEDICATION

First and foremost, I would like to thank my God and Savior, Jesus Christ, for his guidance, grace, and for blessing me by placing individuals in my life who assisted me throughout this journey. This dissertation is dedicated to my husband, Micah, who has been a constant source of support, love, and encouragement throughout this journey. Micah, thank you for easing my responsibilities to ensure that I had time to write. You took care of our home and provided for us financially without complaints. You did it willingly and cheerfully. I could not have successfully completed this journey without your delicious meals and encouragement when I felt like giving up. This dissertation is also dedicated to my loving parents, James and Louise Malone. Mommy and Daddy, thank you for supporting me at age 16 when I expressed my interest in pursuing higher education in the United States. I know there were challenges, but you still made sacrifices and never stopped supporting me. You reminded me daily that I was loved, smart, and more than capable. Your support blessed me tremendously! I would also like to dedicate my work in memory of my wonderful grandfather, also known as “Big Daddy”, who made my dreams of pursuing higher education a reality. Big Daddy’s assistance contributed greatly and made it possible for me to relocate. He passed away before I completed my first year as an undergraduate student, but his words of wisdom remain close to my heart. In closing, I am thankful for every professor, colleague, mentor, family member, and friend who provided words of wisdom, prayers, and assisted me in this journey, no matter how small that assistance might have been. Thank you all.

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## LIST OF ABBREVIATIONS

<i>HEI</i>	Higher Education Institution
<i>LOF</i>	Letters of Finding
OCR	Office for Civil Rights

## CHAPTER I - INTRODUCTION

Sexual harassment and sexual assault has been a longtime problem on college and university campuses (Sloan & Fisher, 2011). However, since April 2011 college sexual misconduct has received more attention nationally. There are two main reasons for this increased attention. First, more college students are coming forward to report their sexual assault experiences. Secondly, the number of institutions under investigation for allegedly mishandling these cases has increased (Edwards, 2015; Stratford, 2015; U.S Department of Education, 2012). The prevalence of sexual assault is supported by numerous studies which assert that up to 25% of college women will experience a sexual assault or rape at some point during their studies (Fisher, Cullen, & Turner, 2000; Fisher, Daigle, & Cullen, 2010; Jordan, 2014; Krebs, Lindquest, Warner, Fisher, & Martin, 2007). In fact, a national study, conducted by Fisher and colleagues (2000) revealed that for a campus with approximately 10,000 college women, an estimated 350 rapes or attempted rapes occur each year. These statistics illustrate how prevalent sexual misconduct is on college and university campuses.

Colleges and universities are required to comply with Title IX of the Education Amendments of 1972, the federal law that prohibits discrimination on the basis of sex in education programs that receive federal funding. Discrimination refers to unequal or unfair treatment of a group or individuals based on certain characteristics, such as gender or sex (U.S. Department of Education, 2015). For example, unequal treatment occurs when female athletes receive less in scholarships or their athletic operating budgets are much smaller than their male counterparts. Discrimination on the basis of sex also

includes sexual violence, such as sexual coercion, sexual harassment, sexual assault and rape (U.S. Department of Education, 2015).

In May 2014, the U.S. Department of Education's Office for Civil Rights (OCR) publicized the names of 55 higher education institutions that were being investigated for possible violations of Title IX over the handling of sexual violence complaints. As of May 2016, this list has grown dramatically due to an increase of complaints. The increase in Title IX investigations and violations suggests colleges and universities are experiencing weighty challenges implementing and complying with Title IX. Institutions also express their frustrations with the lack of clarification provided by guidance documents issued by OCR (New, 2016) which could be a contributing factor to noncompliance. Therefore, this study analyzed the content of OCR's letters of findings (LOFs) to determine OCR's construction of Title IX noncompliance after issuing the 2011 Dear Colleague Letter (DCL), a guidance document that specifically put the focus on sexual harassment and sexual assault, and higher education's responsibility to respond. In the end, this study clarified OCR's expectations for Title IX compliance for college and university administrators.

#### Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 is the federal law that promotes equal opportunity for all individuals by assuring that no student will face discrimination on the basis of sex in any educational activity or educational program receiving federal dollars (Department of Justice, 2012; 20 U.S.C. § 1681). Historically, Title IX referred primarily to athletics. However, Title IX is more than equality in funding for athletics in educational institutions or programs. As a law that prohibits discrimination on the basis



of sex, Title IX prohibits sexual misconduct, which includes sexual harassment and sexual assault (Rammell, 2014; U.S. Department of Education, 2016). Consequently, if a college or university becomes aware of an incident of sexual harassment or sexual assault involving students or employees, Title IX requires the institution to take immediate action to stop the behavior and prevent it from reoccurring (Koss, Wilgus, & Williamsen, 2014; Rammell, 2014; 20 U.S.C. § 1681). OCR is responsible for enforcing Title IX. Students and employees who believe their institution has violated Title IX can file complaints with OCR to initiate an investigation. They can also file private lawsuits seeking injunctive relief or monetary damages in the court system (Rammell, 2014).

*Prevalence of Sexual Assault and Mishandling Allegations.*

Sexual assault occurs at disturbingly high rates on college and university campuses across the United States (Fisher, Cullen, & Turner, 2000). As mentioned earlier, approximately 20- 25% of college women will be a victim of sexual assault at some point during their undergraduate career (Jordan, 2014; Fisher, Cullen, & Turner, 2010). What is even more alarming is the fact that most victims of sexual assault do not disclose or report their experience, suggesting that the number of victims is more than likely a lot higher than the 20-25% statistic that current research shows (Fisher et al., 2010; Sloan, Fisher, & Cullen, 1997). Regardless of institution type, whether it is private, religious, a 2-year or a for-profit college or university, sexual misconduct is occurring on college and university campuses (Karjane, Fisher, & Cullen, 2002).

Some may argue these statistics are archaic. However, recent studies show results that are similar to previous research. In a study conducted by the Bureau of Justice Statistics, 21% of college women reported they had been sexually assaulted since

enrolling in college (Krebs, Lindquist, Berzofsky, Shook-Sa, & Peterson, 2016), yet despite these numbers, most victims are still not reporting. Researchers have studied the barriers to reporting behaviors and reveal that several factors influence whether a victim reports, including feelings of shame or embarrassment, the context in which the assault took place, fear of negative responses (Fisher, Daigle, Cullen, & Turner, 2003; Sable, Danis, Mauzy, & Gallagher, 2006; Tilman, Bryant-Davis, Smith, & Marks, 2010), and lack of awareness of the resources available to assist them (Walsh, Banyard, Moynihan, Ward, & Cohn, 2010). Many students have come forward stating that higher education institutions (HEIs) cover up the sexual assault allegations they receive, which discourages more student victims from reporting to campus authorities (New, 2015). Yet, sexual assault is more than a campus disciplinary problem; it is a crime and a national concern. For this reason, the law requires educational institutions to respond. Failing to respond to and mishandling sexual assault cases can bring detrimental consequences.

#### What *Happens* when HEIs Mishandle Sexual Misconduct?

The infamous Penn State-Jerry Sandusky scandal sheds light not only on sexual misconduct but on the consequences institutions face when they fail to respond and take action against sexual assault or sexual abuse occurring on their campuses (Jaschick, 2012; Pennsylvania State University & Freeh Report, 2012). Before his arrest and conviction, Jerry Sandusky, the assistant football coach at Penn State University, sexually abused children on university property. The Freeh Report, issued following an independent investigation, indicated that senior administrators at Penn State University, including the head football coach and university president, failed to take action to protect Sandusky's victims despite their knowledge of the abuse. Their inaction created an

environment which allowed the abuse to continue (Belson, 2012; Jaschick, 2012). Senior administrators, including President Spanier, were removed from their positions and had criminal charges filed against them, such as perjury, and obstruction of justice (Bublick, 2014). Jerry Sandusky was convicted on 45 counts of child sexual abuse and is currently serving his 30 to 60-year prison sentence. Consequently, the university was subjected to negative publicity and a financial fallout, spending millions in court fees and settlements (Belson, 2012; Wolverton, 2012).

The Penn State scandal and the issuing of the 2011 Dear Colleague Letter (DCL) in April (a guidance document issued by OCR to assist institutions in meeting the requirements of Title IX) encouraged higher education institutions to review their policies and procedures to ensure that similar incidents do not occur on their campuses (Rammel, 2014). Yet, information from the Department of Education and news headlines reveal that similar incidents are still happening, despite the guidance provided by OCR. Beginning early 2015, Baylor University remained in the headlines after six women accused football players of sexual violence; an inquiry found that university administrators failed to respond and actually discouraged victims from filing complaints (Harris, 2016; Mangan, 2016). Similarly, the University of Tennessee found themselves in the spotlight after a group of women filed a lawsuit against the institution claiming that administrators deliberately failed to take action against students accused of sexual assault (Wadhvani & Rau, 2016).

#### Statement of the Problem

While scholars have studied and discussed Title IX compliance in regard to gender equity and intercollegiate athletics (Anderson, Cheslock & Ehrenberg, 2006;

Murphy, 2015; Staurowsky, 2003); there is less literature available on Title IX as it applies to sexual misconduct. Most of the research available on sexual harassment and sexual assault address disclosure and reporting (Krivoshey, Adkins, Hayes, Nemeth, & Klein, 2013; Sable et al., 2006; Tilman et al., 2010; Walsh et al., 2010), prevention and education (Jozkowski, 2014; Payne, 2008). Few examine sexual assault policies at specific institutions for federal compliance in the form of case studies (Iverson, 2015). There is little to no information available on past or current trends of Title IX noncompliance and OCR's conceptualization of the law. The limited information available on Title IX noncompliance has been largely reported by the media and OCR, rather than scholars. Studying this topic was noteworthy because the increase in federal complaints and Title IX investigations indicate that colleges and universities are experiencing significant challenges in meeting Title IX requirements. To effectively address Title IX noncompliance pertaining to sexual misconduct in higher education, it is imperative that researchers, college and university administrators, and the public develop a better understanding of this phenomenon.

#### Purpose of the Study

The purpose of this study was to gain insight and understanding about OCR's interpretation of Title IX noncompliance and their expectations of HEIs. This study sought to examine OCR's definition of Title IX noncompliance concerning how HEIs handle reports of sexual assault by examining current trends of Title IX noncompliance. This study gleans information for future policy and practice from the mistakes of institutions who were noncompliant.

Colleges and universities are failing to effectively and appropriately comply with Title IX. Erin Buzavis, the Director of the Center for Gender & Sexuality Studies and a law professor at Western New England University, proposes that these violations are the result of college and university administrators' continued misperceptions about how to ensure that Title IX and law enforcement efforts coexist (New, 2015), while others argue that the law and Department of Education's mandates are too complex (Mangan 2015). HEIs express frustrations over Title IX guidance and are unsure how to comply with Title IX based on OCR's guidance (New, 2015). These frustrations demonstrate HEIs misunderstanding about OCR's Title IX requirements.

This study analyzed the content in OCR's LOFs in which HEIs were found noncompliant after the 2011 DCL was issued. The outcome provided information on how OCR interprets Title IX and what constitutes as a noncompliant response to allegations of sexual assault. This study's findings will assist college and university administrators in their implementation and compliance with Title IX regulations.

### Context and Conceptual Framework

To understand issues surrounding Title IX noncompliance, one must be familiar with the context in which sexual assault occurs on college and university campuses. The most common type of sexual assault occurring on college and university campuses is acquaintance assault, in which the victim and perpetrator know each other (Donat & White, 2000; Hill & Silva, 2005). It is also quite common to find the use of alcohol, drugs, or both in these incidents as well. Therefore, it is not a surprising to learn that college sexual assault remains the most underreported campus crime (Cantalupo, 2014; Fisher et al., 2000; Hill & Silva, 2005). When it is reported, it is common to find that a

significant amount of time has passed between the time of the incident and when it was finally reported. Additionally, due to the lack of physical evidence or witnesses in most cases, many cases require thorough assessment and investigatory skills in which many of the campus professionals involved in these investigations are not trained (Smith & Gomez, 2013).

In addition to the dynamics of sexual assault, administrative leadership and institutional culture are also underlying contextual factors influencing institutional compliance or noncompliance with Title IX (Carroll et al., 2013). Therefore, it is necessary to address the individual culture, procedures, and administrative leadership of each institution found in violation of Title IX (Cantalupo, 2010; Smith & Gomez, 2013). Colleges and universities have distinct cultures, resources, and administrative leadership practices that can affect how they respond to sexual assault allegations and guide what they value. Being familiar with the context, institutional culture, and the law is essential for developing an integrated and coordinated institutional response to sexual violence on campus (Smith & Gomez, 2013). For these reasons, this framework serves as a structure that provides a visual display of my approach and how factors within the study may relate to theory (Grant & Osanloo, 2014).

### *Social Constructionism Theory*

OCR's construction of Title IX noncompliance concerning how HEIs address sexual harassment and sexual assault complaints will be approached from a social constructionist perspective. Social constructionism theory is concerned with the ways we think about and use categories to structure our experiences and analysis of the world we live in (Best, 1999; Burr, 2005). Research shows that what is considered "sexual assault"

is socially constructed and has varied over time (Bergen, 1998; Loseke, 1989; Muehlenhard & Kimes, 1999). Moving into the 21<sup>st</sup> century, institutions continue to struggle to define sexual assault and to frame the way we think about this crime in our society (Muehlenhard & Kimes, 1999). Social constructionism theory not only explains how people define or understand problems, but it also addresses how people respond to problems (Burr, 1995). For example, the way sexual harassment and assault are socially constructed will affect how HEIs administrators choose to respond (Burr, 2005).

Social constructionism emphasizes that criticisms and misunderstandings arise when definitions and understandings are misinterpreted (Andrews, 2012). HEIs open expression of frustrations over OCR's guidance suggests that this could, in fact, be a contributing problem. Thus, institutions are more likely to violate Title IX if their social construction of noncompliance differs from OCR's.

#### Research Questions

The following research questions address OCR's construction of Title IX noncompliance concerning how HEIs handle sexual misconduct complaints and how these are expressed through the U.S. Department of Education's Office for Civil Rights enforcement. This study investigates the following research questions:

1. What discernable trends are identified in OCR's published LOFs since the issuing of the 2011 Dear Colleague Letter (DCL)?
2. How does OCR respond to HEIs regarding how sexual misconduct complaints are handled under Title IX?

3. How does the information found in letters of findings (LOFs) between April 2011 and September 2016 overlap with or add to previous guidance documents provided by OCR?

### Research Design

Qualitative Content Analysis (QCA) is a method that describes the meaning of qualitative material systematically (Schreier, 2012). In this method, the questions that are asked specify the angle from which the researcher examines the collected data. There is a focus on only selected aspects of the material; however, the process begins with the researcher becoming familiar with all data (Neuendorf, 2016; Schreier, 2012). After becoming familiar with the data, selected parts of the material are assigned to categories of created coding frames in order to reduce the data. This is the heart of qualitative content analysis (Schreier, 2012). This method was selected because QCA describes the meaning of qualitative material and should be used on data that has been sampled from other sources.

Thematic analysis is a type of QCA which focuses on identifying themes or patterns of meaning in qualitative material (Boyatzis, 1998; Braun & Clarke, 2006). Using a social constructionist approach to thematic analysis, OCR's LOFs will be analyzed thematically to identify social influences that influenced OCR's construction of Title IX noncompliance. OCR's LOFs are institution-specific and provide information about investigations and whether or not the institution's policies and procedures violated Title IX, thus making the institution non-compliant.



## Significance of the Study

Compliance with Title IX remains one of the top concerns for college and university administrators (Cantalupo, 2014; Karabel, n.d.; June 2014). The cost of being found liable or non-compliant with Title IX is great. Not only are HEIs concerned about the monetary damages they can face under a private action if the courts find they acted with “deliberate indifference” in the face of “actual knowledge” of sexual assault or rape (Richards & Kafonek, 2016), but they must also worry about compliance reviews and complaint investigations conducted by the U.S. Department of Education’s Office for Civil Rights and the possibility of losing federal funds if OCR finds noncompliance (Koss et al., 2014; New, 2015; Ruckman, 2014). In the midst of these significant concerns, there are unanswered questions and concerns regarding OCR’s Title IX guidance. Despite the guidance provided by OCR, HEIs are failing to comply with Title IX, thus failing to properly protect and serve students. Campus sexual assault stories have appeared in publications and media outlets such as The Huffington Post, The New York Times, and CNN. The negative publicity that comes with mishandling or covering up sexual assault cases is a grave risk for colleges and universities (Wu, 2014).

For the aforementioned reasons, determining how OCR has constructed noncompliance and the current trends surrounding how HEIs are failing to comply will give administrators greater insight regarding Title IX noncompliance. The data collected may also assist policymakers in creating effective policies and practice in an effort to limit violations and liability. Most importantly, this study allows administrators to achieve Title IX compliance from those institutions that failed to comply, simply by examining the letters issued to HEIs by OCR which addressed their noncompliance.

Complying with Title IX standards is a must for HEIs because noncompliance poses the risks of negative publicity, a loss of federal funds, and an increase in financial settlements.

### Definition of Terms

For the purpose of this research the following definitions apply:

*Title IX of the Education Amendments of 1972:* a federal law that promotes equal opportunity for all individuals by providing that no person should face discrimination on the basis of sex under any educational activity or educational program receiving federal dollars (Department of Justice; 20 U.S.C. § 1681 (2012)).

*Office of Civil Rights:* A sub-agency of the Department of Education that is responsible for enforcing several federal civil rights laws that prohibit discrimination in educational programs and activities that receive federal dollars (U.S. Department of Education, 2015).

*Dear Colleague Letter (DCL):* A policy guidance letter issued by the Office for Civil Rights in 2011 that explained the responsibilities of educational institutions for addressing sexual harassment and sexual violence under Title IX (Dear Colleague Letter, 2011).

*Letters of Finding (LOF):* The letter outlining the Office for Civil Rights findings after they complete an investigation. The letter provides information on areas of compliance and noncompliance (U.S. Department of Education, 2015).

*Sexual harassment:* Unwelcome conduct of a sexual nature e.g. unwelcome sexual advances, request for sexual favors, or physical or verbal sexual conduct (U.S. Department of Education, 2015).

*Sexual assault:* A form of sexual violence that involves any type of sexual contact or behavior that occurs without explicit consent of the recipient, e.g., fondling or unwanted touching or penetration (Bureau of Justice Statistics, 2014; Fisher et al., 2010).

*Sexual misconduct:* A broad term encompassing any unwelcome behavior of a sexual nature that is committed without consent or by force, intimidation, or coercion. Consists of a range of behaviors including, sexual assault and sexual harassment (U.S. Department of Education, 2015).

*Title IX Compliance:* Higher education institutions receiving federal financial assistance must comply with Title IX regulations by disseminating a notice of nondiscrimination, designating at least one employee to coordinate its efforts and carry out its responsibilities under Title IX, and adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints (U.S. Department of Education, 2011).

*Title IX Noncompliance:* Failure to comply with the procedural requirements outlined as Title IX regulations (U.S. Department of Education, 2011).

### Assumptions

This study's data was provided by the U.S. Department of Education's Office for Civil Rights. Therefore, it was assumed that the Office for Civil Rights was forthcoming with the information that was requested. It was also assumed that all the documents provided were original documents and not altered in any way, with the exception of removing personally identifiable information. Finally, the last assumption for this study addresses OCR's investigatory process. Since the aforementioned documents were compiled based on OCR's investigations and conversations with HEI administrators and

students, it is assumed that those interviewed were honest and the data provided to OCR was accurate.

### Delimitations

The chosen problem for this study is a delimitation in and of itself. Title IX is the federal law prohibiting sex discrimination; however, sexual misconduct is only one type of sex discrimination. HEIs can also violate Title IX if male and female student-athletes do not receive equitable opportunities to participate in sports or by discriminating against pregnant students (U.S Department of Education, 2015; 20 U.S.C. §1681). However, this study only examined OCR investigations regarding college sexual misconduct, that is, sexual harassment and sexual assault. The framework adopted for this study was also a delimitation. Approaching this study through the lens of social constructionism restricted the researcher from viewing the chosen problem through another lens. The chosen methodology also sets boundaries on what can be learned from future findings. Although it was possible to ascertain what the data said about trends of noncompliance and OCR's construction of Title IX noncompliance based on findings, the researcher was not able to examine underlying motives and personal experiences from the observed trends.

### Limitations

Analysis was also limited by the availability of material since it was impossible to create more data due to the research design used. Nevertheless, most of the documents issued by OCR were already available to the public. Other documents concerning investigations were requested via the Freedom of Information Act (FOIA). Qualitative content analysis required interpretation in creating coding frames and classifying successive parts of data according to categories (Schreier, 2012). Some scholars consider

this reliance on interpretation as a major limitation. Yet, despite the aforementioned limitations, this method was ideal for the purpose of this study and provided valuable insight through analysis of texts.

### Summary

The way HEIs respond to sexual misconduct on their campuses has been a hot topic over the past few years as the number of federal complaints filed against these institutions have increased. Institutions are required to respond to sexual misconduct because of Title IX, the federal law that prohibits discrimination on the basis of sex. The Department of Education's Office for Civil Rights enforces Title IX and investigates institutions when a complaint is filed against them for Title IX noncompliance. To conclude their investigations OCR issues LOFs stating whether the institution is in compliance or noncompliance (U.S. Department of Education, 2016).

By employing social constructionism theory, this study looked specifically at OCR's construction of Title IX noncompliance after they issued the 2011 Dear Colleague Letter, by examining current trends of Title IX noncompliance found in OCR's LOFs. The study explored the research questions (1) What discernable trends of Title IX noncompliance are identified in OCR's published LOFs since the issuing of the 2011 Dear Colleague Letter (2) How does OCR respond to HEIs regarding how sexual misconduct complaints are handled under Title IX? (3) How does the information found in LOFs between April 2011 and September 2016 overlap with or add to previous guidance documents provided by OCR? Answering these questions is timely because the cost for failing to comply with Title IX is far too great. Institutions that fail to comply with Title IX face grave risks such as loss of federal funds and negative publicity (Wu,

2014). The data collected from this study can assist HEI policymakers in creating effective policies and practices as they implement Title IX and strive for compliance.

## CHAPTER II – LITERATURE REVIEW

Title IX's prominent role in higher education has shifted and expanded since it became an equity law in 1972. Title IX breaks barriers in sports for women, creates opportunities for women to pursue fields generally dominated by men, requires the fair treatment of pregnant or parenting students, and it protects students from harassment and sexual violence. In recent years, campus sexual assault, a type of sexual violence, has been one of the most talked about and challenging issues confronting higher education (United Educators, 2015). Title IX has transformed how colleges and universities respond to sexual violence allegations (Pope, 2012). Yet, when it was first created it was understood as the law that prohibited discrimination based on a person's sex, not a law that required institutions to respond, investigate, and adjudicate sexual assault allegations (United Educators, 2015). To fully comprehend Title IX and sexual harassment and sexual assault on HEI campuses, it is necessary to provide an account of Title IX's development. What follows is the history of Title IX highlighting the social movements that influenced its transformation and applicability to sexual harassment and sexual assault through the lens of social constructionism.

