Title IX and Gender Stereotype Theory: Protecting Students from Parental Status Discrimination

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INTRODUCTION

Students who are parents are being discriminated against on the basis of their parental status by educational institutions.¹ Mothers face stereotypes that being committed students or employees makes them bad mothers and conversely, that being committed mothers makes them bad students and employees.² Fathers face different stereotypes, including that they are uncommitted students and employees when they take family leave, because childcare is still regarded as a feminine role.³ However, despite these co-occurring stereotypes, a cultural bias exists against mothers, with employers rating “fathers as the most desirable employees” but holding “mothers to harsher performance standards.”⁴ This cultural bias can result in a “motherhood penalty,”⁵ particularly in the education context, where pregnant and parenting women face discrimination, harassment, and other barriers that make it hard for them to succeed.⁶

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³. Id.


⁵. Id.

Research has shown that when Title IX of the Education Amendments of 1972 (Title IX) is not enforced, unlawful discrimination surrounding pregnancy and parenting can cause dire effects on students’ education.7 Student parents experience parental status discrimination when they are denied admission to educational institutions based on their status as parents,8 excluded from national honor society organizations after becoming pregnant and having children outside of wedlock,9 kicked out of school upon becoming pregnant,10 threatened with detention due to violating dress code requirements out of necessity related to their pregnancy,11 and prevented from participating in school activities because they have “too many excused absences” due to their child’s illness or hospitalization.12

Moreover, the motherhood penalty can manifest in structural barriers and discrimination that prevent parenting women from realizing their potential and can force parents to reluctantly leave school.13 Young women who drop out of school due to pregnancy report that they would have remained in school if they had received greater support from adults.14 Indeed, women who return to school while parenting do everything they can to balance the responsibilities of parenting and education, despite being told by others that “it just won’t work.”15 While federal regulations are slowly establishing stronger rights for working mothers, these protections are not being implemented in the world of academia.16 The burden falls on the student to find some way around parental status discrimination, rather than on the institution to implement policies to prevent parental status discrimination from happening in the first place.17

8. E.g., Tingley-Kelley v. Trs. of Univ. of Pa., 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010).
10. NAT’L WOMEN’S LAW CTR., supra note 6, at 1.
11. Id. at 3.
12. Id.
13. Id. at 1.
15. Id.
17. See id. (writing that post-doctorate students and graduate students put pressure on themselves when “there isn’t a policy to tell them what sort of leave to expect or what sort of accommodations can be made in exceptional circumstances . . . . [The] burden falls on the postdoc to find some way
Title IX, a federal civil rights law, protects parenting students from sex-based discrimination; however, very few court decisions relating to the rights of parenting students exist. As a result, many students are unaware of the scope of Title IX’s protections. Specifically, “[a]fter giving birth, few students seek to enforce their Title IX protections since very few of them even know they can complain on those grounds. At many colleges and universities, there are no published procedures on filing complaints and no Title IX coordinators to handle them.” The protections provided by Title IX, although minimal, are crucial. The equal treatment and support that Title IX mandates is critical to ensure that women have equal access to education and that young fathers can remain engaged in their child’s life while pursuing their education. However, despite Title IX’s prohibition on sex discrimination, educational institutions continue to discriminate against student parents.

Evidence of gender stereotypes has been useful in establishing claims under Title VII of the Civil Rights Act of 1964 (Title VII), the federal employment discrimination statute. Parental status discrimination is not

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18. See generally NAT’L WOMEN’S LAW CTR., supra note 6.
19. See NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 40: WORKING TO ENSURE GENDER EQUITY IN EDUCATION 55 (2012), http://www.nwgc.org/TitleIX40/TitleIX-print.pdf [https://perma.cc/Q3MD-W56W]; Mangel, supra note 7 (“[T]he pregnant and parenting students aren’t the only ones empowered by this information . . . . teachers, nurses, social service providers and others are always shocked to hear that the law actually is in place to protect the pregnant and parenting student.”).
22. See U.S. DEP’T OF EDUC., SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, at 4 (June 2013), https://ww2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf [https://perma.cc/ZMN2-X5CQ] (“Since the passage of Title IX, sex discrimination—including discrimination on the basis of pregnancy, child birth, and parental status has been prohibited. Encouraging pregnant and parenting students to stay in school will have a positive effect on their lives and their children’s lives. The nation as a whole will benefit from having a generation of young adults who are better educated and more economically self-sufficient.”).
23. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., supra note 19.
24. NAT’L WOMEN’S LAW CTR., supra note 6, at 4–14.
a claim in itself, but is instead considered a “sex-plus” claim.26 These sex-
plus claims under Title VII can be established by evidence of gender 
stereotypes.27 A gender stereotype “is a generalized view or preconception
about attributes or characteristics that are or ought to be possessed by, or
the roles that are or should be performed by men and women.”28 Gender
stereotypes are pervasive within the education system and, as this
Comment asserts, result in parental status discrimination.29

