
A BRIEF OVERVIEW OF THE MECHANICS AND CIVIL RIGHTS CHALLENGES OF TITLE IX IN ATHLETICS

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When I think back to my tenure as a Civil Rights Attorney at the U.S. Department of Education's Office for Civil Rights ("OCR"), a personal line of demarcation was April 4, 2011. That was the day that OCR issued a Dear Colleague Letter ("DCL") that many viewed as groundbreaking insofar as it pressed educational institutions to revisit their approach to addressing sexual misconduct pursuant to one of the primary laws that OCR enforces: Title IX of the Education Amendments of 1972 ("Title IX").¹

Since that day in April of 2011, reference to Title IX is now often viewed synonymously, and sometimes exclusively, with addressing sexual misconduct. OCR has issued extensive additional guidance on this topic, including an expansive Questions and Answers document in 2014, a DCL about the Title IX coordinating role in 2015, another DCL in 2017 (that, in many ways, sought to reverse the approximately 72-pages of guidance issued in 2011 and 2014), and an additional Questions and Answers documents issued in 2021 and updated in 2022 that sought to provide further definition to the expansive regulatory revision to Title IX that took place between 2017-2020 and which culminated in updated Title IX regulations (34 C.F.R. Part 106) that were effective in 2020.²

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¹ U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (2011). In fairness, the 2011 DCL was not the first time that the U.S. Department of Education had discussed the applicability of Title IX in the context of sexual misconduct. *See, e.g.*, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001). However, the renewed focus during the Obama administration over a decade later sparked much discussion and debate.

² *See generally* U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014); U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: TITLE IX COORDINATORS (2015); U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER AND ASSOCIATED QUESTIONS AND ANSWERS ON CAMPUS SEXUAL MISCONDUCT (2017); U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT (last updated June 28, 2022).

Even as of the date of publication, the U.S. Department of Education has re-embarked on regulatory updates that will carry into the 2023-24 academic year and beyond, and will assuredly only add to that list of related OCR guidance regarding sexual misconduct.³

This focus on sexual misconduct, while laudable and critical to educational communities, is only a part of what Title IX does, however. I also had the opportunity at OCR, in my teaching, and in my current legal practice to focus on the other aspect of Title IX and the subject for which the law had been best known since its passage and early implementation in the 1970s: ensuring equitable athletic opportunities and treatment at secondary and post-secondary educational institutions. Regardless of how the dialogue has changed, Title IX and its application to athletics remains an important issue for OCR, for secondary and post-secondary institutions, and, perhaps most importantly, for student-athletes.

This essay will provide a basic overview of how Title IX works to ensure equitable athletic opportunities (including equitable treatment within athletics), before turning to a discussion about some of the civil rights issues⁴ that I anticipate will become important areas of focus for anyone who practices or studies the area over the coming years. It is only fair to share that I am a proponent of interscholastic and intercollegiate athletics, generally, because of the broad and extensive benefits that they can provide, including a strong work ethic, values of fair play and fair competition, and sportsmanship, to name but a few. I have observed in the classroom and in the professions how student-athletes translate these skills to success in law, business, academics, and a range of other arenas outside of sports. Without wishing to sound too saccharine, these are also benefits and attributes that can and should be exercised and valued in society. With that preface, it should come as no surprise to the reader that I personally wish for these benefits to be experienced equitably for girls and boys, women and men, and regardless of gender, gender identity, or socioeconomic status.

I. A PRIMER ON THE GUIDANCE UNDERLYING TITLE IX-ATHLETICS

While athletics has not received the attention that sexual misconduct on campus has received in the past decade, the federal guidance involving gender

³ Throughout this essay I will refer to the U.S. Department of Education and OCR frequently. OCR is the primary enforcement wing of the larger Department, i.e., the branch of the Department that investigates and determines whether educational institutions that receive federal financial assistance are out of compliance with any of the laws that OCR enforces, including Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and Title VI of the Civil Rights Act of 1964 to name but a few.