### Social Constructionism

Social constructionism or social construction theory is concerned with the processes by which people or organizations describe, explain, or account for the world in which they live (Burr, 2015; Gergen, 2015). According to this theory, the generation of knowledge and ideas of reality is created through social interactions. Unlike social constructivism which focuses on the generation of knowledge in our minds (cognitively), social constructionism believes knowledge is something people or organizations

construct together. Beliefs are created within social context and social interactions with others. Social constructionism is a dominant approach to the study of social problems and suggests the degree to which a social problem, such as the mishandling of sexual misconduct allegations on college and university campuses, is perceived as problematic, as well as how the problem is understood, is dependent upon social interaction (Best, 1999). As mentioned, HEIs are failing to comply with Title IX despite the recent guidance provided by OCR in the 2011 Dear Colleague Letter. Social constructionism theory recognizes the relationship between interpretation of knowledge and social response. According to social constructionism, interpretations dictate a particular response. In this study, a social constructionist approach was used to research OCR's construction of Title IX noncompliance concerning how HEIs respond to reports of sexual harassment and sexual assault (sexual misconduct).

#### *Foundations and Assumptions*

Tenets of social constructionism were developed more than 300 years ago (Berger & Luckman, 1966). Although the theory cannot be traced to a single source, it has roots in phenomenology, the study of structures of experiences; hermeneutics, the theory of interpretation; symbolic interactionism, the study of meaning and communication; and social psychology, the study of social interactions (Berger & Luckman, 1966; Holstein & Miller, 1993). Social constructionism focuses on the processes of understanding and addressing social change in a postmodern society and in organizations (Gablin, 2014; Gergen; 1985; Gergen 2015). The theory brings philosophical assumptions to reality construction and knowledge production (Gablin, 2014). Immanuel Kant, Karl Marx, and George Mead have been some of the major influences for social constructionists'. Its



formalization as a theory began in the early twentieth century when researchers at the Chicago School of Sociology at the University of Chicago used it to study urban and social phenomena (Lisa, 2008; Lutters & Ackerman, 1996; Van Kham, 2013).

There are four key assumptions to a social constructionist position of knowledge construction (Burr, 1998; Gergen, 1985). The first assumption insists that individuals take a critical stance toward “taken-for-granted” knowledge, such as thinking of people as either masculine or feminine or music as hip-hop or classical (Burr, 2015). It asks individuals to suspend beliefs that categories commonly accepted receive support through direct observation, (Gergen, 1985) and challenges unbiased views of conventional knowledge (Burr, 2003, Gergen, 1985). This assumption opposes positivism by encouraging people to critically analyze existing assumptions about the world in which they live. Kessler and Mckenna, (1978) in “Gender: An Ethnomethodological Approach” posits that the world’s commonly accepted gender categories were not a biological reality, but a social construct with a cultural basis (Burr, 2015). The second assumption addresses historical and cultural specificity. The way in which individuals’ view or understand the world, including the categories and concepts they use, are historically and culturally relative (Burr, 2015; Gergen, 1985). For example, the interpretation of rape has varied historically and culturally (Bergen, 1998; Loseke, 1989; Muehlenhard & Kimes, 1999). There was a time in history where it was impossible for a husband to rape his wife because rape was viewed as a criminal offense that could only be committed outside of marriage (Muehlenhard & Kines, 1999). The third assumption specifically addresses the construction of knowledge and understanding. Social constructionism assumes versions of knowledge are constructed through the daily interaction between people, not by

observing the world as it is. Therefore, social interactions, especially language, is important in social constructionism (Best, 1999; Burr, 2015). According to social constructionism, language gains its meaning from its use in context (Gergen, 2011; McNamee, 2004). For that reason, individuals can create realities through language in different contexts continuously. Lastly, social constructionism assumes knowledge and social action work together. Our understanding of the world is constructed through social interactions and social events, but each social interaction can produce various possible social constructions or understanding of events. Therefore, each construction can result in completely different responses (Burr, 1995; Gergen 1985).

*Applying Social Constructionism.* In this study, social constructionism theory helps explain the evolution of Title IX, its applicability to social conditions and how it is interpreted. Social constructionist perspectives provide a focused lens to examine social problems, such as the mishandling of sexual assault and rape allegations by HEI administrators and Title IX noncompliance. According to social constructionism, social issues do not become social problems unless the general public, policymakers, and the media call attention to the issue and define it as a social problem (Rubington & Weinburg, 2010). All social issues involve interpretation through claims-making which entails framing existing problems through categorization, domain expansion, and frame extension before a social issue is defined as a social problem (Best, 2015). Therefore, a social constructionist views noncompliance as a social construction and fluid, not reality and fixed. Thus, reviewing literature from a social constructionist lens, allows one to understand knowledge and reality, including social problems, within social interactions.

The first element of claims-making is categorization. This involves identifying a new social condition and linking it based on similarities to a familiar problem. As a result, both conditions are understood as belonging to the same category (Best, 2015). Categorization explains how sexual harassment in educational settings became a Title IX issue. Title IX's initial focus was gender equity, however, claims-makers linked sexual harassment to Title IX by saying this form of harassment was discriminatory as it prevented women from participating fully in educational activities (Mackinnon, 1979). Domain expansion refers to the redefinition of a social problem by extending boundaries, such as redefining rape to include rape between individuals who know each other, thereby increasing what constitutes as part of the social problem (Best 1999). The final tenet related to social constructionism is frame extension. Frame extension involves taking an existing frame, such as sexual assault and rape, and applying it to what others may view or understand as a different social problem, such as sex discrimination or abuse (Loseke, 2003).

These aforementioned constructionist tactics, categorization, domain expansion, and frame extension allow people to apply what they know to the interpretation of a new condition (Best, 1999). Not only do these tactics explain how sexual assault became a form of sex discrimination prohibited under Title IX, but it also explains how claims-makers made successful claims regarding HEIs mishandling sexual assault cases on campuses. Claims-makers were able to construct the facts of college sexual assault and HEIs mishandling of cases, through lobbying, campaigning, protests, and social movements. They persuaded the public that college sexual assault and noncompliance

with Title IX requirements by HEI administrators was an epidemic, intolerable, and needed to be changed (Fisher et al., 2010; Ziering & Dick, 2015).

#### A Social Constructionist Perspective of Sexual Misconduct in Higher Education

Unfortunately, there is nothing new about sexual assault and other forms of misconduct occurring on college and university campuses. Sexual assault and the victimization of women have been issues since the origins of higher education (Sloan & Fisher, 2011). Letters written by faculty and students during the seventeenth and eighteenth centuries reveal violence and property crime were taking place on campuses (Sloan & Fisher, 2011). Also, one of the most significant changes to higher education was the evolution from male-only, church-affiliated institutions to sectarian and nonsectarian institutions serving both male and female students. The inclusion of women in higher education brought new realities and “temptations” according to college administrators. They claimed alcohol, gambling, and sexual relationships led male students to criminal behavior (Sloan & Fisher, 2011).

Although campus crime and sexual assault are not new, the construction of sexual assault as a social problem is fairly recent, due to feminist claims-makers and ideological shifts in the late 1980s and early 1990s (Chasteen, 2001; Sloan & Fisher, 2011). The claims-makers, consisting of feminist activists, survivors, and advocates, introduced new ideologies about sexual assault and victims. They claimed sexual assault involved a victim and victimizer who exploited the trust of the victim easily because they knew each other. They argued against the way victims were treated and largely ignored by the public and criminal justice system, despite the little progress the Victim’s Rights Movement made (Carnigella, 2009; Sloan & Fisher, 2011). They sought to influence the public,

specifically institutions and policymakers, to adopt their ideologies and respond via policy initiatives, by making claims, presenting research, organizing social movements, and engaging in advocacy efforts.

As a result of their efforts, the cultural and legal definitions of sexual assault has changed drastically since the early 1960s. The language used to define and understand sexual assault in our society has also changed. The Victim's Rights Movement and the Rape Reform Movement were extremely influential in the social construction of sexual victimization against women in the United States. Both movements influenced and served as a foundation for claims-makers who would speak out against the sexual victimization of women and HEIs response or lack thereof. The Victim's Rights Movement and the Rape Reform Movement increased the public's awareness about rape, and as a result, it was much easier for claims-makers to make claims about college sexual assault and rape in the mid-1980s.

#### *Victim's Rights Movement*

The Civil Rights and Feminist Movement's fight for equal rights increased social consciousness in the United States during the 1960s (Young & Stein, 2004). Their claims for equal rights made it easier for other groups to use an equality theme to fight for their rights, as described earlier by the social constructionist term, frame extension (Best, 1999; Burr, 1995, 2015). During the 1970s, another equality-focused movement emerged The Victim's Rights Movement (Young & Stein, 2004). This movement played an influential role in the social construction of crimes against women, specifically sexual misconduct and partner violence (Johnson, 2015). Women's groups spoke out against outdated laws and attitudes toward rape and the ways in which rape victims were treated

during criminal justice proceedings (Best, 1999; Johnson, 2015). The movement adopted a conservative political focus in the early 1980s when President Ronald Reagan and Attorney General Edwin Meese convened the Task Force on Victims of Crime. As a result of the movement's efforts, the U.S. constitution was amended to ensure the rights of crime victims were addressed through victim programs and compensation services (Mosteller, 1997).

The Victim's Rights Movement brought about many changes, particularly between victims and the criminal justice system. Prior to this movement, victims of crimes were usually ignored by professionals who processed their cases. For the first time in history, the movement created a climate where victims were acknowledged by court professionals, were provided with services to aid in recovery, given opportunities to make impact statements, and treated with more respect by the criminal justice system (Best, 1999; Mosteller, 1997).

*Rape Reform Movement.* The Victim's Rights Movement played a role in the creation of victim services, such as rape hotlines and crisis centers (Mosteller, 1997). The public's increased awareness of rape and victims' rights resulted in another influential social movement, the Rape Reform Movement (Carnigella, 2009). The Rape Reform Movement changed the way rape was conceptualized or defined. Claims-makers made up of rape survivors and women who supported them, made new claims about rape and challenged the perceptions many had about rape during the 1970s. According to their claims, rape was a violation of civil rights and a discrimination crime against a gender. It was typified by power, and not sex (Best, 1999; Carnigella, 2009). Claims-makers wanted to change society's views and approach to rape, by bringing views in line with

other violent crimes and ensure legislation confirmed those views (Carnigella, 2009). Claims-makers and scholars who pushed the movement's efforts highlighted several problems within rape prosecution in the criminal justice system. For example, most offenders were not convicted and victims experienced secondary victimization in the legal system, which included considering the victim's sexual history in arriving at verdicts (Carnigella, 2009). Therefore, the primary goal of the movement was to "promote the prosecution of rape offenders in place of the persecution of rape victims" (Carnigella, 2009 p. 12). Rape reform laws affected the requirements and standards used in rape cases, such as corroboration, consent, previous sexual history, victim polygraphs, and statutory rape laws (Carnigella, 2009; Sloan & Fisher, 2011). Yet, despite the developments the Rape Reform Movement made throughout history, there was a general consensus that the movement was not effective in cases of acquaintance rape, a type of rape more common among college students (Cairney, 1995), because post-reform statutes still emphasized a perpetrator's use of force and victim's resistance to determine whether or not rape occurred (Cairney, 1995; Commonwealth v. Berkowitz, 1992). Feminists and survivors, frustrated by the focus on force and resistance in determining rape cases, gathered in "Take Back the Night" rallies and marches across the country, claiming that once a woman refused to have sex, any penetration occurring afterward was rape, even if force was never used. "No means no" became the slogan for this movement (Anderson, 2016). As a result of the social agitation surrounding consent and rape, most state laws shifted and use of force was no longer necessary for rape to occur (Anderson, 2016; Cairney, 1995).

The earlier waves of the Victim's Rights and Rape Reform Movements were successful because they increased the public's awareness (LaFree, 1989; McMahon, 2011), and challenged traditional constructions of rape (Chasteen, 2001). However, there were still discrepancies between how claims-makers and the larger society viewed rape. This increased awareness was helpful in facilitating discussions and legal changes to address sexual assault occurring on college and university campuses (Anderson, 2016).

### Campus Sexual Misconduct

Historically, feminist scholars claimed that college women were at a particularly high risk for sexual harassment and sexual assault because they interacted closely with men on a daily basis, and most of their interactions occurred in unsupervised settings, such as faculty offices, residence hall rooms, and fraternity houses (Sloan & Fisher, 2011). In addition, the availability of alcohol, combined with the party culture that permeated most college and university campuses, increased the risk of a sexual assault and rape (Fisher et al., 1998). However, these claims were purely anecdotal and lacked empirical support (Sloan & Fisher, 2011).

But, in the mid-1980s two studies were published depicting the levels of sexual victimization of college women. Koss's (1985) study of over 7,000 students at 35 colleges found that 25% of women pursuing higher education had experienced a rape or attempted rape and approximately 90% knew their attacker. In 1985, the Project on Status and Education of Women released a report based on a study, which showed that gang rapes, which involves one person being raped by a group of people, was quite common among college students (Sloan & Fisher, 2011). These studies finally provided the



evidence of the sexual victimization of college women that claims-makers had originally asserted (Sloan & Fisher, 2011).

The rape and murder of Jeanne Clery, a freshman student at Lehigh University, in 1986 also profoundly impacted how higher education institutions responded to crime, including rape (Allen & Lengfellner, 2016; New, 2015). After her brutal murder, Jeanne Clery's parents learned that administrators often failed to provide timely warnings about criminal incidents involving the campus community; and there was no law in place requiring such warnings (Allen & Lengfellner, 2016; Sloan & Fisher, 2011). This lack of information encouraged Jeanne Clery's parents to lobby state legislatures and Congress to pass over 35 laws on campus safety, including the federal Campus Security Act, later renamed as the Jeanne Clery Act. The Clery's lobbying and advocacy efforts after their daughter's death brought legislative changes to crime reporting and campus safety, not only at Lehigh University but at every higher education institution ("Clery Center", 2016; New 2015). Shortly after this, campus claims-makers appeared in the media discussing the sexual assault "epidemic" occurring on college and university campuses. According to claims-makers, the sexual victimization of college women had been largely ignored due to prevailing rape myths, which did not account for rape between individuals who had a relationship as "real rape". "Real rape" included those conditions society believed necessary for a rape to occur, including force, and a stranger as a perpetrator. (Sloan & Fisher, 2011). This myth was debunked when Koss's (1985) study revealed majority of college women, (approximately 90 %), who were forced to have sex knew their perpetrator personally.

Not only was there an outrage over the high levels of sexual victimization, and the rape culture that perpetrated many campuses, there was also an outrage over the silencing of rape allegations by college administrators whom activists believed were more interested in preserving their public images, than helping victims seek justice (Sloan & Fisher, 2011). Therefore, in addition to claims-makers' efforts to re-define rape to include rape between students who knew each other, they also spoke out against higher education administrators for failing to acknowledge sexual assault on their campuses and discipline student perpetrators, especially those who were athletes or fraternity members (Sloan & Fisher, 2011). Not only were claims-makers using constructionist tenets of domain expansion and frame extension to include sexual assault and rape between acquaintances as "real rape", they also began to identify an institution's response or lack thereof as a new social problem. This new claim would appear in the media and be addressed by the federal government in the near future.

#### History of Title IX of Education Amendments of 1972

The late 1960s and early 1970s set the stage for Title IX's beginnings, a law that has changed the course of education in many different ways (Block, 2012; Ware, 2007). The push behind Title IX came from feminists who were frustrated about prevalent discrimination occurring in educational institutions (American Association of University Professors, 2016). Often referred to as the Godmother of Title IX, Dr. Bernice "Bunny" Sandler played an integral role in Title IX's creation and passage (Ware, 2007). Dr. Sandler, a part-time lecturer in the 1960s, applied for a tenure-track position at the University of Maryland but was discouraged by a colleague when he told her she would not receive the position because she was "too strong for a woman" (Sandler, 2000). Dr.

Sandler continued applying for jobs but received, even more, rejections. Even her role as professor was discredited by an employment agency counselor, who only viewed her as a housewife who simply returned to school (Sandler, 2000).

As a result, Dr. Sandler began her research on sex discrimination and found that previous laws, such as Title VI of the Civil Rights Act of 1964 and Title VII focused solely on employment and did not apply to education (Ware, 2007). Educational institutions and their educational activities were intentionally excluded from earlier legislation, such as Title VI because higher education institutions were viewed as autonomous entities that did not require the government's involvement (American Association of University Professors, 2016). This meant that college faculty, administrators, and students were exempt from both laws. While reading a report of the U.S Commission on Civil Rights, she discovered a presidential Executive Order that prohibited federal contractors from discrimination based on race, color, religion, and national origin. The Executive Order had a footnote which stated that President Johnson amended the Executive Order on October 13, 1968, to include sex discrimination (Sandler, 2000). This was the breakthrough she needed to combat sex discrimination in education since majority of institutions received federal contracts.

In January 1970, Dr. Sandler, along with a group of women and men who supported her, filed the first lawsuits against 250 institutions. With Representative Edith Green (D-Oregon) and Representative Patsy Mink (D-Hawaii) supporting the cause, a bill requiring gender equity in education was introduced, passed by Congress, and in 1972 Title IX was signed into law by President Nixon (Ware, 2007). It declared that no person in the United States, on the basis of sex, be excluded from participation in, be denied the

benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance (20 U.S.C. § 1681; Sandler, 2000)

*Cannon v. University of Chicago (1972)* was the first case in which a court interpreted the law. In this case, a female plaintiff claimed she was not accepted into the university's medical school program because of her gender. Using Title VII as a guideline for their decisions, because of the similarities between both laws, the United States Supreme Court ruled that the history behind Title IX and language used supported a private right of action in the plaintiff's case. A decade later, a Supreme Court ruling limited Title IX to apply only to specific programs within institutions that received federal funds in *Grove City v. Bell*. This meant that the U.S Department of Education could only sanction specific programs within an institution for failing to comply with Title IX (Block, 2012). However, Congress passed The Civil Rights Restoration Act of 1987 which overturned the Supreme Court's decision and extended Title IX protections to apply to all features of an institution, not just the specific programs receiving federal aid (Block, 2012).

#### Landmark Title IX Court Cases

Although Title IX's original impetus was gender equity in educational settings, specifically the hiring and admitting women in graduate programs; the law has expanded to include claims of sexual harassment and sexual violence (Smith, 2015). To fully understand how this came to be, and the current implications for higher education institutions, a review of the landmark court cases which led to its transformation and expansion is necessary. There were several seminal court cases that contributed to Title IX's development and application to sexual violence, including *Alexander v. Yale (1980)*,

*Franklin v. Gwinnett County Public Schools (1992)*, *Gebser v. Lago Vista School District (1998)*, and *Davis v. Monroe County Board of Education (1999)*. *Franklin v. Gwinnett County Public Schools*, *Gebser v. Lago Vista School District*, and *Davis v. Monroe County Board of Education* occurred in the K-12 setting, yet because Title IX applies to every educational institution receiving federal dollars; these cases were also significant and applicable to higher education.

In *Alexander v. Yale University (1980)*, the United States District Court for the District of Connecticut upheld charges of sexual harassment under Title IX). Catherine Mackinnon, a legal scholar, and activist, is well-known for research on the experiences of women and gender equity. Her work began in the 1970s at the height of the feminist movement in the United States. Mackinnon advised a group of Yale University female students to file a lawsuit alleging that the university violated Title IX (Brodsy & Deutsch, 2015; Kingkade, 2014). Mackinnon (1979) described women's experiences in the workplace and theorized for the first time that sexual harassment was sex discrimination because women were harassed because of their gender. Plaintiffs in *Alexander v. Yale University (1980)* used Mackinnon's (1979) theory and claimed sexual harassment constituted as sex discrimination and harassment interfered with their access to educational opportunities (*Alexander v. Yale University, 1980*). This was the first non-academic and non-athletic case filed under Title IX. The case was dismissed because all the plaintiffs had graduated by the time the appeals court heard the case, yet their argument was not in vain. The court ruled that an institution's failure to remedy sexual harassment could constitute sex discrimination (*Alexander v. Yale University, 1980*). As a result, Yale University established grievance procedures for sexual harassment

complaints. *Alexander v. Yale University* (1980) had a profound impact on higher education because other institutions followed Yale's example and established grievance boards of their own (Brodsky & Deutsch, 2015; Kingkade, 2014). However, it was the Supreme Court's ruling in *Franklin v. Gwinnett*, *Gebser v. Lago Vista*, and *Davis v. Monroe County Board of Education* that changed the rules on Title IX liability for all educational institutions.

*Franklin v. Gwinnett County Public Schools* (1992) was a significant case in regard to sexual harassment in schools because the United States Supreme Court ruled students could file lawsuits to receive monetary damages under Title IX. Franklin, a female student in high school, alleged that she was sexually harassed by her coach and teacher when he engaged her in sexually explicit conversations, unwanted kissing, and coercive intercourse. Especially noteworthy were her allegations about the school's response. She claimed that school's administrators' were aware of the harassment, yet they did nothing to prevent it from occurring and discouraged her from bringing criminal charges against her teacher.

Franklin filed a lawsuit against the school's board for monetary damages under Title IX, but her claims were rejected by the federal district court in Georgia. The Supreme Court, however, reversed the ruling. It was already clear that Title IX was enforceable through a private right of action (*Cannon v. University of Chicago*, 1972), but this case determined that monetary damages were also available in a private right of action (*Franklin v. Gwinnett County Public Schools*, 1992; Kaplin & Lee, 2007).

The second United States Supreme Court ruling to address teacher-to-student harassment under Title IX was *Gebser v. Lago Vista School District* (1998). Gebser was a

female student in the Lago Vista School District in Texas who was subjected to sexually explicit comments and coercive intercourse by a male teacher. Their sexual relationship remained a secret and all of their encounters occurred off the school's grounds. At the time, Lago Vista did not have an anti-harassment policy or official grievance procedures, which was required by federal law. One day the police discovered the teacher and Gebser having sexual relations and the teacher was immediately arrested. After his arrest, he was fired and his teaching license was revoked.

Following *Franklin v. Gwinnett County Public Schools* (1992) example, the student filed a lawsuit against the school's board for monetary damages under Title IX, but unlike the previous case, she was unsuccessful. The court ruled that schools could only be held liable for private damages if the school knew about the employee's harassing behavior and then deliberately chose to ignore it. In other words, the plaintiff must first show that a school official who had the ability to remedy the situation had knowledge about the harassment. Secondly, the plaintiff must show that despite having knowledge about the harassment, the school deliberately failed to respond appropriately, thus acting in "deliberate indifference" (*Gebser v. Lago Vista School District*, 1998). This landmark case was the first to raise the bar of Title IX liability, with *Davis v. Monroe County Board of Education* (1999) following a year later (Kaplin & Lee, 2007).

The last seminal case in the development of Title IX litigation was *Davis v. Monroe County Board of Education* (1999) in which the United States Supreme Court ruled educational institutions could be held liable for peer-to-peer sexual harassment. Aurelia Davis, the mother of a fifth-grade student LaShonda, brought a claim under Title IX seeking monetary damages and injunctive relief. She made allegations against school

officials claiming they failed to respond to her daughter's subjection to sexual harassment by another student. LaShonda reported the student to her mother and teachers. Ms. Davis contacted the principal and teacher several times seeking protection for her daughter, but her requests were ignored. The case became a Supreme Court issue after the trial court and Eleventh Circuit Court of Appeals rejected the idea of board liability for peer-to-peer sexual harassment. The Supreme Court ruled schools could be subjected to private lawsuits for peer-to-peer sexual harassment if school officials had knowledge and acted with deliberate indifference to harassment that is so severe, pervasive, and objectively offensive it prevents students from accessing educational opportunities (Davis v. Monroe County Board of Education, 1999; DeMitchell, 2000; Morris, 1999).