Gender stereotypes that are common within both the employment
and education context are often subtle. In the academic arena, educators
and institutions risk violating Title IX when they stereotype parenting
students as low academic achievers.30 For example, in the medical school
context, female students have been told that “they should not go into some
surgical specialties if they want to have a family,” and that surgical careers
are “too stressful—[they] looked more like a family doctor—and besides
that [they] might be a ‘distraction’ in the operating room.”31 The legal
profession and legal academia are not immune from gender stereotypes.32
In fact, law students themselves have been found to hold implicit gender
biases that associate men with legal careers and women with the home and
family.33 Implicit biases work to fuel the unconscious stereotypes,34
including the gender stereotypes surrounding parenting women that can
result in Title IX violations.

5, 2006) (stating that allegations that the plaintiff was “discriminated against on the basis of presumed
conformity to a gender stereotype that she would stay home with her children can be evidence in
support of a so-called ‘sex plus’ claim on the basis of gender discrimination under Title VII”).
27. See generally Enforcement Guidance: Unlawful Disparate Treatment of Workers with
Caregiving Responsibilities, supra note 25.
ohr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx [https://perma.cc/8RX8-GPM6].
29. See generally, NAT’L WOMEN’S LAW CTR., supra note 6.
30. NAT’L WOMEN’S LAW CTR., supra note 6.
31. Jessica Leeder, Investigator Finds Culture of Disrespect, Harassment at MUN Medical
School, GLOBE & MAIL (July 16, 2018), https://www.theglobeandmail.com/canada/article-
investigator-finds-culture-of-disrespect-harassment-at-mun-medical/ [https://perma.cc/8XNQ-NU54]
(discussing an internal report regarding sexual harassment concerns at a Canadian medical university).
32. Justin D. Levinson & Danielle Young, Implicit Gender Bias in the Legal Profession: An
Empirical Study, 18 DUKE J. GENDER L. & POL’Y 1, 2 (2010) (“Scholars have argued that due to
negative stereotypes portraying women either as workplace cutthroats or, conversely, as secretaries or
housewives, decision-makers continue to subordinate women to men in the highest levels of the legal
profession.”).
33. Id. at 32.
34. Implicit Bias, PERCEPTION INSTITUTE, https://perception.org/research/implicit-bias/ [https:/
/perma.cc/CKP8-X2UZ].
Similarly, in the employment sector, employers risk violating Title VII when they deny promotions or opportunities to parents based solely on their status as a parent. Particularly, research shows that pregnant and parenting women may be denied opportunities based on the assumption that they are caregivers first and employees second. For example, the discrimination may materialize in a lack of proper facilities to pump breastmilk or in comments about whether parenting women should be home with their children. Supreme Court Justice Ruth Bader Ginsburg encountered the effects of these stereotypes when she found herself “shut out” from job opportunities upon her graduation from law school: “I was Jewish, a woman, and a mother. The first raised one eyebrow; the second, two; the third made me indubitably inadmissible.”

This Comment asserts that students who experience discrimination on the basis of parental status have a cause of action under Title IX by using the gender stereotyping theory that is common in Title VII analysis as illustrated by *Tingley-Kelley v. Trustees of the University of Pennsylvania*. Part I will first provide an overview of the applicable law surrounding Title IX and Title VII. Part II will briefly summarize application of the gender stereotype theory and the applicable case law that provides the legal framework for this proposition. Part III will detail how the Title VII framework can be followed to allow students to bring a claim under Title IX using gender stereotype theory. Part IV will conclude this Comment with specific recommendations and examples for how educational institutions and governing bodies can protect and advocate for the rights of parenting students. Much of this Comment will focus on the discrimination that mothers face, due in part to the motherhood penalty.

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36. Id. at 2.
that females experience in academia and the workplace; however, this is not to discredit or minimize the discrimination that fathers face.