⁴ This paper does not address the issue of name, image, and likeness that was at issue in *Alston v. NCAA*, 141 S. Ct. 2141 (2021). This is partially because this is very much an evolving issue with states still passing laws to address the change. It also remains to be seen how institutions and student-athletes will navigate this issue. In sum, it is a complex topic that could easily subsume the entire symposium discussion.

equity in athletics is also extensive and multi-faceted. In addition to the regulatory requirements found at 34 C.F.R. Part 106, the federal government has published extensive guidance interpreting Title IX athletic policy.⁵

The federal government also, on occasion, publishes institution-specific findings. For example, following an investigation or a compliance review (similar to an agency-triggered audit), OCR will typically issue a letter of finding—or as it is more commonly known, a “resolution letter”—that describes the investigative process and often provides extensive detail with regard to how the institution in question fared in the course of the investigation. In the instances in which an institution is deemed to be out of compliance with Title IX, in whole or in part, these resolution letters typically also attach the resolution agreement that the institution entered to avoid further litigation and the potential loss of federal financial assistance from the U.S. Department of Education. These resolution letters and resolution agreements can provide additional insight into how the government interprets the laws and relevant regulations in the specific context of different institutions.⁶ Finally, in addition to OCR guidance and resolution letters, the courts have increasingly been asked to address specific issues revolving around equitable athletic participation opportunities, counting athletes, and other related issues.⁷ An understanding of these resources, as well as others, is critical to understand how Title IX athletics cases work and how individuals utilize Title IX to improve gender equity in their own institutions.⁸

⁵ See, e.g., U.S. DEP’T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR’S MANUAL (1990); U.S. DEP’T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THREE-PART TEST (1996) [hereinafter 1996 THREE-PART TEST GUIDANCE]; U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE (2003); U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: ATHLETIC ACTIVITIES COUNTED FOR TITLE IX COMPLIANCE (2008); U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: INTERCOLLEGIATE ATHLETICS POLICY CLARIFICATION: THE THREE-PART TEST—PART THREE (2010) [hereinafter 2010 DEAR COLLEAGUE LETTER]; U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: STUDENTS WITH DISABILITIES IN EXTRACURRICULAR ATHLETICS (2013).

⁶ See, e.g., Rutgers, The State University of New Jersey, Case No. 02-08-6001 (Jan. 20, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02086001-b.pdf> [<https://perma.cc/V7QG-L6BV>]; Cleveland County School District, Case No. 06-14-1411 (Oct. 22, 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06141411-a.pdf> [<https://perma.cc/QGV7-RCBZ>].

⁷ See, e.g., Cohen v. Brown, 991 F.2d 888 (1st Cir. 1993); Biediger v. Quinnipiac Univ., 691 F.3d 85 (2nd Cir. 2012); Mansourian v. Regents of Univ. of Cal., 602 F.3d 957 (9th Cir. 2010); Portz v. St. Cloud State Univ., 401 F. Supp. 3d 834 (D. Minn. 2019); Lazor v. Univ. of Conn., 560 F. Supp. 3d 674 (D. Conn. 2021); Balow v. Michigan State Univ., 24 F.4th 1051 (6th Cir. 2022), *cert. denied*, 2022 WL 17573475 (Dec. 12, 2022).

⁸ Importantly, it is not only student- or coach-plaintiffs or advocates that are interested in utilizing Title IX to improve the gender equity of their athletic programs. Athletic Directors and administrators at both the secondary and post-secondary levels often care deeply about gender equity. This form of leadership on gender equity often extends to general counsel, post-secondary college or university leadership, and school principals and superintendents at the secondary school level.

At the outset, the relevant implementing regulations for Title IX state that athletic programs “shall provide equal athletic opportunity for members of both sexes,” including a “selection of sports and levels of competition [that] effectively accommodate the interests and abilities of members of both sexes.”⁹ In assessing this participation opportunity component, OCR and the courts employ a Three-Part Test that allows an institution to demonstrate that it meets *any part* of the Test to assess compliance. To comply with Part One of the Three-Part Test, an institution must provide athletic participation opportunities that are “substantially proportionate” to enrollment and ensure the levels of competition provided by sex are equitable. In practice, this involves an analysis of the institution’s full time student population (either its registered students at the secondary level or the full-time undergraduate population at the post-secondary level) and its athletic population, both categories disaggregated by sex. The law anticipates that men and women will participate in athletics in substantial proportion to their overall representation at an institution. Thus, if an institution’s population is 65% female, it is envisioned that the athletic population will be substantially proportionate to its undergraduate population, *i.e.*, approximately 65% female.¹⁰ Substantial proportionality is reached so long as the gap in “the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, *i.e.*, a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.”¹¹

Part Two of the Three-Part Test allows an institution to reach compliance with Title IX if it has a “history and continuing practice” of program expansion for

⁹ 34 C.F.R. § 106.41(c)(1). The author understands and appreciates that the term “sex” is more complicated to define than the Title IX regulations may indicate, and most post-secondary institutions as well as more current federal guidance, broadly prohibits discrimination on the basis of sex, gender expression, gender identity, and/or gender status. This report will echo the language used in the federal materials and guidance discussed for clarity, and with no other intention or purpose.