*Alexander v. Yale University* (1980) was significant because it set the stage for today's sexual violence activism. Plaintiffs in the case were successful in defining sexual harassment and claiming it was a form of sex discrimination. Domain expansion, a tenet of social constructionism to explain social problems, illustrates this process of redefining what constitutes as a social problem by extending boundaries. Sex discrimination was already viewed as inappropriate and illegal under Title IX (20 U.S.C. § 1681), but sexual harassment, a term that many had never heard before was not. By showing that women were sexually harassed because of their gender and it negatively affected educational opportunities, the boundaries of what constituted as sex discrimination increased.

*Franklin v. Gwinnett County Public Schools, Gebser v. Lago Vista Independent School District, and Davis v. Monroe County Board of Education* were groundbreaking Supreme Court decisions which brought significant changes to education. *Franklin v. Gwinnett County Public Schools* (1992) was the case which decided that students could



recover monetary damages under Title IX. Although significant, the *Franklin* case did not determine the standard of liability for courts to determine liability for teacher-student sexual harassment, but the decision in *Gebser v. Lago Vista Independent School District* did. This decision raised the standard of liability, making it more difficult for students to recover damages. Lastly, *Davis v. Monroe County Board of Education* also raised the standard of liability because institutions could no longer overlook student-to-student sexual harassment.

As Supreme Court decisions, these rulings applied to every educational institution, including colleges and universities, receiving federal funds. The aforementioned cases illustrate how judicial interpretations evolved over time. A social constructionist perspective assumes beliefs and interpretations will change over time because they are culturally and historically specific (Berger & Luckman, 1966; Burr, 2003; Rubington & Weinberg, 2010). As an alternative to filing under Title IX in the courts, students could also file administrative complaints with the U.S. Department of Education's Office for Civil Rights.

#### U.S. Department of Education's Office for Civil Rights Title IX Guidance

Title IX is administered by the Office for Civil Rights (OCR), one of several offices within the U.S. Department of Education (Kaplin & Lee, 2007; U.S. Department of Education, 1997). The U.S. Department of Education distributes federal tax dollars to educational institutions for different educational programs. OCR is responsible for enforcing laws requiring nondiscrimination by institutions receiving federal dollars. Therefore, OCR has the legal authority to enforce and interpret Title IX (U.S. Department of Education, 2011). So, not only can HEIs end up in an expensive battle because of a

Title IX civil lawsuit, but the law also allows for the possibility of the removal of federal dollars. OCR's main headquarters is located in Washington, D.C, but there are 11 enforcement offices located in major cities across the country, such as Dallas and Philadelphia. Each office is responsible for conducting investigations, compliance reviews, and technical assistance in its specific territory. The headquarters office oversees the activities of every enforcement office and is the office responsible for publishing policies and regulatory guidance to help educational institutions, also known as recipients, understand their responsibilities under Title IX.

These documents have been relatively noncontroversial, with the exception of the 2011 Dear Colleague Letter, which OCR issued without following the customary notice and comment rulemaking process. (Nolan, 2015). These documents illustrate Title IX's evolution due to societal and political influences, which agrees with social constructionist perspectives. OCR issued several guidance documents on Title IX requirements concerning sexual harassment and sexual violence. In 1997 and 2001 OCR issued documents after landmark court rulings and because of the public's growing concern over sexual harassment in school settings. In 2011 a guidance document was published reminding recipients of obligations under Title IX. This document signified strict enforcement under the Obama Administration. Lastly in 2014 and 2015 OCR issued guidance in response to HEIs open frustration and lack of understanding of Title IX compliance concerning sexual violence cases.

#### *1997 Title IX Guidance*

Incorporating the criteria set in *Franklin v. Gwinnet County Public Schools*, OCR published their first guidance document, "Sexual Harassment Guidance: Harassment of

Students by School Employees, other Students, or Third Parties” (U.S. Department of Education, 1997). This guidance document was the result of extensive consultation with teachers, students, administrators, and researchers. It defined sexual harassment, discussed Title IX’s applicability, described when and under what conditions a school can be held liable for sexual harassment, the importance of grievance procedures, and addressed confidentiality.

Sexual harassment was defined as either quid pro quo or hostile environment harassment. Although quid pro quo and hostile environment harassment were both examples of sexual harassment, they are two distinct types. Quid pro quo harassment occurs when a school employee makes an educational decision or places conditions on a student’s participation in an educational program on the student’s willingness to sexual favors, advances, and any other physical, verbal or nonverbal sexual conduct. A hostile environment harassment involves sexually harassing behavior by an employee, student, or a third party that is so sufficiently severe, persistent, or pervasive that it limits the student’s ability to participate in educational programs or it creates an abusive environment (U.S. Department of Education, 1997).

According to the 1997 guidance, Title IX applied to all public and private educational institutions that received federal funds, including elementary, secondary and higher education institutions. The guidance document also addressed notice and liability. Institutions could be held liable under Title IX for the aforementioned sexual harassment if a reasonable employee, someone who had authority or an opportunity to address the harassment, was made aware of the harassment either through actual or constructive

notice. Constructive notice exists if the school should have known based on a reasonable inquiry (U.S. Department of Education, 1997).

OCR also discussed the importance of having grievance procedures implemented so that students could report sexual harassment to administrators. OCR provided a list of required items so that institutions could ensure their procedures were prompt and equitable, e.g. providing notice of the procedure and where complaints can be filed, designating reasonable, prompt timeframes for stages in the complaint process, and providing notice of complaint outcomes to applicable parties. According to OCR, the procedures should be readily available to students and employees, easy to understand, and impartial. Also noteworthy in this 1997 guidance document was the issue of confidentiality. OCR acknowledged that at times a complainant may request confidentiality in processing a complaint which may limit the institution's response. OCR advised institutions to discuss confidentiality standards with complainants and Title IX's prohibition on retaliation. Therefore, if a student alleging sexual harassment is fearful and hesitant due to fear of retaliation, they can be reassured that the institution will take steps to prevent such action, and will respond quickly if retaliation occurs. Even so, OCR encouraged institutions to evaluate confidentiality requests before granting a complainant's request because, under Title IX, institutions still had a responsibility to provide a safe environment for all students (U.S. Department of Education, 1997).

Not only was OCR influenced to provide Title IX guidance to institutions because of the ruling that was made five years earlier (*Franklin v. Gwinnett County Public School*, 1992), but there was a growing concern in the public over sexual harassment in educational institutions. The consensus was that Title IX had done very little for the

sexual victimization of women because the law which was meant to prohibit sex discrimination morphed into an equal opportunity in athletics law in the 1970s (Anderson et al, 2006; Heckman, 1992; Staurowsky, 2003). It was necessary for OCR to remind educational institutions that sexual harassment was a form of sex discrimination, and therefore prohibited under Title IX.

*2001 Title IX Guidance.* OCR revised the sexual harassment guidance in 2001 after the Supreme Court issued their decisions addressing sexual harassment of students under Title IX in *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education* (1999). The Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, served the same purpose of the previous 1997 guidance document. It reaffirmed the compliance standards in investigations and administrative enforcement, but it also explained the difference between an institution's Title IX responsibilities and the criteria set forth by the Supreme Court cases for private litigation for money damages (U.S. Department of Education, 2001).

Before issuing the 2001 revision, the Secretary of Education informed school superintendents and college and university presidents that the Supreme Court's decision in *Gebser v. Lago Vista Independent School District* did not change a recipient's (school/college/university) responsibilities to take reasonable steps to prevent and eliminate sexually harassing behavior. Unlike the ruling in *Gebser* (1998) and *Davis* (1999) cases, recipients did not need "actual notice" of a sexual harassment. OCR explained that recipients were still responsible in cases where "constructive notice" was present. OCR also decided that because of the recent Supreme Court decisions, further

clarification of Title IX responsibilities was necessary. On November 2000, OCR published the proposed revised 2001 guidance in the Federal Register, requesting comments from the public following the customary notice and comment rulemaking process. Eleven commenters responded to the notice offering suggestions regarding how the revised guidance could be clarified (U.S. Department of Education, 2001). OCR received and incorporated their suggestions in the final published version on January 19, 2001 (U.S. Department of Education).

In the 2001 revision guidance, sexual harassment was no longer defined in terms of quid pro quo and hostile environment harassment. Instead, sexual harassment was defined as any unwelcome conduct of a sexual nature that limited or denied a student's opportunity to participate in educational programs or activities and created a hostile environment (U.S. Department of Education, 2001). The revision document outlined how OCR determined if a hostile environment was present by evaluating different factors. These included, assessing the effect of the harassment on the student; the type, frequency, and duration of the conduct; the number of individuals involved; the age and sex of the harasser and the individual being harassed; school location and size and context in which the conduct occurred; and other incidents at the school. Another notable difference between the 1997 guidance and the revision in 2001 was the section on notice. The revision reiterated that a recipient would have violated Title IX if the school had "notice" of a sexually hostile environment and failed to take "immediate and effective action". However, the previous 1997 guidance used different language, stating that recipients violate Title IX if they had notice and failed to take immediate and "appropriate" action. The revised document also defined in greater detail who constitutes as a responsible

employee. According to Office for Civil Rights (2001), a responsible employee was not only an employee who had the authority to respond and the duty to report to school officials' sexual harassment and other forms of misconduct, but it was also an employee who a student could reasonably believe had such authority and responsibility.

### *2011 Dear Colleague Letter*

On April 4, 2011, OCR published the 19-page Dear Colleague Letter (DCL) to remind educational institutions of their Title IX responsibilities regarding sexual harassment. The document mirrored earlier guidance in many ways, but there were also several changes. Similar to the revised guidance document issued in 2001, OCR reminded institutions that publishing a notice of non-discrimination, using appropriate grievance procedures, and having a Title IX Coordinator were requirements that served as preventive measures against harassment (U.S. Department of Education, 2011). For the first time, OCR used the term sexual violence and clarified that sexual violence, which included sexual assault, sexual battery, sexual coercion, and rape was a form of sexual harassment, and therefore prohibited under Title IX (U.S. Department of Education, 2011).

The language OCR used in the 2011 Dear Colleague letter was particularly different. It was more specific and more authoritative than previous guidance on Title IX requirements. Not only was there a shift to focus on sexual violence and clarify that it was a form of sex discrimination, but the letter also addressed institutional response. The letter began with OCR sharing how “deeply concerned” (U.S. Department of Education, 2011, p. 2) they were about sexual violence and the statistics on victimization for students in schools and higher education institutions. The letter served as a supplement to the 2001

guidance by providing additional guidance and information regarding recipients' responsibilities under Title IX when responding to complaints of sexual harassment and sexual violence.

One of the Title IX requirements that sparked controversy surrounded the implementation of grievance procedures. According to the Dear Colleague Letter, recipients were required to use the preponderance of the evidence standard, i.e. more likely than not standard, as their standard of proof to comply with Title IX. This presented challenges since some colleges and universities were using the clear and convincing standard, or beyond a reasonable doubt which is a much higher standard used in criminal proceedings (Grasgreen, 2012; Henrick, 2013). However, according to OCR, the standard of proof established for civil rights laws was the preponderance of the evidence standard, and therefore most appropriate for investigating allegations of sexual harassment or sexual violence, which are forms of sex discrimination (U.S. Department of Education, 2011). The letter also stated that any case involving an allegation of sexual assault must be investigated through a formal process, because mediation, even on a voluntary basis, was not appropriate for such serious allegations.

Similar to previous guidance, OCR addressed the need for widespread Title IX training for individuals who receive sexual violence complaints, e.g. coordinators, investigators, and law enforcement. But unlike previous guidance, the 2011 Dear Colleague Letter broadened training recommendations to include any employee or student who is likely to observe or receive a report of harassment or violence (U.S. Department of Education, 2011). Within the document, OCR clarified that Title IX grievance procedures apply to all students, including student-athletes (U.S. Department



of Education, 2011). The majority of the sexual assault complaints that were filed in the courts and appeared in the media involved student-athletes (J.K. v. Arizona Board of Regents, 2008; McCray, 2014). OCR expressed clearly that these cases should not be addressed solely by athletic department procedures and must be investigated and adjudicated within the institution's Title IX proceedings.

This call to action against sexual violence was encouraged by a group of survivors and their advocates who went public with their disappointment about their colleges' and universities' lack of response after they reported being sexually assaulted (Sloan & Fisher, 2011). However, it was the Obama administration's efforts that transformed Title IX compliance surrounding sexual violence. For more than 20 years, Vice President Joe Biden had a political and social interest in ending violence against women (U.S. Department of Education, 2011). In his role as senator he introduced the Violence Against Women Act (VAWA) to Congress; legislation that changed how the country responded to domestic violence and sexual assault (Conyers, 2007). VAWA established new federal crimes of interstate domestic violence and stalking, doubled penalties for repeat sex offenders, and spurred the passage of state laws geared towards protecting victims (Conyers, 2007). The Obama administration was alarmed at the high rates of dating violence and sexual assault against high school and college students. They launched several campaigns to increase the public's awareness and prevent sexual assault occurring on college and university campuses (Bidwell, 2014; Eilperin, 2016; Somander, 2014). The 1is2many campaign was launched in September 2011, just five months after OCR published the 2011 Dear Colleague Letter. In 2014, President Obama and Vice President Biden created the White House Task Force to Protect Students from Sexual

Assault and launched the It's On Us campaign designed to change campus culture and engage men in bystander efforts (Somander, 2014). All of the aforementioned efforts and developments led to OCR's strict enforcement of Title IX, as outlined in the 2011 Dear Colleague letter to support the Obama's Administration crackdown on sexual violence in education (Grasgreen, 2011, 2012).

Recent developments in the court system also played a significant role in the 2011 DCL. There was an increase in sexual violence litigation in the beginning of the twenty-first century (Pulley, 2005; United Educators, 2009). Rulings in *Simpson v. University of Colorado* (2006) and *Williams v. Board of Regents of the University System of Georgia* (2007), and *J.K v. Arizona Board of Regents* (2008) broadened Gebser's (1998) definition of "actual notice". As a result, institutions could be held liable for a Title IX violation if administrators "should have known" of sexual harassment or assault, even if "actual notice" was not given. These significant cases illustrate Title IX's continuous evolution and its application to college sexual assault, highlighting contextual differences that were not observed in the *Franklin*, *Gebser*, or *Davis* court cases, such as sexual assault occurring within athletics.

#### Legal and Social Influences Behind the 2011 Dear Colleague Letter

In the case of *Simpson v. University of Colorado* (2006), Lisa Simpson and Anne Gilmore filed a lawsuit under Title IX against the University of Colorado after they were sexually assaulted by football players and recruits for the football team. Simpson asserted that the university was aware of the sexual assaults that occurred during the campus visits by football recruits. There was an unofficial policy that players would show the football recruits a "good time" during their campus visits, which usually entailed sex and alcohol.

Simpson and Gilmore became intoxicated one night and made allegations that while intoxicated, several football players and recruits sexually assaulted them. The United States Court of Appeals for the 10<sup>th</sup> Circuit found sufficient evidence to suggest the University of Colorado acted with deliberate indifference since they were made aware of the unofficial policy of showing recruits a “good time” and possible risks. This ruling increased the standard of institutional Title IX liability since institutions could now be held liable if they “should have known” sexual assault could have occurred or if they had reason to believe it could occur (Simpson v. University of Colorado, 2006).

The next year the United States Court of Appeals for the 11<sup>th</sup> Circuit ruled in *Williams v. Board of Regents of the University System of Georgia* (2007) confirmed the “should have known” liability standard. Tiffany Williams, a student at the University of Georgia, engaged in consensual sex with Tony Cole, a basketball player at the university, but was sexually assaulted by two of his friends shortly after (*Williams v. Board of Regents of the University System of Georgia*, 2007). Tiffany filed a complaint against all 3 student athletes which resulted in them being suspended from their teams (basketball and football) for two weeks. Tiffany withdrew from the university and filed a Title IX lawsuit against the university, the Board of Regents, and the University of Georgia Athletic Association. In her lawsuit, Tiffany claimed the university and basketball coach recruited and admitted Cole to the University of Georgia despite prior knowledge of Cole’s history of sexual misconduct at the Community College of Rhode Island and Wabash Community College where he previously attended (Walker, 2009). Cole was admitted to the University of Georgia through a special admission program, despite his dismissal from the community colleges for unwanted touching and sexual harassment.

The court ruled in Tiffany William's favor stating the university was liable under Title IX because they "should have known" Cole posed a risk to the campus community (Walker, 2009; *Williams v. Board of Regents of the University System of Georgia*, 2007).

Similar to *Williams v. Board of Regents of the University System of Georgia, J.K vs. Arizona Board of Regents* (2008) was another turning point for HEIs regarding Title IX liability. In 2004 an Arizona State University football player, Darnell Henderson, raped a freshman student, J.K, while she slept in her room on campus. The university was held liable under Title IX because the football player had previously been expelled from the university's summer program for sexually harassing multiple women. Yet, at the athletic department's request, Henderson was readmitted for the fall semester. The university provided no sexual harassment training nor did they monitor Henderson's behavior. Henderson was permanently expelled two months after raping J.K, yet J.K asserted the university's deliberate indifference to Henderson's pervasive sexual harassment because of his student-athlete status, led to her rape. The United States District Court for the District of Arizona ruled Arizona State University had "actual knowledge" of the harassment because they were aware of previous sexually harassing behavior. The university awarded J.K \$850,000 in damages and fees and appointed their first Student Safety Coordinator to reform reporting and investigation policies of sexual violence incidents (*J.K. v. Arizona Board of Regents*, 2008).

*Simpson v. University of Colorado* (2006), *Williams v. Board of Regents of the University System of Georgia* (2007), and *J.K. v. Arizona Board of Regents* (2008) were three significant higher education cases that broadened *Gebser v. Lago Vista Independent School District's* (1998) definition of "actual notice" which in turn increased Title IX

liability. All three cases included student-athlete assailants who received special privileges due to their student-athlete status. These rulings explain why OCR's 2011 Dear Colleague Letter chose to clarify Title IX's applicability to all students, including student-athletes (U.S. Department of Education, 2011). OCR's 2011 Dear Colleague Letter required that schools take immediate and effective steps to end sexual violence in order to protect students' civil rights and use a preponderance of the evidence standard in adjudicating sexual assault because a "clear and convincing" standard were not fair and impartial under Title IX (U.S. Department of Education, 2011). The language and requirements in the 2011 Dear Colleague Letter confused many college and university administrators and OCR received an increase in requests for technical assistance. As a result, OCR chose to publish additional clarification on Title IX requirements to assist recipients.

#### *2014 Questions and Answers on Title IX and Sexual Violence*

On April 29, 2014 OCR issued another significant guidance document entitled "Questions and Answers on Title IX and Sexual Violence", on the same day the White House Task Force to Protect Students from Sexual Assault released the "Not Alone Report" which provided recommendations to assist schools in protecting students from sexual violence (Not Alone Report, 2014). OCR issued this Q&A document on Title IX and sexual violence due to the requests for assistance in clarifying institutions' obligations concerning sexual violence under Title IX after the 2011 Dear Colleague Letter was published. OCR determined that providing additional guidance on Title IX obligations in the form of a published document would be beneficial. OCR advised institutions to use the 45-page Q&A document in conjunction with the 2001 Guidance

and 2011 Dear Colleague Letter to fully understand OCR's recommendations and their legal obligations concerning Title IX and sexual violence (U.S. Department of Education, 2014). In the document, OCR provided questions and answers on 14 different areas. These topics included: a school's obligation to respond to sexual violence, students protected by Title IX, Title IX procedural requirements, responsible employees and reporting, confidentiality and a school's obligation to respond to sexual violence, investigations and hearings, interim measures, remedies and notice of outcome, appeals, Title IX training, education and prevention, retaliation, first amendment rights, The Clery Act and Violence Against Women Reauthorization Act of 2013, and further federal guidance (U.S. Department of Education, 2014).

OCR's 2014 Q&A document was issued to provide further clarification about Title IX requirements outlined in the 2011 Dear Colleague Letter. The letter included clarification regarding a Title IX Coordinator's role, but the information pertaining to this role was limited to one section. A year later, OCR released another Dear Colleague Letter expanding upon earlier clarifications and reminding institutions of their obligation under Title IX to designate one individual to fulfill the role of Title IX Coordinator.

*2015 Dear Colleague Letter.* OCR published the 2015 Dear Colleague Letter which incorporated existing OCR guidance on Title IX Coordinators and provided additional clarification and guidance concerning their responsibilities. OCR began to learn through their investigations that many Title IX violations they observed could have been avoided. According to OCR, an effective Title IX Coordinator was necessary if recipients wanted to achieve compliance (U.S. Department of Education, 2015). The department informed recipients that an effective Title IX Coordinator must have their

institution's full support to carry out their Title IX responsibilities (U.S. Department of Education, 2015). It was made clear that college and university administrators who interfere with a Title IX Coordinator's efforts to implement and comply with the law would be in violation of the law's anti-retaliation policy.

As outlined in the 2015 Dear Colleague Letter, the Title IX Coordinator should report directly to the college or university president and serve in an independent role to avoid any conflicts of interest. OCR did not require recipients to hire a full-time Title IX Coordinator, but they suggested that designating a full-time Title IX Coordinator would minimize the risk of conflicts of interests and ensure that the individual fulfilling this role could devote the time required. OCR also recommended designating multiple Coordinators to assist the Title IX Coordinator, particularly at larger colleges and universities. However, there should only be one individual whose primary responsibility addressed coordinating recipients' responses to all complaints of sex discrimination, including monitoring outcomes, identifying patterns, and assessing the effects on campus climate (U.S. Department of Education, 2015). Title IX Coordinators were not required to be responsible for determining the outcomes of Title IX complaints, nor were they prohibited from holding this responsibility (U.S. Department of Education, 2015). Their only requirement was ensuring the process was prompt, equitable, thorough, and that employees investigating and adjudicating complaints were adequately trained in sexual violence, Title IX, and the recipient's grievance procedures (U.S. Department of Education, 2011; U.S. Department of Education, 2014). Lastly, to ensure grievance procedures comply with Title IX, OCR recommended that Title IX Coordinators be

involved in developing the recipient's sexual harassment and discrimination policies (U.S. Department of Education, 2015).

The 2015 Dear Colleague Letter was written to remind recipients of their obligation under Title IX to designate and fully support their Title IX, coordinators. This was the first guidance document published by OCR that focused solely on describing and clarifying the Title IX Coordinator's role and a recipient's responsibility to ensure that their coordinator has the knowledge, training, and authority to be effective and efficient in their work.

#### Responses to OCR's 2011 Dear Colleague Letter

Many institutions have expressed their frustrations with OCR, specifically the 2011 Dear Colleague Letter, claiming the letter is vague and lacks specificity (New, 2016). Even US Senator James Lankford accused the department of overstepping its bounds by pressuring institutions to fight sexual violence and expanding Title IX compliance requirements (Schmidt, 2016). College and university administrators point to the language OCR uses in discussing Title IX compliance in campus sexual violence cases. They report difficulties in fully understanding what OCR requires as they attempt to differentiate aspects of Title IX which are required regulations and other aspects which are solely suggestions (New, 2016; New, 2016).