I. AN OVERVIEW OF TITLE IX AND TITLE VII

A. Title IX of the Education Amendments of 1972

Title IX prohibits institutions from discriminating against students based on sex. Title IX was originally designed to be a comprehensive legal measure that would protect women from the “persistent, pernicious discrimination” that perpetuates second-class citizenship for women, but it now explicitly prohibits discrimination against both genders. Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” All educational institutions, including colleges, universities, elementary and secondary schools, and training programs that receive federal financial assistance are required to abide by Title IX. Recipients of federal funds are required to recruit, admit, counsel, and educate students in a nondiscriminatory manner. The scope of Title IX is vast, and it prohibits discrimination in relation to financial assistance, athletics, sex-based harassment, discipline, employment, single-sex education, and pregnant and parenting students. Title IX regulations are enforced by the United States Department of Education Office for Civil Rights.

40. Note that courts often use the terms “sex” and “gender” interchangeably in written opinions.
43. Title IX and Sex Discrimination, U.S. DEP’T EDUC. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/PM6X-48S8].
44. Title IX Legal Manual, U.S. DEP’T JUST. (Aug. 6, 2015), https://www.justice.gov/crt/title-ix/fi/20Overview%20of%20Title%20IX%20Interplay%20with%20Title%20VI%20Section%20504%20Title%20IX%20and%20Title%20VII%20as%20Amended [https://perma.cc/4CVB-SHWB].
45. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 42, at 8.
46. Id.
Title IX prohibits three general types of discrimination: “(1) disparate treatment, (2) disparate impact, and (3) retaliation.” 48 This Comment will focus on how gender stereotype theory can be used to allow for a cause of action under Title IX against educational institutions in disparate treatment cases, as generally this is where parental status discrimination is most likely to arise. 49 To bring a disparate treatment claim under Title IX, the student must establish three elements: (1) that they were excluded from participation in, denied benefits of, or subjected to discrimination in an educational program; (2) that the program receives federal financial assistance; and (3) that their exclusion, denial, or subjection to discrimination was on the basis of gender. 50 The student must prove that the discrimination they faced occurred because of their gender. 51

While the gender stereotyping theory is most often applied to Title VII employment discrimination cases, this theory has also been used in Title IX cases. 52 The United States Department of Education’s Office for Civil Rights states that:

[G]ender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity. 53

In relation to parenting students, Title IX requires schools to “give all students who might be, are or have been pregnant (whether currently parenting or not) equal access to school programs . . . and to treat . . . parenting students in the same way that they treat other students who are [similar].” 54 The implementing regulations of Title IX that apply

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48. Title IX Legal Manual, supra note 44.
49. Diana Burgess & Eugene Borgida, Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping Is Sex Discrimination, 5 PSYCHOL. PUB. POL’Y & L. 665, 667 (1999) (“Such discrimination generally takes the form of disparate treatment, in which women who violate prescriptive stereotypes of femininity are punished, either through hostile environment harassment or through the devaluation of their performance.”).
52. Gender stereotyping theory was applied in Tingley-Kelley as discussed earlier.
54. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., supra note 19, at 56.
to parenting students state that no educational recipient of federal funds shall apply "any rule concerning a student’s actual or potential parental, family, or marital status which treats students differently on the basis of sex."55 Therefore, this regulation states that discrimination is only prohibited on the basis of parental status if the school treats students differently on the basis of sex.56 Unfortunately, this allows for the interpretation that schools can discriminate against parents as long as they discriminate against both male and female parents in the same manner.

Although the regulations include the prohibition of discrimination based on parental status, they provide greater protection to pregnant students than to parenting students57 by enumerating specific protections for students relating to pregnancy but not to parenting students.58 Due to the precise enumeration of these protections, educational institutions are subsequently more informed about the rights of pregnant students and are more likely to provide resources for pregnant students—often ignoring or forgetting about the rights of parenting students.59

Problematically, a lack of case law also exists regarding the rights of parenting students under Title IX.60 This lack of case law should not be interpreted to mean that educational institutions are complying with Title IX and respecting the rights of parenting students because there are many other explanations for this lack of case law: (1) students and educational institutions may be unaware that the law protects parenting students, (2) students may avoid lawsuits due to the financial and emotional costs, and (3) students may be unwilling to pursue claims.61 Students often do not realize that Title IX prohibits discrimination against parenting students,62 and, relatedly, the number of Title IX cases that address the rights of