¹⁰ Notably, the targets that an institution must hit to satisfy Part One of the Three-Part Test often change annually. For example, if a post-secondary institution’s full-time undergraduate population fluctuates between 50% female to 52% female between Year 1 and Year 2, then the target for the athletic program would also fluctuate and OCR would analyze whether the athletic program was approximately 50% female in Year 1 and approximately 52% female in Year 2 to reflect the undergraduate gender proportions. While the 1996 DCL on the Three-Part Test “recognizes that natural fluctuations in an institution’s enrollment and/or participation rates may affect the percentages in a subsequent year,” this still proves challenging for many institutions insofar as it does not align with the practicalities of athletic recruiting at the post-secondary level in which student-athletes commonly presume they will participate and utilize all of their athletic eligibility over multi-year cycles.

¹¹ 1996 THREE-PART TEST GUIDANCE, *supra* note 5. *But see Balow*, 24 F.4th at 1059 (holding that the participation gap must be assessed in “numerical terms, not as a percentage,” which meant in that case that “[a] school may fail to achieve substantial proportionality even if its participation gap is only a small percentage of the size of its athletics program.”).

the under-represented sex.¹² Typically, if an institution seeks to satisfy Part Two of the Three-Part Test, it must create a number of teams for the historically underrepresented sex in a consistent manner over a relatively abbreviated period of time.

Finally, if an institution does not reach substantial proportionality (Part One) or demonstrate a history of continuing athletic program expansion (Part Two), it can still satisfy Title IX by showing that “the interests and abilities of the members of [the underrepresented sex] have been fully and effectively accommodated by the present program.”¹³ Thus, Part Three of the Three-Part Test allows an institution to maintain compliance with Title IX by ensuring that “the selection of sports [currently offered] effectively accommodates the interests and abilities of members of both sexes.”¹⁴ This is typically satisfied through a survey and a range of additional steps taken to ensure no unmet interest in students with the requisite ability to compete, including incoming and/or prospective students.¹⁵ This analysis also requires a focus on regional sports, sports offered by regional leagues or conferences, and for post-secondary recruiting regions.

In addition to the Three-Part Test, OCR also considers the levels of competition available to male and female athletes at an institution as part of its analysis. Specifically, OCR considers whether the competition available for both male and female athletes, on a program wide basis, affords equivalently advanced competitive opportunities.¹⁶ In other words, not only must there exist interest and ability sufficient to add a specific varsity sport for the underrepresented gender, but there also must exist a reasonable expectation of appropriate competition for the team. This is why both OCR and the courts have repeatedly given deference to institutions with regard to what sports they offer and how they achieve compliance with Title IX.¹⁷

¹² U.S. DEP’T EDUC., A POLICY INTERPRETATION: TITLE IX AND INTERCOLLEGIATE ATHLETICS 10-12 (1979) [hereinafter 1979 POLICY INTERPRETATION].

¹³ *Id.*

¹⁴ See 34 C.F.R. § 106.41(c)(1).

¹⁵ See generally 2010 DEAR COLLEAGUE LETTER, *supra* note 5.

¹⁶ See, e.g., 1979 POLICY INTERPRETATION, *supra* note 12, at 10-11 (stating Title IX requires institutions to effectively accommodate the “interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes”); 1996 THREE-PART TEST GUIDANCE, *supra* note 5, at 1-2.

¹⁷ See, e.g., 1996 THREE-PART TEST GUIDANCE, *supra* note 5, at 4 (“Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities”); *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 293 (2d Cir. 2004) (holding that institutions “have considerable flexibility in complying with Title IX”); *Portz v. St. Cloud State Univ.*, 401 F. Supp. 3d 834, 868-69 (D. Minn. 2019) (highlighting that the court did “not disregard [the institution’s] self-government” and pointing out that the institution was “still free to implement other cost containment strategies that do not discriminate against women”).

In addition to the participation component, Title IX also requires equitable treatment regarding scholarship aid at institutions that offer athletic financial aid,¹⁸ and this benefit must be provided within 1% of the appropriate portion of student athletes.¹⁹ There are then an additional eleven treatment areas, colloquially referred to as the “Laundry List” upon which institutions are also assessed regarding gender equity, including the quality and availability of practice and competitive facilities, the quality and number of uniforms and equipment, access to appropriate coaching, and recruitment, to name but a few.²⁰

In sum, assessing equity in athletics often involves extensive, detailed analysis to determine whether programs are equitable by gender. And that is also an important concept: athletic equity does not necessarily translate to excellence in every area. If female and male student-athletes utilize the same facility and it is a poor facility, that is not necessarily a Title IX issue because both males and females share that facility. Rather, the question often comes down to whether one gender receives better treatment than the other gender. This is also why athletic reviews are holistic and most OCR cases are focused on looking at the entire athletic program because only by looking at the entire program can a federal regulator or a court determine if the program, as a whole, is equitable or not.