OCR also received criticism from individuals who were concerned about freedom of speech and due process for those accused (American Association of University Professors, 2011; Henrick, 2013). The Foundation for Individual Rights in Education (FIRE) embarked on a legal fight against OCR after the 2011 Dear Colleague Letter was issued. FIRE expressed concern over the "preponderance of the evidence standard" for



allegations as serious as sexual assault, especially rape. Both the American Association of University Professors and the Foundation for Individual Rights in Education expressed grave concern over OCR's lack of guidance on free speech. They claimed the DCL did not clearly acknowledge students' free speech rights, unlike OCR's previous guidance (American Association of University Professors, 2016; Creely, 2012). Many believe administrators are frustrated because the 2011 Dear Colleague letter is a document meant to clarify OCR's interpretation of Title IX. However, determining how OCR defines compliance presents challenges when the DCL is not specific regarding Title IX investigations and adjudication processes (Napolitano, 2014; New, 2016). Others argue that the letter is not interpretive at all; instead it alters the legal landscape in central ways (Schmidt, 2016).

Despite the criticisms, OCR defended the 2011 Dear Colleague Letter. According to the Assistant Secretary, Catherine Lhamon, the 2011 DCL is only a guidance document and does not carry the force of the law. The letter was published to assist and advise recipients and the public of the U.S. Department of Education's conceptualization of existing regulations (U.S. Department of Education, 2011). The department also defended the use of the preponderance of the evidence standard because, as a form of sex discrimination, which is a civil rights issue, sexual violence incidents occurring on college and university campuses required that standard of proof during investigations (U.S. Department of Education, 2016).

Shortly after releasing the 2014 Q&A document, on May 1, 2014, OCR released a list of 55 higher education institutions under investigation for possible violations of Title IX over the handling of sexual violence and sexual harassment complaints (U.S.

Department of Education, 2014). The list included high-profile institutions such as Harvard University, Vanderbilt University, and Emory University, to name a few. This was the first time the department made the list of institutions under investigation public (U.S. Department of Education, 2014). According to OCR's Assistant Secretary for Civil Rights, the list was released to advance the President's White House Task Force's goal to bring more transparency to the department's activities and to encourage dialogue about sexual violence on college and university campuses (U.S. Department of Education, 2014). Since OCR's initial release, the number of HEIs under Title IX investigation has increased with some institutions having multiple cases. OCR has resolved 55 investigations and there are currently 281 open investigations remaining ("The Chronicle of Higher Education", 2016). Of those 55 resolved cases, 30 cases resulted in Title IX violation determinations ("Chronicle of Higher Education", 2016).

Thousands of college students across the nation have engaged in protests to call attention to the way their institutions responded to sexual misconduct. A Columbia University student, Emma Sulkowicz, carried a mattress around the university's campus for one year, including on her graduation day, to protest the university's handling of her case. Her protest became a visible symbol of activism in the movement to hold perpetrators and HEIs responsible in these cases (Thomason, 2014; Whitley & Page, 2015). Even a film, "The Hunting Ground" addressed the "college sexual assault epidemic" and HEIs failure to appropriately respond and silence student victims (Dick & Ziering, 2016). The Know Your IX organization which was created to educate students about Title IX rights and assist them with Title IX complaints against HEIs was co-founded by activists after they were sexually assaulted as college students (Kingkade,

2015). The protests, documentary films, and the federal government's increased Title IX enforcement have all contributed to categorizing HEIs mishandling of sexual assault allegations as a social problem. Although Title IX investigations are not new, for example, OCR investigated 9 HEIs in 2009 (U.S. Department of Education, 2009), the social construction of Title IX noncompliance as a national and social problem is new, and as a result OCR has received an increase in Title IX complaints and number of HEIs in noncompliance. In fiscal year 2015, OCR received over 2000 Title IX-related complaints (U.S. Department of Education, 2015).

Recent rulings in the *Simpson v. University of Colorado* (2006), *Williams v. Board of Regents of the University System of Georgia* (2007), *J.K v. Arizona Board of Regents* (2008), as well as recent guidance provided in OCR's 2014 Q&A and the 2015 DCL illustrates the evolution of Title IX as a means to combat sexual violence, including sexual assault. Title IX has evolved from solely a gender equity law in graduate admission and employment, into a law requiring HEIs to prevent and respond to sexual assault on their campuses. Using social constructionist tenets of linking, domain expansion, and frame extension, sexual harassment, and sexual assault became a social problem and a form of sex discrimination, thus becoming prohibited behaviors under Title IX. The increase in complaints and a federal government who accepted claim-makers' ideologies regarding HEIs mishandling of sexual assault allegations, resulted in an increase in Title IX investigations. However, OCR's decision to publicly release the names of HEIs under Title IX investigation was significant as it made the general public more aware, thus increasing the conversation and media coverage on Title IX sexual violence violations. Social constructionism theory suggests that problems are not

immediately obvious and must be presented and interpreted by an authority with power or influence. OCR has enforcing authority over Title IX and has the power to withhold federal funds from HEIs in noncompliance, therefore according to social constructionism HEIs mishandling of sexual assault allegations is more likely to become and remain a social problem if OCR presents and interprets it as a social problem.

### Summary

How HEIs responded to sexual harassment and sexual assault allegations became one of the most talked about social problems when it consistently appeared in the media and became a federal issue due to claims-makers' and survivors' protests and claims of indifference by HEIs (New, 2016; Whitley & Page, 2015). The way society defines sexual assault is historically and culturally specific, as evidenced by the differences in definitions and what behaviors constitute as sexual assault throughout the years (Muehlenhard & Kimes, 1999). Social, political, and legal influences have all contributed in creating the social construction of sexual misconduct and Title IX compliance in sex discrimination cases. As enforcers of Title IX, OCR publishes guidance documents to assist institutions in Title IX compliance, however these letters are written based on OCR's construction of Title IX and sex discrimination in educational institutions and do not consider context, i.e. dynamics of sexual assault and institutional culture on college and university campuses which usually differs from secondary settings.

HEIs rely on OCR's guidance documents, especially the most recent guidance provided in the 2011 Dear Colleague Letter, for assistance with Title IX implementation and compliance. Yet, it is a document a majority of institutions are struggling to interpret (New, 2016; Schmidt, 2016), which could be a contributing factor to the increase in Title

IX violations, since an individual's interpretation of a problem will dictate how they respond according to constructionist theories (Burr, 2005). This was why researching Title IX noncompliance concerning how HEIs handle complaints of sexual misconduct is necessary.

Social constructionism offers a way to define, understand, and study social problems (Best, 1999; Burr, 2015). In this study, social constructionism theory offered a new way of thinking about Title IX noncompliance where the reality of noncompliance is conceptual, as it is the product of context and social interaction. A social constructionist perspective also acknowledges the importance of context and language. Without considering context, it is impossible to fully grasp one's understanding (Burr, 2015; Gergen, 2011). This is why examining Title IX noncompliance concerning sexual assault through this lens is appropriate because there are contextual factors involved in these cases. Therefore, this study which focuses on OCR's construction of Title IX noncompliance in sexual misconduct cases used social constructionism theory as its framework.

## CHAPTER III - METHODOLOGY

This study specifically examined OCR's construction of Title IX noncompliance concerning how HEIs handle reports of sexual harassment and sexual assault on campus. This can be accomplished by analyzing OCR's investigative findings letters that are sent to HEIs after OCR completes a Title IX investigation. This chapter describes the research methodology used in this study. Following a brief statement of the purpose and research questions, I provide a detailed description of data collection, analysis methods, and establishing trustworthiness.

### Purpose Overview and Research Questions

The purpose of this study was to gain a deeper understanding about Title IX noncompliance concerning how HEIs address sexual misconduct. The researcher used a social constructionist approach to analyze content in OCR's letters of findings. Social constructionism offers a way to define, understand, and study Title IX noncompliance. It is a sociological theory that states that people construct understandings and social issues through their experiences and social interactions (Burr, 2005). This theory is not geared towards explaining sexual misconduct or organizational compliance. Rather, social constructionism is concerned about knowledge or reality construction. This study employs a social constructionist approach to thematic analysis where OCR's Letters of Findings (LOFs) are analyzed for themes to discover what constitutes as Title IX noncompliance. The specific research questions that were addressed in the study are:

1. What discernable trends are identified in OCR's published LOFs since the issuing of the 2011 Dear Colleague Letter (DCL)?

2. How does OCR respond to HEIs regarding how sexual misconduct complaints are handled under Title IX?
3. How does the information found in letters of findings (LOFs) between April 2011 and September 2016 overlap with or add to previous guidance documents provided by OCR?

## Research Design

### *Data Collection Procedures*

Document analysis, a qualitative research method, was used as the primary method of data collection. Although document analysis is often used as a means of triangulation and complementary to other collection methods, it can also be used as a stand-alone method (Bowen, 2009). This is common when document analysis is the most realistic and appropriate approach, such as in historical research, legal research, or hermeneutic inquiry (Merriam, 2009). Since this study's focus was geared toward understanding the construction of Title IX noncompliance, then documents discussing OCR's interpretation of Title IX violations were the most reliable data source. Therefore, OCR's LOFs (investigative finding reports), issued after the 2011 DCL, were used as the main data source.

LOFs were collected via the Freedom of Information Act (FOIA), a federal act which allows the public to access federal agency records (U.S. Department of Education, 2016). However, due to the increased attention on Title IX violations, many LOFs were accessible on the U.S. Department of Education's website. This study did not require approval from The University of Southern Mississippi's Institutional Review Board since no human participants were interviewed. After receiving approval by the Department of

Educational and Research Administration's department chair (see Appendix B), data analysis began. As of September 2016, OCR has resolved 55 cases for Title IX violations which resulted in 30 LOFs. This study received permission and a fee waiver from OCR to use the aforementioned LOFs for research purposes (see Appendix B). A list of the LOFs used in this study is included (see Appendix C).

*Data Set.* The letters of findings originated from OCR's enforcement offices for the specific purpose of describing Title IX investigations and their findings. By employing thematic analysis, these LOFs were thematically analyzed to identify themes addressing OCR's construction of Title IX noncompliance. This method of data analysis, including the origin of OCR's letters of findings, is described in more detail in the following paragraphs.

Before conducting an investigation, OCR evaluates all incoming complaints to determine if they have legal authority to investigate the complaint. OCR will dismiss a complaint if the same allegations were filed against a recipient in the courts or another federal, state or civil rights agency. If OCR determines the complaint will be investigated, written notification is sent to the complainant and recipient informing them of OCR's decision to investigate. OCR begins the investigation process by collecting and analyzing relevant evidence from the complainant and recipient through various methods, including interviews, a review of documents and policies, and on-site visits. Following an investigation, OCR determines one of two conclusions. OCR either concludes there is insufficient evidence to support a finding that the recipient failed to comply with Title IX, or the preponderance of the evidence supports a finding that the recipient failed to



comply with the law. OCR provides a detailed explanation of their findings to recipients in a LOF.

In addition to investigating incoming complaints, OCR is also required to initiate compliance reviews periodically to assess recipients' practices to determine whether they comply with regulations (U.S. Department of Education, 2015). In a compliance review, OCR conducts an investigation based on statistical data, news reports, and information from different advocacy groups or organizations not based on an incoming complaint. Compliance reviews are meant to be a general investigation of Title IX compliance, instead of investigating a specific incident (Kingkade, 2014). Thus, a LOF is always completed when OCR closes a Title IX investigation or a compliance review.

As explained in Chapter II, OCR made a significant move when the 2011 DCL was issued (Grasgreen, 2011). The 2011 DCL was meant to assist recipients as they carried out Title IX requirements. Yet it left many HEI administrators frustrated and confused about Title IX responsibilities and compliance (New, 2016). For this reason, only those LOFs sent to HEIs after April 2011 were selected for data analysis because those Title IX investigations were conducted using a stricter standard as a result of the 2011 DCL.

OCR's LOFs differ in length; however, the majority are between 20-40 pages. Qualitative data analysis methods, unlike quantitative methods, rely on a relatively small number of participants and fewer text documents, due to the fact that analysis is very labor-intensive and large amounts of data would be prohibitive for extensive thematic analysis and interpretation (Bowen, 2009). For this reason, the focus in document

analysis is quality, rather than quantity. Therefore, the LOFs issued between April 2011 and October 2016 qualifies as sufficient.

### Document Analysis

Before analyzing OCR's LOFs, I engaged in a detailed planning process. In qualitative research, the researcher is the instrument (Merriam, 1998; Merriam & Tisdell, 2015) so acknowledging biases and being aware of preconceived ideas prior to data analysis is necessary in order to ensure trustworthy results. I noted assumptions, biases, and reactions prior to analysis and continued doing so throughout the research process (O'Leary, 2004).

### *Positionality Statement*

Positionality describes a researcher's worldview and the position they have accepted within their research study (Savin-Baden & Major, 2013). The researcher's worldview concerns ontological, epistemological, and human nature assumptions. These assumptions are influenced by an individual's background and beliefs such as political affiliation, race, gender, and religion and by one's life history and experiences. Therefore, positionality requires that I acknowledge and locate my views and experiences in relation to the research study and processes involved. This disclosure also termed as "reflexivity", requires ongoing self-assessment about my assumptions and experiences and how my position may influence data analysis and interpretation.

Although I was never raped in college, I was assaulted by someone I trusted a few months before enrolling in college. This was not a Title IX issue, since I was not a college student, and was never reported. However, as demonstrated in Chapter II, acquaintance rape is most common among college students. Therefore, I was aware that it

was possible that some LOFs may disclose stories based on their investigations that were similar to my own experience with acquaintance assault. Also, during my first few weeks in graduate school, I experienced an instance of sexual exploitation by an unknown assailant. Furthermore, I am currently employed in the Title IX Office at my university as a graduate assistant. In my role, I engage in outreach and consultations with the campus community increasing awareness of Title IX resources and the resolution process.

While my knowledge and experiences provided insight into this topic, I was also aware that I was not a neutral researcher and was aware of potential problems this could have created. Therefore, it was necessary to discuss how I planned to keep any potential biases under control. Engaging in reflexivity by sharing aspects of my life and seeking to understand its influence on the research was a crucial first step. Therefore, I journaled throughout the research process and noted my personal reactions and assumptions as I became aware. Secondly, I used peer check or debrief with my dissertation chair and methodologist at least once a week to share my progress. Lastly, my methodologist will review my analyses to ensure that codes, themes, and overall findings make sense (Merriam, 1998; Merriam & Tisdell, 2015).

In addition, I explored and assessed other aspects of the data set; for example, exploring the style, tone, type, and purpose of the LOFs. O’Leary (2004) summed up the processes that occur before content analysis: gathering relevant text documents, developing an organization/management scheme, copying data originals for annotation purposes, assessing documents for authenticity, exploring documents agendas and

background information, asking questions about documents, and lastly exploring content. I completed these eight steps prior to exploring and analyzing the content in the LOFs.

As a qualitative research method, document analysis considers the original purpose of documents (Bowen, 2009; O’Leary, 2014). In other words, it considers the very reason it was produced and the audience the documents were intended for. This is why including information about the author, audience, and other original sources of information is important and helpful for future content analysis. When done correctly, document analysis can produce knowledge and further understanding on specific issues.

### Data Analysis

The approaches used to analyze qualitative data vary, but every procedure’s purpose assists researchers in understanding and interpreting collected data (Caudle, 2004; Miles, 1985; Merriam, 1998). One approach used is qualitative content analysis or QCA. Unlike content analysis, which provides a quantitative description of written, spoken or visual communication (Neundorf, 2017), QCA describes the meaning of qualitative material (Hsieh & Shannon, 2005). QCA takes into account context, manifest and latent content, and even considers what is absent from text in its approach (Schreier, 2012). For these reasons, qualitative content analysis is one of the most prevalent approaches in analyzing documents (Bryman, 2015; Vaismoradi, Turunen, & Bondas, 2013). This study used thematic analysis, a particular type of qualitative content analysis, that focuses on themes mentioned in textual data (Schreier, 2012; Vaismoradi, Turunen, & Bondas, 2013).

Thematic analysis identifies, analyzes, and reports themes within data sets in rich detail (Braun & Clarke, 2006). OCR’s letters of findings were analyzed using this method

in their socio-cultural context to gain a deeper understanding about OCR's construction of Title IX noncompliance concerning HEIs handling of sexual assault cases. Thematic analysis involves six phases: familiarization with data; generation of initial codes; searching for themes among codes; reviewing themes; defining and naming themes; and producing the final report (Braun & Clarke, 2006). These phases and social constructionism's role in analyzing the data will be described in the following section.

#### *Phases of Thematic Analysis*

During the first phase, I became familiar with the overall content in the data. This involved reading the material repeatedly and searching for meanings and patterns. I read through OCR's LOFs multiple times to become familiar with all aspects of the data prior to coding. This first phase provides the foundation for the remaining phases, so, becoming immersed in the data and making a note of any initial ideas about what the data says was helpful for the remainder of the process (Braun & Clarke, 2006).

Phase 2 involved generating initial codes from the data. The coding phase differs from the generating themes phase, which tends to be more broad (Schreier, 2012). Coding can be done manually by writing notes, using highlighters to indicate patterns or via software systems, such as NVivo. NVivo is a qualitative data analysis computer software system. Unlike statistical software, NVivo does not analyze data. Instead, it supports qualitative researchers in the analysis process. NVivo helps by improving the accuracy and speed of the data analysis process (Zamawe, 2015). During this phase, it is important to code for as many themes as possible while ensuring that surrounding data, if relevant, is not lost during coding. Following this, the dataset was organized relevant to each code (Braun & Clarke, 2006).

Phase 3 involved searching for themes. After coding and collating data I identified a list of codes across the data set. The codes were then sorted into potential themes, which were more broad and less specific than codes. Themes capture something important in the data related to the research questions, representing levels of patterned responses within the data set (Braun & Clarke, 2006; Schreier, 2012). Using a visual display, such as a thematic map, the codes generated in phase two were analyzed to form overarching themes and subthemes. These themes were considered candidate themes because after revising some were combined and discarded. Yet, completing this phase was instrumental as it allowed me to make sense of the significance of individual themes (Braun & Clarke, 2006).

Phase 4 involved two levels of reviewing and refining candidate themes. Some candidate themes can be discarded if there is not enough data to support it as a theme, while other themes may be combined to form one theme due to major similarities. At level one, I read the coded extracts for each theme to search for a clear pattern. If a clear pattern was absent, I first considered if the initial theme was problematic or if the data extracts were coded incorrectly. If they were coded incorrectly then it required reworking themes or discarding data extracts from analysis. Once a clear pattern was present, I considered the validity of individual themes in relation to the entire data set and whether the identified thematic map accurately reflected the meanings evident in the data set overall (Braun & Clarke, 2006).

Phase 5 involved defining and refining themes. Once a thematic map of the data was obtained by engaging in the first four phases, I was able to define and refine themes by identifying the essence of themes and their relationship to each other. In other words, I

conducted a detailed analysis which involved identifying the story behind each theme and any subthemes within the data set. By the end of this phase, I was able to clearly define themes, thus providing names that immediately give readers a sense of what the theme entails (Braun & Clarke, 2006).

Finally, phase 6 entailed a final analysis and writing a report. The final write-up should include examples of data extracts to demonstrate relevance for themes and relate the analysis back to the study's research questions (Braun & Clarke, 2006). The report included data extracts and provided a logical, coherent, and vivid account of the story within the data as evidenced by themes. The data extracts selected will demonstrate the prevalence, thus providing evidence of each theme. When thematic analysis is done correctly, the final report not only describes the data within and across themes, it will also make an argument in relation to the research question (Braun & Clarke, 2006).

*Social Constructionism and Thematic Analysis.* A social constructionist perspective states that meanings and experiences are products of social interactions and conditions (Burr, 2015). Therefore, thematic analysis conducted within a social constructionist framework does not focus on individual psychologies, instead, it addresses the socio-cultural conditions and contexts that enable phenomena to exist. OCR's letters of findings were thematically analyzed within social contexts to gain an understanding of OCR's interpretation of noncompliance and what constituted as a compliant response in sexual harassment and sexual assault cases. As discussed in Chapter II, significant social, political, and legal influences contributed in defining college sexual misconduct and HEIs mishandling of these cases as a social problem. These influences, which include shifts in government administration, prominent court

cases, and social movements will be central in organizing codes, identifying trends and themes of Title IX noncompliance.

### Trustworthiness

In document analysis or any type of qualitative research establishing trustworthiness is important. It ensures the study's credibility and dependability (Merriam, 1998; Merriam & Tisdell, 2015). Credibility is one of the most important factors in improving trustworthiness since it ensures that the study examines what it was intended to study. This can be done by triangulation, corroborating the study's findings using other types of sources of evidence (Merriam, 1998). For example, a researcher may observe participants in a natural setting to corroborate findings gathered from interviews. In this instance, the researcher uses a different method, naturalistic observation.

However, similar to the use of a variety of methods to triangulate data, one can use a range of different sources to establish trustworthiness in document analysis (Bowen, 2009). Therefore, to corroborate findings gathered from OCR's letters of findings, I used more than one source to collect data on OCR's construction of Title IX noncompliance. Sources such as resolution agreements, documents outlining recipients' agreement to remedy the effects of Title IX violations; university sexual misconduct policies, and the 2011 Dear Colleague Letter will be used to assure credibility and capture different aspects of noncompliance.

Trustworthiness is also established in the preparation phase when the researcher designs the study and selects a method (Bowen, 2009; Merriam & Tisdell, 2015). The research questions in this study specifically addresses OCR's construction of Title IX noncompliance concerning how sexual harassment and sexual assault cases are handled



by HEI administrators, thus making OCR's letters of findings which are issued after a Title IX investigation or compliance review occurs, the most appropriate data set with minimal threats to trustworthiness.

Dependability is a key factor as it assures reliability, that is, similar results can be obtained if the study was repeated (Merriam, 1998). To improve dependability, the processes within the study, in addition to the findings were reported in detail to show how the researcher arrived at conclusions. To do so, I created an audit trail and reported any evidence that challenged interpretations. Some research textbooks encourage creating an audit trail once a study is completed, but doing so at the end of a study does little to ensure a trustworthy study (Bowen, 2009). Therefore, to ensure trustworthiness I also kept a detailed record of the process through data collection, analysis, and at the final reporting phase.

### Summary

This study used document analysis, a qualitative research method, to explore the construction of Title IX noncompliance concerning HEIs response to sexual harassment and sexual assault allegations. Thematic analysis, a qualitative analytic method, was employed to identify patterns of meaning or themes found in OCR's LOFs to address research questions related to how Title IX noncompliance is constructed during OCR's enforcement. These themes were identified through a process of becoming familiar with data, coding, theme development, and revision (Braun & Clarke, 2006).

Social constructionism informed this study's methodology and analysis as it provided a framework that focused analysis, i.e. coding and theme development, on the concept of social context. It provided a framework to study what Title IX noncompliance

meant to the U.S. Department of Education's Office for Civil Rights and how, if at all, social context contributed to their understanding and enforcement of Title IX. Chapters IV and V discuss the study's findings and discovered themes in great detail, answers research questions, and provides implications and areas for future research.