56. Id.
58. These protections include “prohibiting discrimination against any student, or exclusion of any student from educational programs, classes, or extracurricular activity based on pregnancy, prohibiting requiring pregnant students to attend a specific program not required by nonpregnant students, and requiring schools to treat pregnancy and related conditions like childbirth or termination as any other temporary disability ‘with respect to any medical or hospital benefit.’” 34 C.F.R. § 106.40 (2018).
59. See, e.g., Hady, supra note 57, at 103 (“Title IX has not been robustly enforced in part because the regulations are an ineffective enforcement tool.”).
61. NAT’L WOMEN’S LAW CTR., supra note 6.
62. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., supra note 19.
parenting students is “disproportionately small to the number of students that . . . are having their rights violated.”

Due to the lack of case law, and also because Title IX does not provide an analytical framework for evaluating gender discrimination claims, courts consult Title VII case law for guidance. As illustrated in Tingley-Kelley v. Trustees of the University of Pennsylvania, the District Court in the Eastern District of Pennsylvania used Title VII’s analytical framework to assess a student’s claim of gender discrimination based on her parental status when she was denied admission to veterinary college. The court found that the plaintiff alleged facts sufficient for a gender discrimination claim under Title IX by using the gender stereotype theory.

B. Title VII of the Civil Rights Act of 1964

As mentioned, courts will look to Title VII for guidance on analyzing Title IX claims. Using Title VII for guidance in Title IX analysis opens the door for courts to apply legal theories that are applicable in Title VII cases to Title IX cases. Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. It is important to note that a provision to Title VII, added by the 1978 Pregnancy Discrimination Act, expanded Title VII to include a prohibition of discrimination on the basis of pregnancy, childbirth, or related medical conditions. Moreover, under Title VII, parental leave that is granted for child care purposes must be provided on an equal basis to both men and women. Title VII’s standards and regulations apply to Title IX as well.

Further, Title VII has been expanded to include a prohibition against sex-based disparate treatment of parents and caregivers. While Title VII

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63. Gough, supra note 60, at 218.
64. E.g., Tingley-Kelley v. Trs. of Univ. of Pa., 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010); see, e.g., David S. Cohen, Title IX: Beyond Equal Protection, 28 HARV. J.L. & GENDER 217, 226 (2005).
65. Tingley-Kelley, 677 F. Supp. 2d at 775.
66. Id. at 776.
70. Id. at 78.
71. Id. at 89.
itself does not explicitly prohibit parental status discrimination, parental status discrimination is recognized as a “sex-plus claim.” The labeling of these claims as a sex-plus claim is “simply a heuristic . . . . [A] judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against.” Title VII prohibits decisions against employees that are based on sex “regardless of whether the employer discriminates more broadly against all members of the protected class.” Title VII does not allow employers to treat female employees differently based on the gender stereotype that a female employee’s parental responsibilities will interfere with her performance. These gender stereotypes directly violate Title VII and therefore, by implication, violate Title IX.

Under Title VII, a plaintiff may demonstrate a sex discrimination claim using two frameworks: the burden-shifting framework or the mixed-motives theory. The burden-shifting framework allows a plaintiff to establish a claim of sex discrimination using circumstantial evidence. The burden-shifting framework requires that the plaintiff initially carry the burden of proof. Once the plaintiff establishes his or her prima facie case of discrimination, the burden shifts to the defendant, requiring the defendant to articulate a legitimate nondiscriminatory reason for the adverse action. If the defendant establishes a legitimate reason, the plaintiff then has the opportunity to establish that the defendant’s reason is merely pretext.

In contrast, the mixed-motives theory is applied when direct evidence exists of the alleged discrimination. A defendant is found liable for discrimination under the mixed-motives test when the plaintiff proves that the adverse employment action was motivated by forbidden criterion,

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75. EEOC Enforcement Guidance, supra note 72.
76. Id.
77. Id.
78. Burns v. Johnson, 829 F.3d 1, 8 (1st Cir. 2016).
79. Id.
81. Id.
82. Id.
even if other, permissible factors were present.\textsuperscript{84} However, this test can be more difficult for plaintiffs to satisfy because it requires the plaintiff to demonstrate that the employer substantially relied on an impermissible criterion when acting.\textsuperscript{85} The Title IX analysis uses the Title VII framework by first assessing whether the disparate treatment claim falls under the burden-shifting framework or the mixed-motives test.\textsuperscript{86}