II. CHALLENGES ON THE HORIZON

With all of the structure discussed in Part I, which is only a fragment of the way these matters are analyzed in practice, one would think that Title IX has covered many, if not all, of the areas in an athletic program that can create challenges for an institution. However, there are several civil rights issues on the horizon that will only serve to challenge regulators and others related to athletic equity for the foreseeable future. The issue that appears most likely to challenge

¹⁸ 34 C.F.R. § 106.37(c) (“[T]o the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics.”).

¹⁹ This standard arose from an OCR letter to Bowling Green State University in 1998, which stated in relevant part: “If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the ‘substantially proportionate’ requirement.” See U.S. DEP’T EDUC., DEAR COLLEAGUE LETTER: BOWLING GREEN STATE UNIVERSITY (1998) (emphasis added). This standard is still applied by OCR and the courts today.

²⁰ The regulatory provisions require consideration of the following factors: equipment and supplies; travel and per diem allowance; scheduling of games and practice times; opportunity to receive academic tutoring and assignment and compensation of tutors; opportunity to receive coaching and assignment and compensation of coaches; provision of locker rooms, practice and competitive facilities; provision of medical and training facilities and services; provision of housing and dining facilities and services; provision of publicity; provision of support services; and recruitment of student athletes. 34 C.F.R. § 106.41(c).

the structure of Title IX and align with the political and ideological battles that have been prevalent in the United States in the previous years is the issue of transgender athletes.

Earlier in this essay, I began to self-edit for terms like “boys” and “girls” and “men” and “women,” understanding that gender identity and gender expression are much broader concepts at many secondary and post-secondary campuses in this country.²¹ Title IX does not adequately address this nuance. Part of the challenge is that, while men have participated as practice players on female teams in the past, and women may participate in men’s sports, e.g., as coxswains for men’s rowing teams or even on men’s teams more generally,²² those are relatively limited situations and the Title IX athletics construct is otherwise built around a binary view of sex that is outdated in the modern era for most campuses. This view has also created division—and in some instances unanticipated alliances—between individuals who focus on transgender athletes (positively or negatively) and individuals who may have advocated for female athletic opportunities in the past.²³

Many states have, in turn, passed legislation that focus on “gender at birth,” potentially require genital examinations, or suggest equally abhorrent approaches, even though transgender student-athletes make up a tiny number of athletic participants.²⁴ The harm caused by these laws, and the impact on

²¹ See *supra* note 10.

²² See *Kicking Down Barriers: Sarah Fuller Makes History as Kicker for Vanderbilt Football Team*, VAND. MAG. (Feb. 18, 2021, 8:59 AM), <https://news.vanderbilt.edu/2021/02/18/kicking-down-barriers-sarah-fuller-makes-history-as-kicker-for-vanderbilt-football-team/> [https://perma.cc/K4GN-2NK3] (discussing the “first woman to play in a football game in the Southeastern Conference and for a Power Five program”).

²³ See generally Will Hobson, *The Fight for the Future of Transgender Athletes*, WASH. POST (Apr. 15, 2021, 9:00 AM), <https://www.washingtonpost.com/sports/2021/04/15/transgender-athletes-womens-sports-title-ix/> [https://perma.cc/Y9SM-QQEW]; Katelyn Burns, *The Rise of Anti-Trans Radical Feminists, Explained*, VOX (last updated Sept. 5, 2019, 11:57 AM), <https://www.vox.com/identities/2019/9/5/20840101/terfs-radical-feminists-gender-critical> [https://perma.cc/YTT3-9Z7U].