## CHAPTER IV – ANALYSIS AND FINDINGS

This study examined OCR's construction of Title IX noncompliance concerning how HEIs handled complaints of sexual misconduct. The purpose of this study was to gain a deeper understanding of Title IX noncompliance by employing a social constructionist approach to thematic analysis as described in Chapter III to identify patterns and themes in LOFs. OCR's resolution agreements were used to corroborate findings. A resolution agreement is a separate document which provides information on the steps and actions HEIs must complete after Title IX investigations are resolved. The researcher discovered nine themes revealing ways HEIs failed to comply with Title IX requirements. The first 7 themes organize and provide guidance on OCR's expectations regarding Title IX compliance, while themes 8 and 9 provide general information. The discovered themes were as follows: (1) unclear grievance procedures, (2) overlooking responsibilities, (3) investigative inadequacy, (4) limited documentation, (5) communication: failing to notify, (6) insufficient measures and remedies, (7) students' perceptions, (8) Title IX noncompliance as a continuum, and (9) relationship: colleague or antagonist. The researcher used themes discovered from a social constructionist lens to organize data extracts that allowed the researcher to identify patterns and the story behind themes. In this chapter, the researcher presents the study's findings, including ancillary findings and organizes coded data by the aforementioned themes. In Chapter V, the researcher uses the findings to answer the study's research questions, provides implications from this study and recommendations for future research.

## Introduction to the Data

When a Title IX investigation is completed, OCR forwards the LOF to the recipient's central administrator. This administrator is usually the institution's president or chancellor. The LOF, which discusses in detail OCR's investigative findings and confirms whether the HEI agreed to enter a resolution, is sent only after OCR and the HEI enter a voluntary agreement to resolve areas of noncompliance. This means that HEIs do not have access to OCR's written investigative findings until they agree to resolve areas of Title IX noncompliance. Since the 2011 DCL, OCR has resolved 55 investigations and 30 of those investigations resulted in LOFs. Of those 30 letters, 21 were identified and selected as appropriate for this study based on the study's purpose, applicability to the research questions, and availability. Only LOFs that were made available by OCR, addressed sexual harassment and/or sexual assault (after the 2011 DCL was issued) were included in this study. LOFs which addressed sex discrimination and harassment in intercollegiate athletics were excluded.

Table 1 provides a description of each LOF including the year it was issued, OCR's enforcement office that conducted the investigation, and whether it was the result of a filed complaint or compliance review. All 21 letters were written in similar formats. The letters began with OCR providing an introduction, their investigative approach, legal standards, an investigation summary and analysis, and conclusion. From the 21 LOFs, OCR investigated 11 private colleges and universities, including 3 Ivy League institutions, and 10 public institutions. This information about the selected LOFs is provided in below.

Table 1

*Description of Letters of Findings*

Year	Higher Education Institution	OCR Office	Type
2011	University of Notre Dame	Chicago Office	Compliance Review
2011	George Washington University	District of Columbia Office	Complaint
2012	Yale University	Boston Office	Complaint
2013	The University of Montana	The United States (DOJ and OCR)	Both
2013	State University of New York	New York Office	Compliance Review
2014	Tufts University	Boston Office	Complaint
2014	Virginia Military Institute	District of Columbia Office	Complaint
2014	Cedarville University	Cleveland Office	Complaint
2014	Ohio State University	Cleveland Office	Compliance Review
2014	Princeton University	New York Office	Complaint
2014	Southern Virginia University	District of Columbia Office	Complaint
2014	Southern Methodist University	Dallas Office	Complaint
2014	Harvard Law School	Boston Office	Complaint

Table 1(continued).

2014	Marquette University	Chicago Office	Complaint
2015	Carthage College	Chicago Office	Complaint
2015	University of Virginia	District of Columbia Office	Compliance Review
2016	Michigan State University	Cleveland Office	Complaint
2016	East Carolina University	District of Columbia Office	Complaint
2016	San Diego State University	California Office	Complaint
2016	Occidental College	California Office	Complaint
2016	Frostburg State University	Philadelphia Office	Complaint

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*Introduction to Themes*

By examining the LOFs through the lens of social constructionism, the researcher discovered 9 themes and ancillary findings. Each theme emphasizes the role of social interactions, context, and language. As discussed in Chapter II, social constructionism is a paradigm for understanding. Therefore, by exploring patterns in the LOFs, the researcher was able to gain insight into OCR’s interpretation of Title IX noncompliance

concerning how HEIs handled sexual harassment and sexual assault complaints. From a social constructionist position, achieving Title IX compliance is conceptualized as an ongoing process in which HEI administrators continuously build and rebuild knowledge as they interact with OCR and the campus environment (Burr, 2005; Gergen, 2015). The LOFs illustrated that the first 7 themes describe why HEIs failed to comply with Title IX and demonstrate the challenges surrounding communicating to students and considering social context. Theme 8 demonstrates why Title IX noncompliance is a social construct due to OCR's multiple accounts of noncompliance. Theme 9 and ancillary findings (social influence) emphasize the significance of relationship and social influences, such as the media and campus advocacy. The themes and examples from the data are explained in greater detail below.

#### Theme One: Unclear Grievance Procedures

To comply with Title IX, recipients i.e. schools, colleges, and universities are required to adopt and publish policies and procedures that apply to sex discrimination complaints for students, employees, and third parties (U.S. Department of Education, 2011). In almost all of the LOFs, OCR cited inconsistent and confusing grievance procedures in their investigative findings. Most HEIs had multiple policies and procedures to address the various forms of sexual misconduct. For example, the University of Montana had a total of eight policies and procedures that addressed sexual harassment and sexual assault prior to OCR's investigation. There were also several HEIs that had policies and procedures in place that did not clearly apply to sexual harassment and sexual assault, such as the policies and procedures at Southern Virginia University. In the 2011 DCL, OCR required HEIs to ensure grievance procedures were widely

available to the campus community (U.S. Department of Education, 2011). However, in an attempt to increase availability of policies and procedures, it appears that Title IX violations occurred due to lack of consolidations and consistencies. In fact, OCR LOF Compliance Review —The University of Montana (2013) acknowledged the University’s effort to include sexual harassment in their policies, yet because they failed to provide clear cross-references among all eight policies it left “unclear which policy should be used to report sexual harassment or sexual assault” (OCR LOF Compliance Review —The University of Montana, 2013, p. 7). OCR viewed this ambiguity as confusing for students and found HEIs in noncompliance because of confusing policies which could have the potential to make reporting challenging for students. For example, in the LOF to Notre Dame, OCR stated:

The university’s policies and procedures related to sexual harassment and nondiscrimination were described in numerous university policies and documents, including in the policies and procedures cited in du Lac, and this was a source of confusion. These policies are not consolidated and were somewhat inconsistent, particularly in identifying appropriate complaint recipients (OCR LOF Compliance Review —University of Notre Dame, 2011, p.5)

OCR also referred to Frostburg State University’s five policies and procedures as conflicting and not consolidated. They stated, “In particular, the former Title IX policies and procedures were at times confusing and contradictory to complainants, accused students, members of the university community, and third parties” (OCR LOF Complaint —Frostburg State University, 2016, p.6). In OCR’s report on Harvard Law School, OCR also mentioned the need for Harvard to make procedures and processes clearer and more



explicit numerous times. In this case, OCR did not find inconsistencies because of multiple policies but focused on how information was presented to the campus community in the Law School's policies and procedures. OCR examined policies and procedures searching for conflicting language which could possibly confuse others or give false suggestions. Take for example OCR's recommendations to Harvard Law School after OCR reviewed the Law School's policies and procedures:

1. Language clarifying that the university has an obligation to address incidents of sexual harassment that it knows or should know about, even when a complaint or report is not filed, and to respond to all complaints, reports and other incidents of sexual harassment it knows or should know about (OCR LOF Complaint —Harvard Law School, 2014, p. 14).
2. Language clarifying that no school or unit-based policy, procedure or press can reverse or alter a factual finding, remedy, or other decision made through the University's Title IX Coordinator (OCR LOF Complaint —Harvard Law School, 2014, p. 14).
3. To the extent that the discipline is part of the Title IX review and/or appeal process, assurance that both parties are to be provided an equal opportunity to participate in the process (OCR LOF Complaint —Harvard Law School, 2014, p. 15).

Nothing within OCR's letter to Harvard Law School indicated that the Law School failed to do the above-mentioned recommendations, however, OCR still determined that further clarification was needed to ensure that the campus community was aware of and clearly understood the Law School's obligations under Title IX.

OCR also spoke out against HEIs inadequate definitions, specifically in defining what constituted sexual harassment, and how sexual harassment differed from a hostile environment and sexual assault. For example, in The University of Montana's case OCR stated:

The SCC (Student Code of Conduct) is not an adequate Title IX grievance procedure for sexual harassment because it does not clearly cover sexual harassment that not does not constitute sexual assault. The SCC covers malicious intimidation or harassment which the university defines as. . . This definition does not explicitly include sexual harassment, and the requirements of malicious intent and bodily harm, fear of bodily harm, destruction of property, or repeated telephone communications exclude many forms of unwelcome conduct of a sexual nature that constitute sexual harassment (OCR Compliance Review — The University of Montana, 2013, p. 18).

In defining sexual harassment, HEIs generally defined it as behavior that had to be sufficiently severe or pervasive to disrupt the person's educational activities, which was discussed in OCR's 1997 guidance. However, OCR clarified that the severe or pervasive standard was sexual harassment that created a hostile environment, which was a different type of sexual harassment. For this reason, HEIs were required to investigate any report of unwelcome conduct of a sexual nature even if it was not severe enough to create a hostile environment. At Michigan State University athletes received sexual misconduct training which covered appropriate behavior for student athletes. The university shared a portion of the materials used for athlete training when OCR requested

data. OCR found that the definitions provided to Michigan State University athletes did not meet Title IX's standards. They wrote:

OCR also noted that the definition of sexual assault states: *“If you touch someone in a sexual manner (making sexual contact) and the touching is offensive to that person you have committed sexual assault. Sexual contact is any touching of the sexual or intimate parts of a person to arouse or to meet your sexual desire.”* This definition seems to require that the touching be done to arouse or meet the perpetrator's sexual desire, which is not the Title IX standard. The definition is also overbroad with respect to offense (OCR LOF Complaint—Michigan State University, 2016 p.19).

OCR examined documents closely, especially HEIs with multiple policies and procedures, searching for inconsistencies and definitions which did not comply with Title IX's standards. HEIs did not create clear, consistent, and easily understood grievance procedures in compliance with OCR's requirements for the purposes of Title IX. Many HEIs included inadequate definitions which failed to meet the requirements of Title IX. It is not surprising that these issues appeared most frequently in the data. OCR's conclusions regarding grievance procedures address challenges in writing policies, procedures, and training materials. Social constructionism aims to account for the ways in which reality, especially language is socially constructed and understood by others. As discussed in Chapter II, the definition of sexual harassment and sexual assault has changed and continues to do so. Social constructionists would state that the meanings of words, such as definitions, are examples of social constructs, and a, therefore, subject to

debates and misinterpretation. From a social constructionist viewpoint, the way language is used in policies to convey information is a form of social action.

#### Theme Two: Title IX Coordinators Overlooking Responsibilities

OCR's 2011 DCL also clarified the need for HEIs to designate at least one employee, a Title IX Coordinator, to coordinate the institution's efforts to comply with and carry out Title IX responsibilities (U.S. Department of Education, 2011). The second theme addressed these individuals designated with the task of coordinating Title IX and investigating complaints. Most institutions had a designated Title IX Coordinator when OCR began their investigation, with the exception of, The State University of New York (SUNY) system. OCR determined HEIs violated Title IX because designated Title IX Coordinators failed to oversee every complaint related to sexual harassment and sexual assault. Many letters discussed the forwarding or "in-house handling" of complaints to offices other than the Title IX Office. OCR interpreted this as noncompliance because Title IX Coordinators who did not receive all complaints were unable to track incoming complaints and identify trends to further prevent harassment. For example, OCR was concerned about The University of Montana's Title IX Coordinator's lack of awareness concerning complaints. They stated:

Previously, some offices notified the Title IX Coordinator when they received a sexual harassment complaint, but complaints of sexual assault were handled by the Dean of Students and were not always discussed with the Title IX Coordinator. For example, a university student who was also a Dining Services employee filed a sexual harassment complaint against another student employee. Dining Services investigated the complaint in consultation with the Title IX

Coordinator. Dining Services fired the student. A year and a half later, the Dean of Students investigated the same student for violating the SCC prohibition on sexual assault. The Title IX Coordinator was not involved in this second investigation. Neither the Title IX Coordinator nor the Dean of Students recognized that this student had been accused of engaging in discriminatory conduct on two separate occasions (OCR LOF Compliance Review — The University of Montana, 2013, p. 27).

Another complaint OCR reviewed revealed that the Title IX Coordinator forwarded a complaint to campus police and relied on them to conduct the investigation into one of their police officers who allegedly sexually assaulted a student while on the job. OCR found further evidence suggesting this practice was common and not a single instance. OCR reported:

In five incidents, the university did not conduct an investigation under its Title IX responsibilities and procedures, but instead, it relied upon the local police or campus police to conduct an investigation (OCR LOF Complaint —Frostburg State University, 2016, p. 22).

Similarly, Southern Methodist University's Title IX Coordinator did not fulfill her job responsibility when she became aware of the retaliatory harassment a student was subjected to after he reported being sexually assaulted by a fraternity member. According to OCR:

The Title IX Coordinator informed OCR that she was aware that complainant 3 was concerned about student 2's friends and fraternity members but she believed the police and the Associate Provost were providing complainant 3 support. She

further confirmed that the university's Chaplain spoke with the fraternity involved. However, the university did not investigate any of complainant's 3 concerns regarding retaliatory harassment by student 2's fraternity members or friends (OCR LOF Complaint — Southern Methodist University, 2014, p.14).

OCR determined the University of Virginia “failed to comply with Title IX during a specific time period because the Title IX Coordinator did not adequately coordinate and oversee all Title IX complaints with regards to employees” (OCR LOF Compliance Review — The University of Virginia, 2015, p.23). The Title IX Coordinator's failure to coordinate all incoming Title IX complaints among various departments was also clearly evident among Yale University's procedures. OCR reported that the “University-wide Title IX Coordinator had no relation with the other Title IX complaint mechanisms at the University for students or any mechanisms for tracking such complaints (OCR LOF Complaint—Yale University, 2012, p. 5). This theme was a major issue for OCR. To effectively coordinate, Title IX Coordinators must receive all reports or complaints of sexual assault and sexual harassment, so that a system for tracking allegations, repeat perpetrators, and identifying training needs could be implemented. This need to be involved and aware of every Title IX process was demonstrated in OCR's Title IX investigation at East Carolina University. According to OCR, the Title IX Coordinator revealed during an interview that she had little involvement or knowledge over a critical part of the university's grievance process because the Faculty Senate Office coordinated that specific level of the grievance process, so she could not identify the type of sexual harassment training panel members needed (OCR LOF Complaint — East Carolina University, 2016, p. 9). For majority of HEIs, it appears this issue arose due to unclear

job roles and responsibilities. For example, OCR's investigation into Southern Methodist University revealed it was the president, not the Title IX Coordinator, who reviewed all Title IX complaints. Overall, OCR determined Title IX violations if Title IX Coordinators failed to review all complaints making them unaware and unable to track systemic patterns and identify trends.

Under this theme, OCR examined the position of Title IX Coordinators, including whether they oversaw all complaints and conducted simultaneous investigations, instead of relying on campus or local police or other departments to investigate. OCR determined HEIs in violation of Title IX if the Title IX Coordinator failed to coordinate and was unaware of Title IX complaints and proceedings. According to OCR, if Title IX Coordinators were unaware of complaints they were no longer privy to contextual factors which would assist them in examining sexual harassment and sexual assault patterns in the campus community. OCR sought to understand HEIs failure to coordinate Title IX complaints, which lead to a conclusion of Title IX noncompliance, within social interactions. OCR interviewed Title IX Coordinators and assessed the intent underlying specific actions, including inactions. Social constructionism highlights the social processes through which people give meaning to their motives (Berger & Luckmann, 1966; Burr, 2005) which can explain OCR's decision to meet and speak with Title IX Coordinators.

### Theme Three: Inadequate Title IX Investigations

The third theme addressed inadequate investigations. Based on OCR's investigative findings, HEIs responded and investigated complaints of sexual harassment and sexual assault. There were only a few reported instances where a HEI did not

investigate. Title IX violations generally occurred because of the HEIs investigative approach which created delays and resulted in inequitable resolutions. Title IX requires a prompt and equitable resolution of all sex discrimination complaints (U.S. Department of Education, 2011). OCR used statements such as, “deficiencies in the investigations”, “limited and incomplete investigations”, and “failed to provide a prompt and equitable resolution” when describing Title IX proceedings in 19 of the 21 letters. In some cases, when HEIs inadequately investigated allegations of sexual assault and sexual harassment it created a hostile environment or allowed one to continue. The researcher identified two subthemes related to this overarching theme: (a) lengthy processes, and (b) unequal opportunities. These subthemes and examples from the data are discussed below:

#### *Lengthy Title IX Processes*

OCR examined policies and procedures, as well as the recipient’s practices to determine if complaints of sexual harassment and sexual assault were resolved promptly, i.e., 60 days as outlined in the Dear Colleague Letter (U.S. Department of Education, 2011). Generally, when OCR discovered delays or lengthy processes within the fact-finding investigation, hearing, or adjudication process; OCR acknowledged the delay in its findings, stated that it violated OCR’s timeframe requirement, and concluded the HEI failed to comply with Title IX. In evaluating promptness, OCR also required HEIs to include specific and clearly written timeframes in the college or university’s policies and procedures. For example, OCR wrote:

With respect to the requirement for designated and reasonably prompt timeframes for the major stages of the complaint process, the University’s procedures are not in compliance with Title IX. The policy states only that the process will be



completed within a “reasonable timeframe” (OCR LOF Compliance Review—Ohio State University, 2014, p.25).

LOFs revealed investigations with delays well beyond OCR’s 60-day or on average 2-months timeframe. For example, OCR determined that Tufts University failed to respond promptly to sexual harassment and sexual violence allegations. At Tufts University, cases took approximately four months to resolve. OCR does not require HEIs to include an appeals process as a part of their Title IX process, so appeal processes were not included within the 60-day timeframe in prior guidance documents (U.S. Department of Education, 2011). Nonetheless, findings revealed that OCR includes appeals processes when evaluating whether HEIs responses and investigations are adequate and prompt. At the time of OCR’s investigation, The University of Montana had five levels of appeals and Title IX complaints often took several months to resolve. In fact, one case took approximately one year because the accused student used all five levels of review to appeal a policy violation finding.

*Unequal Opportunities.* The second subtheme addressed whether HEIs conducted equitable or fair investigations. OCR’s investigative letters revealed HEIs did not provide equitable resolutions, specifically in regards to whether the alleged victim and the accused were given equal opportunities. According to OCR, HEIs are required to provide equal opportunities for both parties (U.S. Department of Education, 2011). Although there were a few letters in which accused students were not given opportunities afforded to the alleged victim, findings revealed that it was mostly alleged victims who were not afforded equal opportunities as their accused counterpart. For example, alleged victims were not allowed to participate in the appeals process and were burdened by the process

of securing their witnesses. Even in instances where a HEI conducted a complete investigation and/or sanctioned students in violation, OCR still evaluated the response as a Title IX violation if both parties were not given the same opportunities. The following is an excerpt from OCR's LOF to Carthage College. Student 2 was the alleged victim otherwise referred to as the complainant, student 3 was the accused student, also referred to as the respondent, and the Associate Dean of Students served as the College's Title IX Coordinator:

The following day Student 2 met with the Associate Vice President for Student Life and Dean of Students regarding his complaint. On that same day, the College informed Student 3 that he was being charged with sexual harassment. The Associate Dean of Students charged with investigating and adjudicating Student 2's complaint against Student 3, met with Student 3. Student 3 submitted a statement of admission. On September 24, 2014, the Associate Dean held a student conduct hearing with Student 3. Student 2 was not invited to or present at the hearing. The Associate Dean determined that Student 3 violated the College's Sexual Harassment Policy...issued the following sanctions against Student 3: dismissal from the College...barred from contacting Student 2...banned from campus without prior approval...The College did not give Student 2 a copy of the letter to advise him verbally of the determination (OCR LOF Complaint—Carthage College, 2015, p.11)

OCR later concluded that Carthage College violated Title IX for failing to provide an "equitable response" to the complaint. Although the College responded promptly, its response was not equitable, which OCR still interpreted as a Title IX violation. OCR

provided a list of Title IX compliance concerns after they examined SUNY at New Paltz's 33 case files of sexual assault and sexual harassment complaints. New Paltz's "failure to provide notice of or the opportunity for a complainant to appeal a determination, while providing that right to the accused" (OCR LOF Compliance Review— SUNY at New Paltz, 2013, p. 16) was OCR's first addressed concern. OCR also found Yale University's grievance process to address sexual harassment and sexual assault inequitable. The university used a disciplinary body to respond to complaints which did not allow for a Title IX investigation, nor did it provide protections and rights for the complainant. The following is an excerpt describing the university's process:

In a number of the cases OCR reviewed, the alleged perpetrator elected to admit to the validity of the charges and chose a disposition proceeding, which is a hearing before a subgroup of ExComm where there is no investigation or input from the complainant (OCR LOF Complaint—Yale University, 2012, p. 7).

Overall, findings provide insight into OCR's interpretations and requirements of a prompt and equitable response. Based on overall findings, OCR can determine that HEIs violated Title IX if responses were prompt, but not equitable; or equitable, but not prompt; and if responses were both not prompt and equitable. OCR noted HEIs investigative process because determining the facts of each case was a key aspect of Title IX work. The following is an example from Marquette University demonstrating the consequences of an inadequate investigation.

Student A, the respondent, desired a relationship with the complainant, however, the complainant declined once he became verbally abusive towards her. She reported this abuse to the Milwaukee Police Department and the university issued

a stay-away order to the respondent, prohibiting contact, but not proximity. Besides the stay-away order, the university did not offer or provide the complainant with any additional remedies, such as escort services or academic support. According to the complainant's report, Student A continued to harass her, but the university did not take additional steps to protect her. After the complainant reported multiple encounters of harassment, the university charged Student A with harassment on the basis of gender and interfering with the health and safety of a community member. Student A admitted responsibility to the charge, but denied ever using force or holding the complainant against her will beyond 5 minutes, which the complainant alleged. Student A's statements were accepted and used to determine his sanctions. The university placed Student A on probation because the panel recognized his honesty and willingness to take responsibility (OCR LOF Complaint—Marquette University, 2015).