II. GENDER STEREOTYPE THEORY AND ITS APPLICATION IN LAW

A. Gender Stereotype Theory

One theory for litigating employment discrimination under Title VII is to allege disparate treatment under the gender stereotype theory.\textsuperscript{87} The gender stereotype theory argues that “an adverse employment decision was made because of the operation of stereotypes associated with a protected class.”\textsuperscript{88} Gender stereotypes cause unequal treatment because of a person’s gender. These stereotypes are harmful when they limit a person’s capacity to “develop their personal abilities, pursue their professional careers and make choices about their lives.”\textsuperscript{89} Such stereotypes can be categorized into four types: personality traits, domestic behaviors, occupations, and physical appearance.\textsuperscript{90} These stereotypes, particularly those about women, “are used to justify and maintain the historical relations of power of men over women as well as sexist attitudes that hold back the advancement of women.”\textsuperscript{91} However, it is important to emphasize that these gender stereotypes are also applied to men, particularly in the areas of caregiving.\textsuperscript{92}

\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} See id.
\textsuperscript{87} Stephanie Bornstein, Unifying Antidiscrimination Law Through Stereotype Theory, 20 Lewis & Clark L. Rev. 919, 937 (2016).
\textsuperscript{88} Id.
\textsuperscript{89} Gender Stereotyping, supra note 28.
\textsuperscript{92} See, e.g., Lenora M. Lapidus & Vania Leveille, Why Trump’s Newest Parental Leave Proposal Still Doesn’t Cut It, ACLU (June 1, 2017), https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/why-trumps-newest-parental-leave-proposal [https://perma.cc/TT2P-K8DZ] (discussing how gender stereotypes against men were being promoted by the Trump administration when the original proposed family leave program limited the benefits of family leave to married birth mothers); Derek Rotondo, I Want to Be My Child’s Primary Caregiver, but My
Gender stereotype theory originated under the Equal Protection doctrine, and it was first applied in the Title VII context in the landmark Supreme Court case Price Waterhouse v. Hopkins. Gender stereotyping is the “practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men.” Under Title VII, a worker experiences gender stereotyping when, because of her gender, her employer assumes that she will behave in a certain way, be less committed to her job, or produce a lower quality of work.

The Supreme Court has identified gender stereotyping as an impermissible form of sex discrimination. The Court further held that the stereotype that a woman will perform worse based on her presumed family obligations constitutes sex discrimination. “The essence of Title VII in this context is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities.” Under Title VII, “treating a woman worse at work based on assumptions or stereotypes about her behavior because she is a mother is, itself, evidence of sex discrimination regardless of how other workers are treated.” Essentially, in Title VII claims, evidence of gender stereotyping can establish a cause of action without comparative evidence that shows the parenting employee was treated differently than members of the opposite sex.

In Price Waterhouse, the Court found that the plaintiff was denied a promotion due to her failure “to conform to stereotypes about how she

Employer J.P. Morgan Chase Treats That as a Woman’s Job, ACLU (June 15, 2017), https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/i-want-be-my-childrens-primary-caregiver-my [https://perma.cc/9HE3-XR5V] (writing that the author, a father, was unable to be his child’s primary caregiver without going through an additional application process for family leave benefits).

93. Bornstein, supra note 87, at 925 (citing to Stephanie Bornstein, The Law of Gender Stereotyping and the Work-Family Conflicts of Men, 63 HASTINGS L.J. 1297, 1306-09 (2012)).
94. Id.
95. Gender Stereotyping, supra note 28.
97. Chadwick v. WellPoint, Inc., 561 F.3d 38, 44 (1st Cir. 2009).
98. Id. (citing to Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003)).
99. Id. at 45.
should appear and behave because she was a woman.\textsuperscript{101} The Court noted that for a Title VII violation to be actionable, the plaintiff must establish that the employer relied on the plaintiff’s gender in making the adverse employment decision.\textsuperscript{102} The Court found that the plaintiff established this by proving that her employer’s assessment of her work performance was “impermissibly influenced by her failure to conform to sex stereotype[s].”\textsuperscript{103} Further, in Back v. Hastings on Hudson Union Free School District, a plaintiff argued that comments made about a woman’s inability to effectively work and parent at the same time are direct evidence of discrimination.\textsuperscript{104} The court found that stereotyping women as caregivers is evidence of an impermissible sex-based motive.\textsuperscript{105}