²⁴ See Katie Barnes, *Alabama to Wyoming: State Policies on Transgender Athlete Participation*, ESPN (June 7, 2022), https://www.espn.com/espn/story/_/id/32117426/state-policies-transgender-athlete-participation [https://perma.cc/G4YK-AF7F]. See also Madeleine Roberts, *Human Rights Campaign, Athlete Ally Announce Partnership with Cut.com on New Video with Chris Mosier, “Kids Meet a Trans Athlete!”*, to Mark 2020 Tokyo Olympic Games, HUM. RIGHTS CAMPAIGN (July 24, 2021), <https://www.hrc.org/press-releases/human-rights-campaign-athlete-ally-announce-partnership-with-cut-com-on-new-video-with-chris-mosier-kids-meet-a-trans-athlete-to-mark-2020-tokyo-olympic-games> [https://perma.cc/V4NR-BN8A]; Meghan Brink, *Protections for Trans Athletes in Title IX Proposal Still Unknown*, INSIDE HIGHER ED (July 5, 2022), <https://www.insidehighered.com/news/2022/07/05/title-ix-transgender-athletes-be-considered-separately> [https://perma.cc/34Q7-4PFG] (“Transgender athletes make up a minuscule population of athletes across the nation, with even fewer going on to participate in college sports. Reportedly, there are only 32 trans athletes who have competed openly in college sports.”).

vulnerable student-athletes, in my view, far outweighs competitive concerns that could be addressed in other ways, particularly because there are such a small number of students who identify as transgender or in another manner that would impact competition. At the same time, many state laws seek to deny or at the very least chill athletic participation by transgender or other non-conforming student athletes, thus depriving them of the very benefits athletics can provide for all student-athletes, e.g., opportunities to make friends, develop skills like teamwork, etc. discussed above, and even network for future educational and professional opportunities. Still, this debate likely will continue to receive a mountain of media attention, similar to the positive focus on gender equity provoked by a single but powerful 37-second TikTok video posted by basketball standout Sedona Prince demonstrating the inequity of the 2021 NCAA basketball tournament.²⁵

In 2020, for example, under the Trump Administration, OCR went so far as to begin the process to try to suspend the provision of federal financial aid to the Connecticut Interscholastic Athletic Conference (“CIAC”) and various public school districts within Connecticut because of the CIAC’s policy of allowing transgender girls to compete on female athletic teams, holding that the policy discriminated against women in violation of Title IX.²⁶ This decision came in the wake of *Bostock v. Clayton County*, in which the U.S. Supreme Court held that discrimination against gay and transgender individuals violates Title VII of the Civil Rights Act, which bars employment discrimination because of sex. The Biden Administration reversed these Trump-era positions and re-affirmed the agency’s 2016 position in June of 2021.²⁷

²⁵ See Dylan Mickanen, *Sedona Prince’s Viral TikTok Shows the NCAA Had Enough Space for an Equal Weight Room*, NBC SPORTS (Mar. 19, 2021), <https://www.nbcsports.com/northwest/oregon-ducks/sedona-princes-viral-tiktok-shows-ncaa-had-enough-space-equal-weight-room> [https://perma.cc/XLG8-73GW]. I appreciated that most cuts of Prince’s TikTok that I viewed were exactly 37-seconds long, or the exact length in words of Title IX. See Steve Wulf, *Title IX: 37 Words That Changed Everything*, ESPN (Mar. 22, 2012), https://www.espn.com/espnw/title-ix/story/_/id/7722632/37-words-changed-everything [https://perma.cc/5FRR-KJ7R].

²⁶ As a backdrop to this discussion, it is important to highlight that during the Obama Administration, OCR and the Department of Justice’s Civil Rights Division jointly released a May 13, 2016 DCL on Transgender Students that that interpreted a student’s gender identity as a student’s “sex” under Title IX and stated that educational institutions should not treat transgender students differently from how they treat other students of the same gender identity. Instead, students should be treated consistent with their chosen gender identity. The guidance also noted that requiring students to produce documents that reflect their gender identity could itself violate Title IX. The Trump Administration rescinded that 2016 guidance almost immediately, stating that it had not been properly analyzed and/or that it exceeded the government’s regulatory authority.

²⁷ See Press Release, U.S. Department of Education, U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity (June 16, 2021), <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity> [https://perma.cc/K383-FHPU].

Once the presidential administration changed, the CIAC case persisted in a different form: four cisgender student-athletes who competed against transgender students filed suit against the CIAC and its member institutions alleging the CIAC's transgender policy violated their Title IX rights. While this case was dismissed by the District Court, it was appealed to the Second Circuit, which just recently affirmed the lower court's dismissal.²⁸ There will doubtless be more litigation around transgender student-athletes and the athletic programs that house them are stuck in a quandary of how to best support these student-athletes, in accord with relevant interscholastic rules, NCAA rules, and a federal response that is still not entirely clear.

²⁸ *Stanescu ex rel. v. Conn. Ass'n of Schools, Inc.*, No. 3:20-cv-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021) (dismissing the Title IX allegations), *aff'd*, 57 F.4th 43 (2d Cir. 2022).