The complainant appealed the university's decision and provided evidence of Student A's continued harassment and retaliation. As a result, the University changed Student A's sanction from probation to "suspension in abeyance", which meant that a future incident will result in suspension. OCR concluded Marquette University violated Title IX regarding this complaint because the university only interviewed the complainant and respondent during its investigations. According to OCR, "The evidence establishes that the university's investigation of the assault was insufficient to determine what occurred" (OCR LOF Complaint—Marquette University, 2015, p.18). The university only relied on the complainant's and respondent's testimonies and did not investigate every reported incident of Student A's harassing behavior, which left gaps in

the analysis of the case. The university also relied on Student A's admission in determining sanctions and assumed he was being honest when he reported not being forceful with the complainant. Accordingly, OCR determined there was no difference between the original and revised sanction. OCR learned during their investigation that probation was a warning that further misconduct may result in suspension, whereas suspension in abeyance is a warning that further misconduct will result in suspension. However, students, including Student A, suspended in abeyance were still allowed to attend Marquette University. OCR, therefore, concluded that the University did not provide remedies to truly end and prevent the harassment from recurring. Marquette University's failure in conducting a thorough and reliable investigation negatively influenced the University's ability to determine all the facts of the case, issue appropriate sanctions, provide interim remedies, and examine systemic patterns and trends. An inadequate investigation created a ripple effect which resulted in the university violating other areas within the Title IX process.

OCR examined HEIs investigative response by reviewing procedures and case files searching for deficiencies and structural flaws within procedures and investigations. OCR determined Title IX noncompliance occurred if HEIs did not investigate complaints under Title IX and if they investigated but failed to conduct an adequate and fair investigation. Noncompliance generally occurred when there were significant delays in resolving complaints and when the alleged victim and accused were not given equal opportunities. OCR required HEIs to investigate complaints of sexual harassment and sexual assault to determine the context behind circumstances, even in instances when an accused student admitted responsibility. HEIs could not fully resolve a complaint if there

was a lack of understanding concerning the circumstances of each case. From a social constructionist perspective, understanding social and situational context is necessary to gain a comprehensive understanding of an incident of sexual assault (Burr, 2003; Fish, 1994). Therefore, HEIs failed to comply with Title IX because they failed to conduct thorough investigations which also made it increasingly challenging to identify trends and assess the environment. The next theme expands this theme further as it expounds upon OCR's focus on determining social context during Title IX investigations.

#### Theme Four: Limited Documentation

The fourth theme reflected in the findings was a theme of limited documentation. Throughout the letters, OCR stated their findings and conclusions were based on the documents and evidence provided by the college or university. In some letters, OCR even acknowledged it was possible that college and university administrators took further action, however, OCR still made a determination of noncompliance in some capacity based on the preponderance of the evidence available. Even when OCR examined files related to the original filed complaint, and found no concerns regarding recordkeeping, OCR still reviewed other unrelated case files and university procedures, similar to what would occur during a compliance review. While reviewing those files, OCR noted when there was a lack of documentation. OCR included these findings when evaluating the HEIs Title IX violations. Take for example OCR's Title IX investigation at Michigan State University. OCR noted concerns within 30 additional files and selected those 30 files to evaluate, but was unable to examine the files completely because majority of the files lacked information. OCR reported, "A significant number of files contained no investigative report and/or otherwise lacked information (OCR LOF Complaint—

Michigan State University, 2015, p.36). However, despite the lack of available information, OCR used what was available in two files and made conclusions based on the available information. OCR wrote:

Based on the documentation in the file, while the investigation was thorough and prompt, OCR concluded that the university's conclusion was not supported by its investigation, as the information the university provided indicates that the reporting employee was subjected to a sexually hostile environment (OCR LOF Complaint—Michigan State University, 2015, p.37).

Findings indicate that the type of grievance process used to address complaints of sexual harassment and sexual assault played a significant role in whether or not HEIs maintained documentation. For example, Yale University's use of an informal process instead of a formal process to resolve complaints of sexual assault not only made investigations inadequate as discussed in the previous theme but prevented proper record-keeping. Below is an excerpt describing Yale University's Sexual Harassment Grievance Board (SHGB):

As an informal process, OCR learned that the SHGB did not keep records and was not intended to be a fact-finding or investigatory body, and thus did not formally interview or otherwise gather and consider evidence from students and witnesses. Instead, the SHGB was a victim-driven process where an alleged student victim could learn about resources on campus or obtain informal remedies such as separate class scheduled from an alleged perpetrator or having an alleged perpetrator talked to by a SHGB member to understand that his/her behavior was

wrong, as a means to educate the perpetrator (OCR LOF Complaint—Yale University, 2012, p.6).

As a result, OCR was unable to obtain specific information regarding the complaints of sexual misconduct that the Sexual Harassment Grievance Board (SGHB) responded to due to lack of records. This theme was also clearly reflected in OCR's LOF to Michigan State University. In the letter OCR addressed the incomplete files and lack of record-keeping, and determined that the university's investigation conclusion was not supported:

Based on the documentation in the file, while the investigation was thorough and prompt, OCR concluded that the University's conclusion was not supported by its investigation, as the information the University provided indicates that the reporting employee was subjected to a sexually hostile environment (OCR LOF Complaint—Michigan State University, 2015, p. 37).

During OCR's complaint investigations, OCR approached their Title IX investigation as a compliance review. In other words, OCR requested and examined every case of sexual harassment and sexual assault for a specific time period gathered by reviewing HEIs Departments of Campus Safety and Security Data Analysis, including statistics collected pursuant to the Clery Act. OCR reported when any additional information was incomplete, especially in instances where it was unclear whether HEIs provided interim measures and remedies to student complainants. For example, OCR reported:

In addition to reviewing the University's response to the Student's complaint, OCR also reviewed documents from the eight complaints of sexual misconduct, a



majority that alleged sexual assault, that were processed by the University in the 2011-2012 and 2012-2013 academic years. Documentation provided to OCR from the University about its handling of these complaints did not include information about whether interim measures were provided to the complainants. Of these cases, two concluded with insufficient evidence findings, and one case was resolved without a full investigation. The five remaining cases resulted in violation findings, with disciplinary sanctions that varied with the severity of the conduct (OCR LOF Complaint—Tufts University, 2014, p. 13).

Under this theme, OCR examined HEIs recordkeeping and searched for critical gaps. OCR made Title IX determinations based on the available information, regardless of limitations. During complaint investigations, OCR still examined unrelated documentation in detail, similar to what occurred during compliance reviews. In other words, OCR conducted a thorough and comprehensive review of every incident and document addressing a Title IX issue. This theme is closely linked to the previous theme of inadequate investigations. Findings illustrated that HEIs lacked documentation which confirmed that a prompt and equitable investigation was conducted or that interim measures were provided to students. As a result, OCR made a noncompliance determination with the available information. HEIs could not justify that they determined all the circumstances related to a complaint of sexual assault due to the limited record-keeping. Their failure to demonstrate via written documentation an understanding of the social context surrounding each case resulted in Title IX violation (Burr, 2015).

## Theme Five: Communication, Failing to Notify Students

This theme addressed HEIs failure to effectively convey information to students, including parties involved in Title IX investigations. In all 21 LOFs, OCR highlighted when HEIs failed to provide the campus community with the name and contact information of the Title IX Coordinator, the institution's notice of nondiscrimination, and failed to inform the community that Title IX inquiries should be forwarded to the Coordinator and to OCR. This theme is also reflected during the investigation process when parties, mostly complainants, were not notified of investigation outcomes, sanctions, or the processes involved. The findings suggest that OCR pays attention to how HEIs notify students about sexual misconduct and filing complaints under Title IX because it has the potential to increase or decrease reporting of sexual misconduct. According to OCR, students cannot report sexual harassment or sexual assault to the Title IX Coordinator if the Title IX Coordinator's name, contact information, and the types of behaviors which are prohibited, are not communicated to the campus community. Below is a data excerpt from OCR's LOF to Princeton University:

The sections addressing sex discrimination, sexual harassment, and sexual misconduct in the RRR did not include a description of or reference to how to file a complaint of sexual discrimination, sexual harassment, and/or sexual misconduct, including sexual assault or other sexual violence, or detail the investigative process, resolution, and appeal processes (OCR LOF Complaint—Princeton University, 2014, p. 9).

Princeton University did not provide information related to filing a complaint or the University's Title IX investigation process in policies and notices issued to students. This

information was important and necessary to effectively notify students about their rights to report. In addition, OCR also determined HEIs violated Title IX if HEIs failed to give the title of the HEI administrator designated as Title IX Coordinator. For example:

OCR also found that while SMU has designated an employee, the Associate Vice President for Access and Equity, as its Title IX Coordinator, the University's notice of nondiscrimination does not include contact information for its Title IX Coordinator. Thus, OCR concluded that the University failed to properly notify students and employees of the Title IX Coordinator pursuant to 34 C.F.R. § 106.9(a) (OCR LOF Complaint— Southern Methodist University, 2014, p.21).

In a few cases, HEIs notified students that Title IX inquiries should be directed to the Title IX office or OCR, but did not include the Title IX Coordinator's name. In describing Michigan State University's Title IX Coordinator and Notice of Nondiscrimination OCR reported:

The Notice of Nondiscrimination states that individuals who want additional information or assistance should contact the I3 office; and lists the I3 office's address, phone number, fax number, website address, and email address.

However, the notice does not provide the name or title of the Title IX Coordinator. The notice also does not state that inquiries may be referred to OCR (OCR LOF Complaint—Michigan State University, 2015, p. 9).

To properly and effectively notify students, HEIs were also expected to have a university-wide notice that was easily accessible. In describing Ohio State University's notice of nondiscrimination, OCR stated:

When OCR initiated this compliance review, the University's notice of nondiscrimination did not meet the Title IX requirements, at 34 C.F.R. § 106.9, in that, although some of the University's professional schools (e.g., Moritz College of Law) had individual notices of nondiscrimination on the basis of sex, not all schools within the University had a notice of nondiscrimination and there was not a general University-wide notice (OCR LOF Compliance Review—Ohio State University, 2014, p. 9).

The absence of a university-wide notice to notify the campus community was also an issue for the SUNY system. OCR concluded:

There were no notices of non-discrimination required by Title IX in any of the reports of publications posted online for the SUNY system; nor did SUNY provide any information to support that nondiscrimination notices appeared in any system-wide printed publications or applications (OCR LOF Compliance Review—State University of New York, 2013, p. 6).

Analysis of the letters clearly show that OCR also assessed contexts of communication. OCR assessed the notice's content and location, such as websites, handbooks, and bulletins to determine whether HEIs properly notified the campus community, particularly students. OCR appeared to favor providing notices of nondiscrimination in numerous locations. For example, when Ohio State University finally established a University-wide notice of nondiscrimination after OCR determined their previous notice did not meet Title IX requirements, OCR reported, "The University also created a web link to the nondiscrimination statement on the footer banner on many

of the University web pages.” (OCR LOF Compliance Review—Ohio State University, 2014, p. 9).

OCR also held HEIs accountable if complainants and respondents were not notified during the Title IX resolution process. Providing updates and outcome of an investigation was a priority for OCR because HEIs that failed to do so infringed upon a complainant’s or respondent’s rights. Under Title IX, both the complainant and respondent have the right to be present at hearings, present evidence, and appeal decisions. This is why HEIs are required to provide notice. However, OCR determined that HEIs failed to comply with Title IX because they did not provide updates or notify complainants of Title IX outcomes. For example, OCR stated in Michigan State University’s LOF, “Others complained that the University was not good at keeping students updated regarding the status of complaint investigations,” (OCR LOF Complaint—Michigan State University, 2015, p.22). From a social constructionist perspective, knowledge and understanding occurs via communication and social interactions (Gergen, 1985; Burr, 2015). Therefore, communicating with students during the Title IX process and notifying students about Title IX and the HEIs obligations to address sexual harassment and sexual assault complaints is understandably a significant aspect of OCR’s interpretation of compliance.

This theme addressed how HEIs notified students and communicated to them during and after Title IX investigations. OCR found HEIs noncompliant with Title IX if they did not provide regular updates to student complainants, which included informing students about their resolution options under Title IX. In addition, HEIs were expected to have widely publicized notice of nondiscrimination, so that students could easily access

Title IX information for reporting and assistance. Although HEIs had designated Title IX Coordinators, many did not provide the name or title of the Title IX Coordinator to the campus community in a way that met Title IX's standards.

#### Theme Six: Insufficient Interim Measures and Remedies

Not only do LOFs demonstrate OCR's decision to hold HEIs accountable for failing to provide complainants with interim measures, but it also revealed OCR's concerns related to the effectiveness of such measures. For example, OCR determined that Virginia Military Institute did not comply with Title IX for several reasons, including the institution's failure to provide interim measures to protect complainants. OCR's reported statements regarding one of the investigated complaints follows:

OCR reviewed a complaint that a female cadet had been sexually assaulted by a VMI alumnus, who had kissed her against her will, pulled her to a secluded area of VMI, and pushed her to the ground before she was able to run away from him. The cadet reported the assault to a designated member of the Title IX Coordinator's staff, who obtained witness statements and text messages from the complainant's cell phone and substantiated the allegation. The Title IX Coordinator's staff member asked a professor who was a friend of the alumnus to tell the alumnus that he was not to have contact with the complainant; the Title IX Coordinator's staff member did not contact the perpetrator directly. Even though VMI's ability to take direct action against the alleged perpetrator was limited, VMI should have taken steps to conduct an appropriate investigation and to provide other appropriate remedies for the complainant, none of which were offered (OCR LOF Complaint— Virginia Military Institute, 2014, p. 16).

This expectation was confirmed earlier in OCR's (2013) LOF to the University of Montana where OCR reminded the university of its obligations under Title IX:

Even if the complainant students did not want to continue to participate in the investigation, the University was nonetheless obligated to conduct and conclude an adequate, reliable investigation and, as appropriate, take steps to remedy the effects of any harassment, and prevent it from recurring. Such steps could have included, for example, offering counseling services and implementing other measures, independent of disciplinary action, that could assist the complainants and/or address sexual assaults on the campus at large (OCR LOF Compliance Review—The University of Montana, 2013, p. 15).

HEIs were expected to remedy the effects of harassment for the entire campus community. This meant that even in situations where a complainant was uncooperative or requests confidentiality, HEIs failed to comply with Title IX if they did not evaluate the situation to determine whether the community was at risk. This occurred at the University of Virginia when the university failed to investigate incidents involving fraternities. OCR stated:

OCR finds that at least in these two instances the University did not promptly investigate information in cases that involved fraternities. In one of the cases, the Chair of the SMB took the written position that “unfortunately, the actions of our office are limited to the assistance and support of the survivor at this point as the student who reported the sexual assault does not wish to file a complaint through the SMB.” In addition to reflecting the absence of a prompt investigation, the files do not reflect the University evaluating steps necessary to protect safety of the

broader University community (OCR LOF Compliance Review—University of Virginia, 2015, p. 17).

Although some HEIs failed to implement interim measures that provided relief to complainants and ensured student safety, most HEIs implemented interim measures but failed to follow up with students to ensure that provided measures were effective and did not interfere with educational activities. For example, in OCR’s letter to Tufts University, OCR stated:

The interim measures provided by the university deprived the student of an equal opportunity to participate with other students in the Program by first alternating her attendance at the weekly seminars with the accused and then making arrangements in the fall 2010 under which she did not participate in all the seminars. The University also failed to ensure that escort services were effective, even after the student reported to the University that the services were not working for her (OCR LOF Complaint—Tufts University, 2014, p. 21).

The findings demonstrated that OCR discussed the effectiveness of interim measures and minimizing the burden on the complainant. OCR had this to say about Tufts University’s Title IX process:

The University’s failure to provide effective interim protective measures for the student and, instead placing the burden of interim measures largely on the student was contrary to the requirements of Title IX to provide effective interim measures that minimize the burden on complainants of sexual harassment/violence (OCR LOF Complaint—Tufts University, 2014, p. 21).



HEIs that provided interim measures still failed to comply with Title IX if OCR learned during interviews that the measures did not provide relief for student complainants. A review of resolution agreements also revealed that OCR required HEIs to ensure measures were working. In describing the terms of OCR's resolution agreement with Ohio State University, OCR stated:

The University will provide timely and effective interim relief for complainants, including academic adjustments, housing changes, counseling, and health and mental services, as necessary, and document this relief in investigative files; the Title IX Coordinator or other specifically designated University employee will coordinate the provision of interim measures so that complainants are not required to arrange such measures by themselves through multiple University departments and offices (OCR LOF Compliance Review—Ohio State University, 2014, p. 28).

LOFs illustrated differences between OCR's and HEIs priorities and purpose regarding Title IX investigations. OCR wanted HEIs to conduct thorough investigations so that HEIs could identify trends of sexual violence and implement effective remedies, which could include sanctions. However, LOFs indicated that HEIs leaned more towards pedagogic remedies. For example, Yale University's process for handling sexual harassment and sexual assault issues focused on providing resources for alleged victims and educating accused students. The purpose of the University's process was to help the accused student understand why their behavior was inappropriate, not to remove them from the campus community (OCR LOF Complaint—Yale University, 2012, p. 6). A comment made by a HEI administrator further illustrated the culture of HEIs. As highlighted in previous themes, Marquette University failed to comply with Title IX

because Title IX investigations were inequitable for student victims. In one case, a student was allowed to continue his education after administrators learned he violated the university's sexual misconduct policy. The administrator justified their actions to OCR and stated, "We have hearts; we want the student to finish the semester" (OCR LOF Complaint—Marquette University, 2015, p.9). Both the complainant and the respondent were scheduled to graduate that spring semester.

Under this theme, the researcher discussed findings related to interim measures and remedies provided by HEIs. Not only did OCR determine HEIs noncompliant with Title IX for failing to provide interim measures, but OCR also found HEIs in violation with Title IX if measures were ineffective and burdensome for students. According to OCR, it was the institution's responsibility to ensure interim measures and remedies were effective in protecting students and ensuring that measures did not interfere with educational activities. Similar to previous themes, this theme demonstrated OCR's expectations for HEIs to evaluate context in order to determine if interim measures, as required by Title IX, were effective. Not only did OCR emphasize the importance of social context, but they emphasized the significance of learning that occurs during social interactions (Lindgren & Packendorff, 2006; Burr, 2015; Gergen, 2011, Loseke, 2015). Findings illustrated that it was the HEIs responsibility to communicate with students via "follow-ups" to determine whether implemented measures were working.

#### Theme Seven: Students' Perceptions

The seventh theme addressed students' perceptions surrounding the Title IX process. LOFs illustrated that OCR cared about students' attitudes, perceptions, and experiences, regarding sexual harassment and sexual assault. As outlined in Chapter II

and demonstrated in the aforementioned themes, OCR requires HEIs to adopt clear grievance procedures and notify the campus community to encourage reporting and increase Title IX awareness (U.S. Department of Education, 2011). OCR noted when HEI administrators acted or responded in ways that could discourage reporting. For example, the President of Occidental College responded in a campus email to comments a campus advocacy group made via the media regarding the College's response to sexual assault complaints. In the email, the President stated that he was dismayed that a group of individuals would question the motives of college officials, the college's response, and attempt to embarrass the college in public (OCR LOF Complaint—Occidental College, 2016). The president sent a letter of apology to the campus community stating he realized his email may have implied students should not speak with the media a few weeks later, but OCR still acknowledged the influence such comments had on students:

The comments made by the president referred to a group of individuals and raised concerns for OCR because they could have had the effect of chilling or interfering with protected activity for the student and other students (OCR LOF Complaint—Occidental College, 2016, p.28).

OCR could not determine if the president's comments did, in fact, have a chilling effect on other students. However, when OCR interviewed students at the University of Virginia it was confirmed that comments made by HEI administrators discouraged reporting. The University of Virginia's Chair of the Sexual Misconduct (SMB) Board made comments on a radio interview indicating that the university would never expel a student accused of sexual assault because it was impossible for HEI administrators to know for sure whether an assault occurred because the university used the preponderance

of the evidence standard. During OCR's on-campus interviews, students shared their perceptions about the university's response:

OCR's interviews of students confirmed that they are aware of the University's position. Students expressed a belief that the university has failed to impose what they see as serious disciplinary actions, i.e., suspension or expulsion, and that this indicates to them that the university does not take complaints of sexual misconduct seriously. Students explained to OCR that this perception makes students less likely to use the university's grievance process (OCR LOF Compliance Review—University of Virginia, 2015, p. 21).

During resolution, OCR required both Occidental College and the University of Virginia to assess students' perceptions and attitudes by conducting climate checks as a part of its resolution agreement. Examining other resolution agreements revealed it was a common requirement as OCR routinely required HEIs to complete climate assessments. OCR's focus on students' perceptions highlighted the context in which many incidents of sexual assault occur. In describing the Title IX violations at Frostburg State University OCR said:

The evidence also reflects that the university took actions that could have a chilling effect on students reporting incidents of sexual assault. Specifically, complainant 1 perceived the Dean of Students as having suggested she could receive discipline for having engaged in underage drinking the night of the offense and the Dean of Students confirmed that he counseled complainant 1 regarding her consumption of alcohol on the evening of the incident (OCR LOF Complaint—Frostburg State University, 2016, p. 20).

Frostburg State University's Dean of Students "counseled" a student complainant about her drinking. It is unclear from OCR's LOF whether the Dean of Students was blaming the victim or advising the student for safety reasons. Nonetheless, as discussed in Chapter II, sexual assault in a college or university setting is the most underreported campus crime (Hill & Silva, 2005; U.S. Department of Education, 2011). Victims of sexual assault are less likely to report for a variety of reasons, but most do not report because alcohol or drugs were involved and because their assailant was a friend or partner (Cantalupo, 2012; Fisher et al., 2000; Hill & Silva, 2005). As discussed in Chapter II, social constructionist tenets such as categorization and domain expansion explain how HEIs handling of sexual harassment and sexual assault allegations became a social problem, due to feminists' claims of HEI administrators discrediting student reports (Sloan & Fisher, 2010). From a social constructionist perspective, social issues are not immediately recognized as a social problem until they are presented and interpreted as a social problem by someone with power (Best, 1999). The increase in sexual assault research and feminists' claims about administrators can explain OCR's focus on student perceptions' and how HEI administrators' actions could discourage reporting.

How students perceived HEIs responses to sexual harassment and sexual assault was one of OCR's main focus areas. OCR invited students to meet with them to share their perceptions and experiences during OCR's on-campus visits. The LOFs indicated that OCR evaluated comments made by HEI administrators to see if their comments had the potential to discourage students from reporting. Lastly, resolution agreements often

included the need to conduct climate checks to assess students' attitudes regarding sexual misconduct and Title IX reporting on campus.

#### Theme Eight: Title IX Noncompliance as a Continuum

Themes 8 and 9 provide valuable information about OCR's interpretation of Title IX noncompliance and the relationship between HEIs and OCR. As discussed in Chapter III, when thematic analysis is done correctly, the themes should tell a story. Themes 8 and 9 provide a comprehensive overview of OCR's investigation process, including why noncompliance is a social construct, whereas the first 7 themes expound on OCR's requirements outlined in the 2011 DCL.

The letters also illustrated that Title IX noncompliance concerning HEIs response to sexual harassment and sexual assault complaints fall along a continuum. In other words, OCR determined noncompliance in varying degrees. Most letters written in 2011-2013 refer to specific HEIs actions and inactions as only a "compliance concern", whereas majority of letters written after 2013 explicitly refer to those same actions and inactions as "violations" and "failures". For example, in LOFs written after 2013 OCR no longer concluded that they had "concerns" with HEIs promptness. Instead, OCR concluded that the institutions "failed to provide a prompt response". This was the determination regardless of the actual number of complaints resolved with delays. For example, if 8 cases were resolved promptly and 3 cases were not resolved promptly, OCR determined that the HEI failed to comply with Title IX due to delayed responses. OCR's LOF to San Diego State University was an exception to this trend. In San Diego State's LOF, OCR reported having "compliance concerns" only (OCR LOF Complaint—San Diego State University, 2016).