In contrast, one court found that comments that a male employee was “arrogant,” “rude,” “aggressive,” and “violent” did not rise to the level of invidious gender stereotypes because the terms did not have any inherent gender-specific meaning and no reasonable jury could determine that the employer treated females more favorably than males based on these purported gender stereotypes.\textsuperscript{106} Based on case law, the key to successfully arguing the gender stereotype theory is providing evidence of gender-specific comments in order to establish proof of disparate treatment.\textsuperscript{107}

\textbf{B. Application of Gender Stereotype Theory}

Gender stereotype theory has been most often used in Title IX cases to assert sex discrimination claims based on sexual orientation or sexual harassment in relation to transgendered students.\textsuperscript{108} Lower federal courts

\begin{itemize}
\item \textsuperscript{101} Bornstein, supra note 87, at 938 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)).
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118 (2d Cir. 2004).
\item \textsuperscript{105} Id. at 122. Further, courts have continually held that employment decisions based on gender stereotypes are impermissible and are evidence of discrimination within the Title VII context. E.g., Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 727 (8th Cir. 1982).
\item \textsuperscript{106} Kahan v. Slippery Rock Univ. of Pa., 50 F. Supp. 3d 667, 690–91 (W.D. Pa. 2014).
\item \textsuperscript{107} See, e.g., Chadwick v. WellPoint, Inc., 561 F.3d 38, 44 (1st Cir. 2009); Kahan, 50 F. Supp. 3d at 690–91; Back, 365 F.3d at 118; Bornstein, supra note 87, at 938.
\end{itemize}
have applied the theory to discrimination based on parental status in the Title VII context; but, as stated, it is most commonly applied in the Title IX context.\textsuperscript{109} This gender stereotype theory has been labeled “the social roles framework” by legal scholars.\textsuperscript{110} Reva B. Siegel wrote that “deciding when different treatment, or same treatment, is wrongful requires making a judgment about the larger social world in which the challenged practice occurs. At bottom, then, the wrong discrimination concerns the social roles and relations it perpetuates.”\textsuperscript{111} In evaluating sex-discrimination claims, it is “crucial to consider the social-roles account.”\textsuperscript{112} Below is a brief summary of how the theory is applied in both Title IX and Title VII cases.

\textit{Tingley-Kelley} provides the analytical structure for evaluating Title IX sex discrimination claims based on parental status. In \textit{Tingley-Kelley}, a prospective veterinary graduate student was denied admission based on her status as a parent.\textsuperscript{113} The court considered the case in the context of a summary judgment issue and ultimately held that the plaintiff presented sufficient evidence to support an inference of gender discrimination under Title IX after being subjected to gender stereotypes.\textsuperscript{114} The admissions committee in \textit{Tingley-Kelley} made notes on the plaintiff’s application’s review forms that included “concerns about how she’ll do in school esp. w/family, etc.” and it “will be a tough row to hoe,” referring to being “at school [with two] young children.”\textsuperscript{115} The court found that these comments demonstrated that the committee discriminated against the plaintiff on the basis of her gender by “stereotyping her as a busy mother of young children who would have a difficult time handling both graduate school and her childcare responsibilities.”\textsuperscript{116} The court looked to Title VII cases to support its holding, stating that this type of gender-based stereotyping, without evidence of how similarly situated males were treated, was sufficient to support an inference of gender discrimination.\textsuperscript{117}

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\item \textsuperscript{110} See generally Reva B. Siegel, \textit{Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination}, 59 WM. & MARY L. REV. 969, 974 (2018).
\item \textsuperscript{111} Id. at 975.
\item \textsuperscript{112} Id. at 996.
\item \textsuperscript{113} \textit{Tingley-Kelley}, 677 F. Supp. 2d at 775.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. at 777.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. at 778.
\end{itemize}
In *Ray v. University of Pittsburgh School of Dental Medicine*, the plaintiff’s claim of Title IX sex discrimination failed because the court found that the alleged stereotypical statements were stray remarks that did not constitute direct evidence of discrimination, and the case failed as a matter of law.\(^\text{118}\) In *Ray*, a professor made comments that the plaintiff “could start a family now that she was not in dental school,” and discussed the plaintiff’s wedding.\(^\text{119}\) However, the court found that these comments were made *after* she was dismissed from the dental school program.\(^\text{120}\) The court stated that these comments were nothing more than stray remarks that were unrelated to the decision-making process and held that the plaintiff failed to fulfill the prima facie case of gender discrimination.\(^\text{121}\)