There was a notable shift between how OCR made Title IX noncompliance determinations in LOFs written after 2013, with only a few exceptions. As discussed in Chapter II, OCR publicly released the list of HEIs with open Title IX investigations in early 2014 to promote more transparency (U.S. Department of Education, 2014). It appears that this shift also represented OCR’s new stance on transparency to ensure HEIs were held accountable and improved their responses related to sexual harassment and sexual assault under Title IX. OCR’s referral to Title IX violations as failures and their conclusions that HEIs failed to comply with Title IX holds HEIs more accountable. For example, OCR stated, “On August 31, 2011, the University signed the enclosed agreement which, when fully implemented, will resolve the concerns identified regarding the complaint” (OCR LOF Complaint—George Washington University, 2011, p. 2). OCR did not provide examples of their compliance concerns, and the LOF was brief and less transparent than future letters which referred to HEIs Title IX noncompliance as failures.

Although OCR and DOJ determined the University of Montana had conflicting policies, did not investigate complaints, used the incorrect standard of evidence etc., the Departments never determined that the University of Montana failed to comply with Title IX, because the university had complied with Title IX in some areas. Instead, they described their findings using words such as, “fell short”, and stated what the university needed to do to “make things better”. In contrast, the concluding statement to Frostburg State University stated, “OCR determined that the University’s policies and procedures and its notice of nondiscrimination are not compliant with the regulation implementing Title IX (OCR LOF Complaint—Frostburg State University, 2016, p. 24). OCR made

this conclusion despite OCR's acknowledgment earlier in the letter that Frostburg State University was compliant with Title IX in some areas.

OCR also referred to the University of Virginia as having a "mixed record" of compliance pertaining to complaints of sexual harassment and sexual assault, which suggested there were some areas of compliance and some areas of noncompliance. However, despite this, OCR still concluded the university failed to comply with Title IX. These findings demonstrate that OCR's construction of Title IX noncompliance is rather complex. OCR can determine a HEI as compliant, having a mixed record/compliance concerns, and not compliant with Title IX. Similar to OCR's varying degrees of describing HEIs Title IX noncompliance, social constructionism recognizes a multiplicity of perspectives (Berger & Luckmann, 1966; Gergen, 2015; Burr, 2015). A social constructionist viewpoint would not disagree that Title IX noncompliance exists but would argue that Title IX noncompliance is contingent on social, cultural, and historical variables. As discussed in Chapter II, a social constructionism insists that people should be more critical toward taken-for-granted ways of understanding reality and the world we live in (Burr, 2003). HEIs are expected to comply with specific requirements under Title IX. The assumption is that there are two categories. HEIs who meet OCR's standards are compliant and those HEIs that do not are in noncompliance. However, from a social constructionist approach scholars challenge the commonly accepted categories of compliance and noncompliance and take a more critical stance. In other words, multiple accounts and varying degrees of what OCR considers Title IX noncompliance is possible.



## Theme Nine: Relationship, Colleague, or Antagonist

The final theme refers to the complicated relationship between OCR and HEIs reflected in each LOF. As discussed in Chapter II, OCR enforces Title IX and has the authority to revoke federal funds from HEIs found in Title IX violation, yet also collaborate with HEIs to resolve areas of concern by providing technical services (U.S. Department of Education). Although OCR's stance on Title IX reportedly became more aggressive under the Obama Administration (New, 2016), findings reveal OCR makes attempts to collaborate with HEIs in order to resolve areas of Title IX noncompliance.

OCR resolved all 21 Title IX investigations with resolution agreements.

Resolution agreements are agreements between OCR and HEIs after OCR determines there was failure to comply with Title IX. Resolution agreements require HEIs to take specific actions to address noncompliance. The agreement includes OCR's findings and explains how the findings and terms of the resolution agreement are related. Before issuing a LOF, OCR contacts HEIs states their determination and seeks their interest in resolving areas of noncompliance (U.S. Department of Education, 2016). Findings revealed that majority of HEIs expressed interest in resolving issues and entered resolution agreements before OCR's deadline. Tufts University chose not to enter a resolution agreement and OCR's LOF included a discussion on pending enforcement. However, while corroborating this study's findings, the researcher learned that in a revoked LOF, OCR issued a statement on pending enforcement for the University of Virginia as well. The revoked LOF was more detailed and discussed University of Virginia's violations in a less positive light, in comparison to the LOF published on

OCR's website. These factors reflect just how complicated the relationship between OCR and HEIs can become.

To discover this theme, the researcher coded data which highlighted interactions between OCR and HEIs. Overall, OCR appeared to be appreciative of HEIs cooperation during investigations and interpreted the university's actions as a commitment to Title IX and students. For example, OCR praised the University of Notre Dame's commitment to comply with Title IX before discussing areas of concern:

Through its education program and published policies and procedures, the university has taken steps to encourage students and staff to report incidents of sexual misconduct and sexual assault to the appropriate university and law enforcement authorities. To further encourage reporting, the university's procedures provide that students who report sexual misconduct and/or sexual assault will not be subjected to disciplinary action for violating other provisions of the disciplinary code or be subjected to questioning concerning the past unrelated sexual relationships (OCR LOF Compliance Review—University of Notre Dame, 2011, p. 5).

OCR also praised Yale University's commitment to improving Title IX processes. Below is an excerpt from OCR's report:

During the course of OCR's investigation, the University voluntarily and proactively made changes to its procedures and practices related to compliance with Title IX and notified the university-wide community of these changes (OCR LOF Complaint—Yale University, 2012, p. 2).

OCR concluded their letter by thanking the university, “for the courtesy and cooperation” (OCR LOF Compliance Review—University of Notre Dame, 2011, p.5) they received during the investigation. Even in LOFs where OCR noted significant structural flaws and deficiencies, OCR expressed gratitude for a cooperative climate within investigations. OCR concluded The University of Montana’s LOF by stating:

The United States sincerely appreciates your cooperation...throughout the course of this compliance review and investigation and looks forward to continued cooperation during the implementation of the Agreement (OCR LOF Compliance Review—The University of Montana, 2013, p. 31).

OCR expressed gratitude and acknowledged HEIs strides in complying with Title IX when HEIs entered a resolution agreement. However, unlike OCR’s approach in the University of Notre Dame and Yale University’s LOF, OCR only reported facts and findings to Tufts University and University of Virginia. OCR concluded that Tufts University’s policies failed to comply with Title IX. Tufts University entered a resolution agreement, which OCR stated would, “will resolve these Title IX violations,” (OCR LOF Complaint—Tufts University, 2014, p.24) when fully implemented. However, OCR’s conclusion continued:

On April 26, 2014, the University General Counsel wrote to OCR to indicate she was revoking her signature on the Agreement. The General Counsel’s letter constitutes a breach of the Agreement the University signed on April 17, 2014. Pursuant to section 404 of the Manual, OCR is, therefore, notifying that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement entered into by the university. The

University has sixty (60) calendar days from the date of this letter to cure its breach of the Agreement (OCR LOF Complaint—Tufts University, 2014, p. 26).

OCR's LOF to Tufts University explained OCR's investigative findings and served as a warning to the university that a resolution must be met to avoid further enforcement action, which included withdrawal of federal funds. OCR did not express any gratitude for Tufts University's cooperation. However, according to a statement written on the university's website, Tufts University was surprised by OCR's conclusion because their policies were fully compliant with Title IX and they cooperated with OCR. Refusing to allow their campus community to believe they were out of compliance, the university revoked its initial signature (Tufts University, n.d). The University re-signed the resolution agreement and submitted policy changes to OCR after Tufts University's president and the Department's Assistant Secretary met to clarify and discuss concerns (Bombardieri, 2014).

OCR published a 39-page LOF to the University of Virginia on August 31, 2015. This letter determined that the University of Virginia violated Title IX because it "failed to investigate and adequately address student reports of sexual assault in the absences of formal complaints (OCR LOF Compliance Review—University of Virginia, 2015, p. 38). OCR's LOF not only explained investigative findings in detail but also indicated that OCR and the University of Virginia were still in the process of resolving concerns. OCR wrote:

As noted above, to date OCR's attempts to resolve this matter with the university through negotiations have not been successful. Accordingly, pursuant to §303(b)(3) of OCR's Case Processing Manual, OCR is issuing this letter of

findings that the university has violated Title IX and its implementing regulation (OCR LOF Compliance Review—University of Virginia, 2015, p. 38).

OCR reported that the original LOF contained inaccuracies (Anderson, 2016). On September 21, 2015, OCR released a revised version which was much shorter and removed examples in the original LOF illustrating inadequate investigations. OCR's determinations did not change, as OCR still found the university noncompliant. However, the letter did not elaborate on findings and appeared to be written in a more cooperative tone. In the new letter, OCR stated that "The university requested to enter a resolution agreement before OCR had completed investigation of university files" (OCR LOF Compliance Review—University of Virginia, 2015, p. 3), which contradicts what was outlined in the first LOF released by The Washington Post. OCR concluded the letter by confirming the university's resolution. OCR reported, "based on the commitments the University has made in the Agreement, OCR has determined that it is appropriate to consider this complaint resolved" (OCR LOF Compliance Review—University of Virginia, 2015, p. 26).

Analysis of the social interactions between OCR and HEI provided insight into the complex and often contradictory relationship between OCR and HEIs under a Title IX investigation. It appears that OCR appreciates cooperation and seeks a voluntary resolution at the conclusion of an investigation. However, OCR did not hesitate to pursue administrative enforcement when Tufts University and University of Virginia refused to enter a resolution agreement to resolve areas of noncompliance. Yet, OCR still provided HEIs with opportunities to clarify concerns and negotiate as necessary. The resolution agreement process for the University of Virginia indicated that OCR's initial findings are

not permanent and OCR is willing to work with HEIs to create an agreement. However, OCR's stance in this situation could have also been heavily influenced by lobbying efforts. Regardless of the underlying reason, both possibilities support social constructionist assumptions because they demonstrate the influence of social interactions and that OCR's determination of noncompliance is fluid (Burr, 2003).

### Ancillary Findings

#### *Social Influences*

The researcher also discovered a pattern of social influences during thematic analysis, but was not included as a major theme because codes related to this theme: media, protests, and advocacy groups, were only discovered in a few letters (Frostburg State University, Tufts University, University of Virginia and Occidental College), yet were cited enough and grounded in social constructionism to examine further. The letters illustrated that OCR and HEIs were strongly influenced by social influences, such as the media and advocacy groups. HEIs were influenced to do more to improve how they handled sexual harassment and sexual assault complaints because of the media and community involvement. It also appeared that OCR considers information from the media in selecting HEIs for compliance reviews and considers media influences during Title IX investigations. A few examples follow.

OCR investigated the pledging incident that occurred on the evening of October 12, 2010, at Yale University's campus. During the event, fraternity pledges stood outside the University's Women Center chanting sexually aggressive comments. The incident was recorded and circulated online shortly thereafter. The university became aware of the incident on October 13, 2010, but did not file a complaint using the university's

grievance procedures until October 20, 2010, when the campus community and alumni demanded further action. OCR reported:

In response to student’s concerns and to reaffirm the University’s commitment to ensuring that it maintains an environment that is safe and supportive of all students, the university formed the Advisory Committee on Campus Climate charged with looking at the university’s policies, practices, and resources... (OCR LOF Complaint—Yale University, 2012, p. 10).

Similarly, Occidental College made changes to improve its response to sexual assault because of the pressure from various advocacy groups. According to OCR, “The College has attempted to respond to concerns raised by an on-campus advocacy group by convening town hall meetings, creating task forces, and adding resources for students (OCR LOF Complaint—Occidental College, 2016, p. 24).

The LOFs also suggested that OCR remains up-to-date regarding media reports of sexual violence and used this information in various ways. For example, OCR was aware of Tufts University’s most recent climate survey because of media reports. When Tufts University failed to include the results of their most recent climate survey for OCR’s data request, OCR noted within the LOF that the university failed to include all climate survey results (OCR LOF Complaint—Tufts University, 2014). In addition, OCR’s investigation can include any information publically available related to how HEIs respond to sexual violence:

OCR also reviewed and considered information that is generally available to the public, such as news reports, social media, including blogs, and information from

advocates regarding the university's response to sexual harassment/violence (OCR LOF Complaint—Tufts University, 2014, p. 8).

By taking a social constructionist approach, findings reveal that campus and community advocates influenced HEI administrators to respond and address the culture of sexual violence on their respective campuses. The media also played a huge role in influencing OCR's view of HEIs and their conclusion of Title IX noncompliance in several LOFs. HEIs and OCR's responses and understanding of how HEIs handled these complaints were jointly constructed by social influences (Gergen, 2015).

### Summary of the Findings

Using a social constructionist approach to thematic analysis, the researcher identified nine themes to help answer research questions. Theme one: unclear grievance procedures demonstrated OCR's issues with conflicting language and definitions in HEIs policies and procedures. Theme two: overlooking responsibilities demonstrated OCR's views on the position and responsibilities of a Title IX Coordinator because OCR views the Title IX Coordinator's ability to identify trends as a key aspect of Title IX compliance. Theme three: investigative inadequacy and theme four: limited documentation also demonstrated the importance of completing investigations and maintaining documentation to understand context within sexual assault cases and to identify trends. Theme five: communication: failing to notify demonstrated the importance of communicating with the campus community to ensure students were notified in various ways, including in person, on university websites, and in policies and procedures. Theme six: insufficient measures and remedies addressed the need for not only providing interim measures to students but ensuring these measures were effective.



Theme seven: students' perceptions demonstrated OCR's commitment in preventing further sexual harassment by exploring students' attitudes and perceptions. Theme eight: Title IX noncompliance as a continuum suggested that Title IX noncompliance, similar to gender and rape, is a social construction. OCR determined what Title IX violations lead to a conclusion of Title IX noncompliance and this determination of noncompliance varied. OCR used varying terminology to describe Title IX noncompliance. The final theme: relationship, colleague or antagonist, demonstrated that OCR can act as a colleague, using cooperation and praise during investigations, but can also threaten to enforce its power and begin proceedings to remove funds. During data analysis, the researcher also noted ancillary findings. The theme of social influence revealed both OCR and HEIs were influenced during investigations by social influences, including campus advocates and the media.

The researcher believes these findings lay the foundation for understanding OCR's interpretation of Title IX noncompliance by highlighting OCR's focus areas during a Title IX investigation. However, this study aimed to answer specific research questions, so Chapter V organizes and further analyzes findings from the aforementioned themes to answer the study's three research questions.

## CHAPTER V – DISCUSSION

The purpose of this study was to examine OCR's construction of Title IX noncompliance regarding HEIs response to sexual harassment and sexual assault complaints using social constructionism. The study's findings and overarching themes were discussed in Chapter IV and included the following: (1) unclear grievance procedures, (2) overlooking responsibilities, (3) investigative inadequacy, (4) limited documentation, (5) communication: failing to notify, (6) insufficient measures and remedies, (7) students' perceptions, (8) Title IX noncompliance as a continuum, (9) relationship: colleague or antagonist, and ancillary findings (10) social influences. By employing a thematic analysis to discover themes, the researcher was able to analyze what it meant for HEIs to fail to comply with Title IX. Analysis of the discovered themes affirmed social constructionist assumptions related to social interactions and context. The themes also highlighted elements related to the research questions:

1. What discernable trends of Title IX noncompliance are identified in OCR's published LOFs since the issuing of the 2011 Dear Colleague Letter?
2. How does OCR respond to HEIs regarding how sexual misconduct complaints are handled under Title IX?
3. How does the information found in letters of findings (LOFs) between April 2011 and September 2016 overlap with or add to previous guidance documents provided by OCR?

In this chapter, the researcher will use the aforementioned themes to answer the study's research questions, discuss implications, and areas of future research.

## Research Question 1

*What discernable trends of Title IX noncompliance are identified in OCR's published LOFs since the issuing of the 2011 Dear Colleague Letter?*

A trend is a “general direction in which something is developing or changing,” (“Trend,” 2016). The aforementioned themes highlight two main ways in which Title IX enforcement and OCR’s subsequent conclusions are changing. Four LOFs were the result of compliance reviews and the remaining 17 LOFs were because of OCR’s investigation into a complaint. According to OCR’s Case Processing Manual (2015), OCR’s approach in conducting a compliance review is less specific, since a specific sexual harassment and sexual assault incident is not investigated, and more general, since OCR tends to review a wider range of documents and procedures. When investigating a complaint, OCR often uses a variety of fact-finding techniques to determine with regard to the allegation whether the HEI failed to comply with Title IX. Unlike compliance reviews, OCR’s conclusion of noncompliance would depend on their findings from investigating the allegation. However, this study’s findings reveal little difference between OCR’s complaint investigations and compliance reviews. As mentioned earlier, complaint investigations were less comprehensive than compliance reviews. During complaint investigations, OCR only reviewed files and conducted investigations to gather more information about the incident that preceded the filed complaint. However, LOFs illustrated that OCR reviewed how HEIs investigated the original complaint, but similar to compliance reviews, OCR reviewed additional sexual harassment and sexual assault case files, policies, training procedures, and HEI climate information. OCR’s

determination of Title IX noncompliance incorporated information unrelated to the original complaint.

Therefore, the first discernable trend relates to OCR's investigative approach in complaint investigations. OCR's complaint investigations, not only investigate the specific allegation but now mirrors compliance reviews in regards to OCR's technique and the type of information reviewed. During each investigation, whether it was the result of a filed complaint or a compliance review, OCR completed a thorough investigation in order to examine how HEIs carried out Title IX responsibilities. Their Title IX investigations involved reviewing policies and procedures and all case files related to complaints of sexual harassment and sex discrimination for a specified time frame. In majority of the cases, OCR interviewed students and HEI administrators to explore perceptions and to learn more about the circumstances of each case. According to social constructionism, OCR's beliefs about compliance and noncompliance would be constructed within social interactions (Berger & Luckmann, 1966; Burr, 2015; Gergen, 1994). OCR did not solely rely on documents to determine whether HEIs failed to comply with Title IX. OCR also interacted with HEI administrators and provided students with the opportunity to speak with them in order to acquire rich information to further determine the context in majority of the cases they reviewed. In addition, OCR remained up-to-date with the media and advocacy efforts and considered this information during Title IX investigations.

Of the nine discovered themes, the first six themes: unclear grievance procedures, overlooking responsibilities, investigative inadequacy, limited documentation, communication: failing to notify, and insufficient measures and remedies, highlighted

HEIs need for improvement. According to the 2011 DCL, to comply with Title IX HEIs must:

Disseminate a notice of nondiscrimination; designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; and adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints (U.S. Department of Education, 2011, p. 6).

Majority of the HEIs implemented Title IX's procedural requirements outlined above but were still determined by OCR to have some form of Title IX noncompliance because they did not do enough. Overall, OCR required HEIs to do more than what they were already doing in order to comply with Title IX. None of the LOFs suggested HEIs intentionally covered up incidents of sexual harassment and sexual assault, instead, HEI administrators mishandled investigations by not doing enough to prevent broader harassment in the campus community and/or forwarding investigations to other departments. OCR also determined that HEIs did not comply with Title IX because Title IX Coordinators did not have administrative oversight of all complaints of sexual harassment and sexual assault. The findings also illustrated a lack of understanding of the Title IX Coordinator's role in preventing harassment by identifying trends and tracking all complaints. Social constructionist scholars state that misunderstandings are more likely when definitions are misinterpreted (Andrews, 2012).

A social constructionist viewpoint sees knowledge as something people create together within interactions, rather than something people have or do not have (Burr, 2005; Philips & Hardy, 2002). Therefore, the findings which illustrated that Title IX

Coordinators failed to do their jobs and did not fully understand their role and position as it relates to coordinating Title IX indicates that Title IX Coordinators misunderstood OCR's Title IX requirements. It could also indicate OCR's and HEIs failure to work together prior to a Title IX investigation. This could also explain why OCR issued the most recent 2015 DCL, discussed in Chapter II, which focused solely on the role of Title IX Coordinators and the need for this individual to have full authority over all Title IX complaints (U.S. Department of Education, 2015).

## Research Question 2

*How does OCR respond to HEIs regarding how sexual misconduct complaints are handled under Title IX?*

Findings indicated that OCR's response to HEIs and their conclusions of Title IX noncompliance varied. In the most recent LOFs (between 2013 and 2016) OCR disclosed more details related to their findings and referred to Title IX violations and Title IX noncompliance using less unambiguous terms. In earlier LOFs OCR described findings using terminology such as "compliance concerns," without explaining in detail why HEIs actions were concerning. However, OCR's response in most recent LOFs indicated OCR's desire for more transparency and greater accountability. OCR described HEIs handling of sexual harassment and sexual assault complaints using explicit terminology such as, "failed" and "violated" with regard to Title IX requirements.

Interestingly, although OCR's LOF to San Diego State University was published in 2016, OCR still used less explicit terms, such as "concerns" to describe San Diego State University's handling of sexual harassment allegations. OCR did not state explicitly that the University failed to comply with Title IX. Similarly, OCR's LOF to Occidental

College used the term “compliance concerns” in the conclusion, even though OCR stated that the College violated Title IX. This could suggest that there are multiple accounts or contradictions pertaining to how OCR’s various enforcement offices interpret HEIs handling of sexual harassment and sexual assault allegations under Title IX and what HEI action/inaction constitutes as a concern, instead of a failure and violation.

In addition, every LOF was resolved by OCR and the HEI entering a resolution agreement, regardless of the terminology used to describe HEIs handling of complaints under Title IX. OCR resolved Title IX investigations using resolution agreements which HEIs were required to sign and implement in order to achieve “compliance” or in order to “fully comply” with Title IX. These resolution agreements demonstrate the multiple challenges HEIs encounter in order to meet Title IX requirements and OCR’s focus on accountability. Not only did OCR’s resolution agreements require HEIs to make changes to grievance procedures, communication notices, the Title IX Coordinator’s role, interim measures and remedies, record-keeping, Title IX investigations, and training, but OCR also required HEIs to provide them with documentation by a specified deadline proving the requested changes were made. OCR reported that HEIs enter resolution agreements voluntarily and that voluntary agreements do not constitute an admission of Title IX noncompliance. However, OCR’s response to University of Virginia and Tufts University, the HEIs that did not enter a voluntary resolution agreement within a certain timeframe, indicate that resolution agreements are perhaps not completely voluntary agreements.

Nonetheless, OCR appears to cooperate with HEIs that express an interest in improving. Looking at Title IX noncompliance through a social constructionist lens, the

researcher views Title IX implementation and compliance as a construction that emerges through interactions between HEIs and OCR (Burr, 2005). The underlying reason why HEIs failed to comply with Title IX concerning the handling of sexual harassment and sexual assault complaints was not because HEI administrators were unwilling to comply with the law. Rather, Title IX noncompliance occurred because HEIs and OCR did not work together to address misunderstandings prior to a Title IX investigation. According to the U.S. Department of Education, OCR provides technical assistance to HEIs to assist them in complying with Title IX in order to prevent violations (U.S. Department of Education, 2014). In fiscal year 2015, OCR engaged in approximately 130 technical assistance to schools, districts, and higher education institutions. However, the number of HEIs that seek assistance from OCR before a Title IX complaint is filed with OCR is unknown. Nonetheless, LOFs indicated that once HEIs agreed to enter a resolution agreement, OCR and the HEI work together in a monitoring phase (U.S. Department of Education, 2015).