In *Saleski-Shingara v. VNA Health Systems*, the plaintiff asserted a discrimination claim on the basis of parental discrimination.\(^\text{122}\) The defendant moved for the case to be dismissed on the grounds that Title VII did not prohibit discrimination related to parenting.\(^\text{123}\) The court stated that parental status was not a protected characteristic under Title VII, but that the plaintiff was arguing a form of sex-plus discrimination.\(^\text{124}\) The plaintiff asserted in her pleading that she was being discriminated against on the basis of her sex and that the defendants complained to the plaintiff about her being pregnant while having other children.\(^\text{125}\) The court stated that her claim was a sex-plus discrimination claim and merely a form of gender discrimination.\(^\text{126}\)

The court in *Saleski-Shingara* laid out a framework for the prima facie analysis based on familial responsibility,\(^\text{127}\) requiring the plaintiff to demonstrate that: “(1) she was a woman with young children; (2) she [was] qualified for the position; (3) she suffered an adverse employment action; and (4) the circumstances of her termination give rise to an inference of discrimination such as might occur when the position is filled by a person not of the protected class.”\(^\text{128}\) The court held that the plaintiff failed to establish the fourth element of her claim and that she did not plead

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119. Id. at 293.
120. Id. at 294 (emphasis added).
121. Id.
123. Id.
124. Id.
125. Id.
126. Id.
127. This is analogous to a parental status discrimination claim.
evidence establishing that she was terminated because of her parental status.129 The court dismissed her claim, but gave her leave to amend the claim to allege that the circumstances surrounding her termination did indeed create an inference of discrimination.130

III. USING TITLE VII FRAMEWORK AND GENDER STEREOTYPE THEORY IN TITLE IX

The pervasive discrimination faced by parenting students makes it harder for those students to stay in school or to obtain an education.131 While the Supreme Court has not spoken on this issue, and while there is a lack of case law surrounding the rights of parenting students, the rights of these students are being infringed upon drastically.132 Specific findings on parenting students include that only fifty-one percent of teen mothers earned their high school diploma by age twenty-two; fewer than two percent of teen mothers attain a college degree before age thirty; and fifty percent of female dropouts cited parental responsibilities as one factor of many in their decision to leave high school, while thirty-three percent of male students also cited parental responsibilities as a factor.133

Arguably, when students are discriminated against on the basis of parental status, that discrimination is almost entirely based in gender stereotypes. For example, if women are denied admission to university because of their parental responsibilities, the denial is based on deeply wrought stereotypical notions that women are unlikely to be successful students because they are committed caregivers to their children, as illustrated by Tingley-Kelley.134 However, discrimination based on parental status can also be less visible. For example, comments about time management, or placement in a different class—such as a home-economics class rather than a science class—can stem from impermissible gender stereotypes. As stated, while parental status discrimination itself is

129. Id.
130. Id.
132. See supra pp. 1–4.
133. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., supra note 19, at 57.
134. See Tingley-Kelley v. Trs. of the Univ. of Pa., 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010).
not a legal claim, discrimination based on parental status is a “sex-plus” discrimination claim, first identified in a Title VII case.

Gender stereotype theory can allow a plaintiff to bypass this regulatory element. Typically, under a Title IX disparate impact analysis, in order to establish a prima facie case a student first must establish that a rule disadvantages female students in a statistically significant manner. However, appellate courts have found gender stereotypes sufficient to overcome summary judgment in gender discrimination cases and have not required additional evidence that the female was treated differently from similarly situated males. Specifically, the First Circuit has held that a reasonable jury could find that gender stereotyped comments indicated that sex discrimination was behind the adverse action. If a student experienced discrimination based on parental status, the first step in the analysis would be to identify any possible gender stereotypes because “stereotyped remarks can certainly be evidence that gender played a part” in an adverse action. Gender stereotypes are direct evidence of discrimination, thus the mixed-motives analysis discussed above is applied. The mixed-motives test finds a defendant liable for sex discrimination “upon proof that a forbidden criterion ‘was a motivating factor for any employment practice, even though other factors also motivated the practice.’”