### Research Question 3

*How does the information found in LOFs between April 2011 and September 2016 overlap with or add to previous guidance documents provided by OCR?*

This study's findings did not result in any additional Title IX requirements. However, findings revealed that unlike previous guidance documents, such as the 2011 DCL, OCR's LOFs account for social context. OCR's Dear Colleague Letters clearly outline Title IX procedural requirements (U.S. Department of Education, 2011). However, despite providing this information, OCR's formal guidance documents still do not explain or clarify what complying with Title IX would look like when considering the



dynamics of college sexual assault, institutional resources, and other contextual factors as described in Chapter II. OCR's formal policies do not address specific issues of compliance because OCR makes determinations of compliance and noncompliance on specific facts on a case-by-case basis (U.S. Department of Education, 2015). Similar to social constructionism, this approach emphasizes the importance of social context in understanding how HEIs implement Title IX and where they experience challenges. OCR discussed the circumstances surrounding their investigative findings and suggestions for an improved response. The LOFs provide examples of inequitable investigations on a college or university campus. For example, providing an outcome notice to a respondent, but not a complainant or a HEI administrator giving a complainant the impression that she could be disciplined for underage drinking-related to her sexual assault. HEI administrators, specifically those involved in Title IX investigations, can review current LOFs to glean OCR's expectations in related situations.

#### What Do the Findings Mean?

Majority of HEIs in the LOFs investigated complaints of sexual harassment and sexual assault, but OCR determined Title IX noncompliance because investigations were not conducted promptly and equitably. According to OCR, HEIs did not do enough to provide student complainants with effective interim measures and prevent further harassment of the complainant or broader campus community. Overall, the findings reveal a few important takeaway points. First, HEIs responsibilities under Title IX may begin at an individual level. For example, a Title IX Coordinator receives a student's complaint of sexual assault, but the Title IX Coordinator's responsibilities extend far beyond that individual student. Based on the findings, HEIs obligations under Title IX do

not end after a complaint is investigated or even after a victim receives accommodations or a resolution for a specific incident. Instead, HEIs obligations under Title IX extend to the entire campus community. The LOFs illustrated that during Title IX investigations, OCR addresses institutional culture and the steps being taken to improve Title IX efforts, encourage student reporting, and prevent further harassment. A consistent pattern in the findings was the emphasis given to social interactions, social context, and language (Burr, 2015).

As highlighted in Chapter II, social constructionism emphasizes the importance of understanding social context to fully gain an understanding of a situation (Berger & Luckman, 1966; Burr, 2015). Similarly, OCR also emphasized why it was important for HEI administrators to complete Title IX investigations and track Title IX complaints to determine what is occurring on their respective campuses and within each individual Title IX complaint. Doing this will allow HEIs to evaluate the situation and take appropriate actions, including interim measures, to ensure that discriminatory behaviors are eliminated and prevented from reoccurring.

Similar to society's current focus on victims or survivors, which began during the Victim's Rights and Rape Reform Movements discussed in Chapter II, OCR also focuses on alleged victims or complainants. This supports social constructionist tenets which state that social issues become social problems when claims-makers, political figures, and society calls attention to the social issue (Best, 1999). As a result of society making claims that HEIs were discrediting student victims (Sloan & Fisher, 2011) and lobbying efforts under the Obama Administration, OCR noted instances in LOFs when victims were treated unfairly by HEIs. OCR did not discuss the rights of a respondent and

whether HEIs fell short ensuring their rights were met in any of the selected LOFs. In fact, OCR noted when HEIs avoided sanctioning respondents with harsher sanctions, such as suspensions and expulsions, after violating a policy. OCR's investigation into noncompliance appeared to be centered around the victim, and students' perceptions and experiences surrounding reporting, and not necessarily a student's experience as the accused.

OCR's focus on students who experienced sexual assault, in comparison to HEIs, also suggest culture differences. HEIs often avoided harsh sanctions, such as suspensions and expulsions, and used more restorative practices as a means to educate alleged perpetrators/respondents. In recent years, improving student retention has been an issue of concern and a priority for HEI administrators (Borgen & Borgen, 2016; Crosling, Heagney, & Thomas, 2009). If HEI administrators are striving to retain students for financial reasons, then educating respondents and engaging in more mediation practices would take precedence. However, this approach appears to go against OCR's expectations.

### Implications

There are several major implications for HEI administrators and the U.S. Department of Education's Office for Civil Rights (OCR). How HEIs handled sexual harassment and sexual assault allegations under Title IX gained a lot of attention under the Obama Administration, especially after the 2011 DCL. This study's first major practical contribution is that it provides insight into the challenges of complying with Title IX. This information is important because this is the first study that investigates Title IX noncompliance concerning how HEIs handle complaints of sexual harassment

and sexual assault under Title IX, in an era where Title IX implementation and compliance is a top concern. Previous studies examining Title IX noncompliance address Title IX in intercollegiate athletics and whether intercollegiate level participation opportunities for female students are proportionate to enrollment statistics (Elliot & Mason, 2001; Yanus & O'Connor, 2016)

The study's findings also reveal that OCR prioritizes students' ability to make reports of sexual misconduct and preventing reoccurrences on campuses. Findings showed that HEIs had multiple policies to address sexual harassment and sexual assault which created confusion. According to OCR, policies and procedures were not consolidated and were written in language that was difficult for students to understand. HEI administrators should consolidate multiple policies and procedures and consider having a single policy and procedure for the entire campus community. This not only ensures consistency and clarity, but it also ensures easier accessibility, so that students could make reports. The study's findings also illustrated OCR's concern with campus climate as a means to address and prevent sexual harassment and sexual assault. OCR even required HEIs to conduct campus climate surveys in resolution agreements. Therefore, HEI administrators should include climate surveys regularly as a part of Title IX efforts to generate information about their students, institutional culture, sexual harassment and sexual assault on their campus.

According to U.S. Department of Education, LOFs are not formal policy documents and should not be interpreted as formal policy, yet the study offers suggestive evidence for HEI administrators, specifically Title IX Coordinators and Presidents, to remain well-informed of Title IX violations and OCR's conclusions. Unlike OCR's

formal policy documents, such as the 2011 DCL, LOFs provide context and more information related to specific incidents of sexual assault occurring on HEI campuses and best practices. HEI administrators are able to gather valuable information about OCR's expectations for Title IX. OCR referred to OCR LOF Compliance Review—The University of Montana (2013) as the blueprint for colleges and universities. This suggests that complying with Title IX in many cases requires monitoring of OCR's investigative findings at other HEIs.

This study also provides implications for Title IX Coordinators and Sanctioning Officials regarding appropriate sanctions for complaints of sexual harassment and sexual assault. Many HEIs use and encourage restorative justice practices which involves a victim and an offender meeting in person with a mediator to resolve a situation. Offices of the Dean of Students on HEI campuses value student learning and development (Dannells, 1997). The goal is usually to retain students and help them succeed. However, per OCR's guidelines, restorative justice/mediation techniques and sanctions do not comply with Title IX in sexual assault cases. This implies that Deans of Students Offices and other Sanctioning Officials should be trained in Title IX and familiar with OCR's investigative findings pertaining to appropriate sanctioning for specific Title IX complaints.

Newcombe and Conrad (1981) asserted that the major influence for implementing legal mandates on a college or university campus was the central administration. Senior HEI administrators, such as presidents or chancellors, provide a pivotal link between government and institutional compliance (Newcombe & Conrad, 1981). Although OCR requires Title IX Coordinators to oversee all Title IX related matters, LOFs were written

and addressed to the college or university's president. This could imply that in order for an HEI to effectively comply with Title IX, the institution's president must be committed to implementing Title IX, and providing essential support to facilitate compliance within the institution. Newcombe and Conrad (1981) proposed four conditions which would lead to a president's commitment to implement a legal mandate. First, the college or university's president's values and priorities for the institution align with the mandate's priority. Second, the president and senior administrators' organizational affiliations influence them toward reform. Third, advocates pressuring for change within the institution and in society create an environment in which resistance is minimized, and lastly a government intervention leads to an awareness of shortcomings between written policies and desired outcomes (Newcombe & Conrad, 1981). Any of these aforementioned conditions or a combination could cause a college or university president to make a commitment to initiate necessary change to comply with a legal mandate. In this study, student and community advocates played a significant role in creating change, as evidenced by the created focus groups, task forces, and town-hall meetings. In addition, although some HEIs began changing policies and procedures prior to OCR's investigation, majority did not. This could suggest that many HEIs were unaware of gaps and inconsistencies until OCR's involvement. Newcombe and Conrad's (1981) proposed theory of mandated academic change has many common elements found in social constructionism theory, such as the importance of values, organizational culture, and social advocates in creating one's reality and understanding (Burr, 2015; Gergen, 1985). Therefore, this study's findings suggest that Title IX Coordinators will effectively

coordinate and oversee compliance only when the HEIs central administration is committed to change and given the resources to implement change.

Although the study's findings reveal that OCR no longer engages in Early Complaint Resolution (ECR) or resolves a complaint prior to the conclusion of a Title IX investigation, the findings still imply that HEIs benefit when they express a commitment to OCR to improve current practices. OCR responded more favorably to HEI administrators who demonstrated an interest in making changes to Title IX procedures and practices before OCR opened their investigation and during their investigation. When HEIs expressed interest to OCR, OCR provided a balance of positive remarks about the institution's progress, and negative remarks about areas of failure. Thus, communicating with OCR periodically, before and during an open Title IX investigation can demonstrate a commitment and lead to more effective Title IX efforts toward reform where necessary.

Sexual misconduct on college and university campuses was a top priority for the Obama Administration (New, 2016; U.S. Department of Education, 2011). Under the Obama Administration, OCR issued three significant Title IX guidance documents related to HEIs handling of sexual harassment and sexual assault: 2011 DCL, 2014 Q&A on Sexual Violence, and 2015 DCL to Title IX Coordinators. In addition, OCR conducted more Title IX investigations and made the list of HEIs under investigation available to the public to promote transparency. Title IX protections expanded and HEIs Title IX responsibilities increased under the Obama Administration.

However, on January 20, 2017, the most recent presidential inauguration ceremony occurred, and Donald Trump became the 45th President of the United States. The Republican Party discussed Title IX in the party's platform. The platform

acknowledged college sexual assault as a terrible crime but disagreed with the Obama Administration's approach to college sexual assault under Title IX. The party's platform stated that sexual assault cases should be investigated by civil authorities and prosecuted in the court system, not on college and university campuses (Republican Platform, 2016). This implies that under the Trump Administration, Title IX enforcement and what constitutes as noncompliance could change. For example, in May 2016, the U.S. Department of Justice and U.S. Department of Education issued a 2016 DCL advising institutions to allow transgender students to use facilities and bathrooms consistent with their gender identity (U.S. Department of Education, 2016). Recently, this guidance was rescinded "in order to further and more completely consider the legal issues involved," (U.S. Department of Justice & U.S. Department of Education, 2017, p. 1). The letter stated that the previous administration's interpretation of Title IX's applicability to gender identity gave rise to significant litigation regarding restrooms and locker facilities. As a result, the Departments believe that "in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy (U.S. Department of Justice & U.S. Department of Education, 2017, p. 1).

Similar to the withdrawing of Obama-era guidance to the rights of transgender students to use facilities consistent with their gender identity, the Trump administration could withdraw OCR's 2011 DCL on how HEIs handle sexual harassment and sexual assault complaints or issue new guidance that requires a Title IX investigation to use "beyond a reasonable doubt standard" instead of "preponderance of evidence" standard currently required and lobbyists, such as the Fraternity and Sorority Political Action Committee, are now fighting for a Title IX resolution process that mirrors the criminal



justice process to ensure accused students' due process rights (Kingkade, 2015; New, 2015). As discussed in Chapter II, tenets of social constructionism can explain Title IX's expansion and the social construction of college sexual assault as a social problem and a campus issue that should be addressed by HEI administrators (Sloan & Fisher, 2011). The Republican Platform on Title IX and college sexual assault indicates that the Trump Administration may not require HEIs to investigate campus sexual assault under Title IX, or as described above, a Trump Administration may focus more on the Title IX and due process rights of accused students. This shift in federal administration changes the context and priorities (Burr, 2015) and could influence OCR's interpretation of Title IX noncompliance and future enforcement.

#### Directions for Future Research

This study examined OCR's construction of Title IX noncompliance concerning how HEIs responded to complaints of sexual harassment and sexual assault. Previous studies have explored the history of Title IX (Sweeney, 1997) and HEIs progress towards Title IX compliance in intercollegiate athletics (Elliot & Mason, 2001; Stafford, 2004). This study filled the gap in the research by examining Title IX noncompliance by looking at HEIs investigated by OCR. However, a limitation of this study was that the researcher only examined HEIs in Title IX noncompliance after OCR issued the April 2011 DCL. Therefore, only LOFs published between May 2011 and September 2016 were used. Although the researcher was able to make inferences about OCR's enforcement practices prior to the 2011 DCL, future research regarding this topic could compare OCR's construction of Title IX under the Bush Administration with the findings from this study. In addition, with the most recent change in federal administration, many believe

President's Trump Administration will scale back on Title IX enforcement, this could be another area of research using future LOFs of guidance documents issued under the Trump Administration.

Staurowsky (2017) study revealed that today's college athlete lacks Title IX knowledge and their perceptions of the law are limited. Similar to Staurowsky's (2017) research Marra and Cromartie's (2016) study examined the perceptions of intercollegiate athletic administrators regarding Title IX compliance and gender equity. The 2015 Inside Higher Ed Survey of College and University presidents also incorporated the issue of college sexual assault and HEIs obligations. The study polled over 600 HEI presidents to explore their perceptions ("Inside Higher Ed", 2015). However, there is still a need to examine the experiences of HEI administrators, primarily Title IX Coordinators, who are responsible for coordinating the law on campus. Although, this study employed a thematic approach to examine the construction of Title IX noncompliance, the researcher used OCR's LOFs and other documents, such as resolution agreements, to corroborate findings. Since no interviews or surveys were used in this study, the researcher was unable to acquire information pertaining to HEIs experiences implementing Title IX or their personal experiences working with OCR. Therefore, future research could explore HEI administrators' perceptions surrounding working with OCR during Title IX investigations by conducting interviews. Along those same lines, OCR's LOFs indicate a conflicting relationship between OCR and HEIs. Future research could also examine OCR's evolving relationship with HEIs.

In addition to the increase in the number of Title IX investigation by the U.S. Department of Education's Office for Civil Rights, there has also been an increase in the

number of private lawsuits filed against HEIs for failing to comply with Title IX obligations (New, 2015). Victims of sexual assault and those accused of sexual assault have filed private lawsuits against HEIs under Title IX. OCR reminded HEIs that OCR's administrative standard under Title IX differed from the court's standards (U.S. Department of Education, 2011). Additional research can look at the courts' interpretation of Title IX noncompliance.

### Summary

To make this dissertation practical for HEI administrators, such as Title IX Coordinators, the researcher has consolidated a list of the lessons gleaned from the LOFs. This list is a supplement to the 2011 DCL and may guide HEIs in Title IX efforts and compliance:

1. LOFs illustrated that OCR examined grievance procedures searching for inconsistencies and definitions that did not meet Title IX standards. Several HEIs had multiple policies and procedures which created confusion due to a lack of cross-references. Thus, OCR determined that ambiguous and confusing procedures had the potential to discourage students from reporting sexual misconduct to the Title IX Office/Coordinator. HEIs should ensure that policies and procedures are written in appropriate, easily understood language. HEIs should also ensure that multiple policies and procedures are consolidated or implement a single policy and procedure for students, employees, and third parties.
2. LOFs illustrated that OCR closely examined Title IX Coordinators role and responsibilities. HEIs failed to comply with Title IX because Title IX

Coordinators did not oversee every complaint of sexual misconduct. Majority of LOFs indicated that Title IX Coordinators relied on other departments or police to investigate, instead of overseeing Title IX investigations. As a result, Title IX Coordinators were unable to determine context and identify patterns of sexual misconduct in the campus community. LOFs also indicated that most Title IX Coordinators did not have final authority regarding campus resolutions. HEIs should ensure that Title IX investigations occur simultaneously with police investigations. HEIs should ensure that Title IX Coordinators have a system in place to identify trends and patterns related to sexual misconduct on respective campuses.

3. LOFs illustrated that in addition to examining grievance procedures for definitions and inconsistencies, OCR also examined procedures and case files to determine if majority of complaints (ones without extenuating circumstances) would be resolved within 60 days, based on the institution's written procedures. This timeframe generally included the appeals process. LOFs revealed that most HEIs resolve Title IX complaints within several months because of lengthy stages within the investigation and appeals processes. HEIs should review stages within grievance procedures and consolidate, as necessary, to ensure prompt timeframes.
4. LOFs revealed that HEIs failed to provide equitable resolutions, specifically in regard to whether the alleged victim or the accused student were given equal opportunities. OCR determined HEIs failed to comply with Title IX if HEIs did not investigate sexual misconduct complaints under Title IX or if

they investigated, but failed to conduct a thorough and equitable investigation. OCR expected HEIs to determine all the circumstances within an investigation, before making a decision using the preponderance of the evidence standard. OCR emphasized the importance of determining all of the facts related to a case, to ensure appropriate sanctions, identifying trends, and preventing harassment in the larger campus community. HEIs should always conduct a thorough investigation into sexual harassment and sexual assault complaints, even in instances where there are multiple reports or an accused student admits responsibility prior to an investigation.

5. LOFs illustrated that OCR examined HEIs recordkeeping by searching for critical gaps within Title IX resolutions. Majority of HEIs failed to comply with Title IX because there was no written documentation available demonstrating that actions were taken to meet Title IX requirements. HEIs may have conducted sufficient investigations, but without documentation could not show this. OCR also determined that HEIs could not effectively identify patterns and assess the community if documentation was not maintained. Offices and Departments involved in Title IX compliance efforts should maintain accurate and detailed notes, especially pertaining to investigation findings.
6. LOFs illustrated that during complaint investigations, OCR examined unrelated case files in detail. OCR conducted a comprehensive review of every incident and materials in previous academic years and searched for critical gaps.

7. LOFs illustrated that HEIs did not always communicate and notify students during Title IX resolution processes. OCR determined that HEIs failed to comply with Title IX if regular updates were not provided to involved parties and if they were not properly notified of resolution options under Title IX. OCR also determined HEIs as noncompliance if HEIs failed to widely publicize notices of nondiscrimination. HEIs should include notices in multiple locations and materials.
8. LOFs illustrated that OCR determined HEIs failed to comply with Title IX if the interim measures and remedies provided to complainants were ineffective. According to findings, it is the institution's responsibility to ensure the effectiveness of measures, which can include following up with students and implementing other remedies. LOFs also illustrated differences between OCR's and HEIs priorities and purposes regarding Title IX resolutions. HEIs selected pedagogic remedies to help respondents understand the inappropriateness of behavior, instead of removing them from the campus.
9. LOFs indicate that OCR paid attention to how students perceived HEIs responses to sexual harassment and sexual assault. Resolution agreements which require HEIs to conduct climate assessments to assess students' attitudes regarding sexual misconduct and reporting was a common theme. This further demonstrated OCR's purpose for Title IX resolutions and emphasized the need to encourage reporting and address students' concerns. HEIs should conduct regular climate checks or assessments to improve Title IX efforts.

10. Findings revealed that HEIs did not intentionally cover up complaints of sexual misconduct, rather HEIs failed to comply with Title IX due to structural flaws within grievance procedures and resolution process. Themes highlighted the need for HEIs to improve Title IX resolution processes and rely only on the Title IX Coordinator's position for administrative oversight.
11. The 2011 DCL is an example of OCR's formal policy that outlines Title IX's procedural requirements, however, the guidance document does not clarify what compliance would look like, nor does it address specific compliance issues because determinations are made individually. LOFs account for social context and provide examples of common areas of noncompliance, which is not provided in formal policy. HEI administrators should review LOFs, especially LOFs written to institutions similar as their own, to have a better understanding of OCR's expectations.

### Conclusion

This study used social constructionism as a framework to study how the U.S. Department of Education's Office for Civil Rights constructed Title IX noncompliance and how, if at all, social context contributed to OCR's understanding and enforcement of Title IX. Using a thematic analysis approach, the researcher discovered nine themes and ancillary findings. These themes were (1) unclear grievance procedures (2) overlooking responsibilities (3) investigative inadequacy (4) limited documentation (5) communication: failing to notify (6) insufficient measures and remedies (7) students' perceptions (8) Title IX noncompliance as continuum (9) relationship: colleague or antagonist, and social influences. Findings illustrated that Title IX Noncompliance

concerning how HEIs handled sexual harassment and sexual assault complaints is indeed a social construct because OCR's interpretation of Title IX noncompliance varied among LOFs. OCR not only accounted for social context during their Title IX investigations, but OCR determined Title IX noncompliance at HEIs that failed to determine social context by conducting inadequate Title IX investigations which created a ripple effect of other areas of noncompliance. HEIs that failed to conduct thorough investigations were unable to determine circumstances in cases, and according to OCR were unable to prevent broader harassment and identify trends. According to this study's findings, HEIs are failing to comply with Title IX because administrators are mishandling investigations and there is a need to do more to understand patterns and change the culture of sexual harassment and sexual assault.



APPENDIX A – Permission Letter



**UNITED STATES DEPARTMENT OF EDUCATION**

**OFFICE OF MANAGEMENT**

Office of the Chief Privacy Officer

June 14, 2016

Lenore N. Schaffer  
201 blue Gable Road  
Apt. 711  
Hattiesburg, MS 39401

RE: FOIA Request No. 16-01599-F

Dear Ms. Schaffer:

This letter is in response to your request dated May 23, 2016, requesting information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was received in this office on May 24, 2016. Your request was assigned to the Office of Civil Rights within the Department to search for documents that may be responsive to your request.

You have asked for a waiver of all fees, including duplication fees, associated with processing your request based on your requester category as an educational institutional requester and that information will be used in your coursework of studies. That request is granted.

If you have any questions, or would like the original signed copy of this letter, please contact the FOIA Requester Service Center at (202) 401-8365 or via e-mail at [EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov).

Sincerely,

A handwritten signature in cursive script that reads "Elise Cook".

Elise Cook  
Government Information Specialist  
FOIA Service Center

APPENDIX B – IRB Approval Not Required



THE UNIVERSITY OF  
SOUTHERN MISSISSIPPI.

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Department of Educational Research and Administration  
118 College Drive #5027  
Hattiesburg, MS 39406-0001

cc: JoAnn Johnson  
Institutional Review Board

From: Lilian H. Hill e/—  
Professor and Co-Chair

Letter of confirmation for Lenore Malone Schaffer

Date: November 22, 2016

After reviewing Ms. Schaffer's dissertation proposal, I have concluded that her proposed study does not meet the requirements of Institutional Review Board for human subject protection. She plans to make use of publicly available documents through the federal government which manages Title IX and college/university compliance. These documents have been de-identified by the federal government and do not pose an identifiable threat to individual human subjects.

cc: Eric Platt  
Lenore Malone

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## APPENDIX C – OCR Letter Index

Letter of Findings Complaint—Carthage College, 2015

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