By using the gender stereotype theory borrowed from Title VII case law, students have a cause of action for parental status discrimination without needing evidence that an educational institution purposefully applied a rule differently based on gender—no comparative evidence is necessary. However, as illustrated by Rey v. University of Pittsburgh

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139. Tingley-Kelley, 677 F. Supp. 2d at 775.
142. See Price Waterhouse, 490 U.S. at 251; Tingley-Kelley, 677 F. Supp. 2d at 775.
143. Tingley-Kelley, 677 F. Supp. 2d at 775.
144. However, it is important to note that circuits are split on the issue of comparators. For example, “the Sixth Circuit has not directly addressed the issue . . . . [T]he district court was persuaded by those cases ‘that require the comparator to be outside of the protected class.’” Spink-Krause v.
School of Dental Medicine, students will need to provide more evidence of gender stereotypes than a stray remark. That is when comparative evidence becomes helpful—however, not necessarily gender comparative evidence. For example, if a student provides direct evidence of gender stereotypes and evidence that non-parenting students are treated differently than parenting students (rather than evidence that mothers are treated differently than fathers), they can likely meet their burden of proof.

The gender stereotype theory has recently allowed plaintiffs to be “more successful in converting what might otherwise be considered ‘stray remarks’ into valuable circumstantial evidence from which to infer discrimination,” broadening the lens of probative discrimination. Title VII cases show that proof of gender stereotypes help identify second-generation discrimination and they show that courts should stop discounting the value of this type of evidence. Similarly, as Title VII is often used as a framework for Title IX analysis, courts should seriously consider evidence of gender stereotypes as indicators of sex discrimination, allowing a student to enforce her rights under Title IX. Gender stereotype theory allows a plaintiff to eloquently and successfully
assert a claim of parental status discrimination because it equates to sex discrimination.  

To succeed on a general claim of sex discrimination under Title IX, a student must establish three elements: (1) there was an adverse action taken against her; (2) the program received financial assistance; and (3) her exclusion was based on her gender. However, as courts will use a Title VII framework to evaluate claims of parental status discrimination via gender stereotype theory, that analysis becomes more complicated. A court would follow a framework similar to that laid out in Saleski-Shingara: “(1) she was a woman with young children; (2) she [was] qualified for the position; (3) she suffered an adverse employment action; and (4) the circumstances of her termination give rise to an inference of discrimination such as might occur when the position is filled by a person not of the protected class.” Because courts have held that gender stereotypes can be direct evidence of discrimination, the student is not required to show comparative evidence of males being treated differently. In the high school context, a student could likely succeed on a parental status discrimination claim under Title IX if, for example, a teacher removed her from a specific class because the teacher stated the student could not handle the rigors of the class while parenting. Absent comparative evidence, the student would likely succeed under a Title IX claim based on the gender stereotype theory borrowed from Title VII.

IV. RECOMMENDATIONS FOR ADVOCATING AND PROTECTING PARENTING STUDENTS’ RIGHTS

To address the issue of parental status discrimination in academia, this Comment asserts three general recommendations. First, educational facilities, teachers, and lawyers should be educated on gender stereotypes and how they interact with Title IX violations. Second, schools should draft their Title IX policies to include specific protections for parenting students, and States should consider writing protections for parenting students into state law. Third, the language of Title IX’s regulations should

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150. Hyman, supra note 135.
151. Tingley-Kelley, 677 F. Supp. 2d at 775.
153. However, lower circuit courts are split on this. The Supreme Court has not definitively spoken on this issue.
154. See Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118 (2d Cir. 2004) (holding that stereotyping of women as caregivers by itself is evidence of an impermissible, sex-based motive); Tingley-Kelley, 677 F. Supp. 2d at 775.
be reconsidered to make it clear how gender stereotypes and parental
discrimination can be a violation of Title IX.

Contributing to this discrimination is a general lack of knowledge of
the law. Universities, colleges, schools, administrators, and teachers
should be educated on gender stereotypes and how they interact with Title
IX violations. Improved knowledge is crucial because “a student may
suffer irreparable harm in the form of denied educational opportunities
before even being aware that anything the school or its agents did was
wrong or discriminatory.” One author, after analyzing case law
regarding pregnant and parenting students, found that five out of eighteen
cases did not allege Title IX violations despite fact patterns that supported
Title IX allegations. Lawyers should be aware of the interplay between
gender stereotypes and Title IX in order to competently and diligently
represent their clients. Increased education on the scope of Title IX and
gender stereotype theory can ensure that both students and individuals
with authority understand the law, broadening the available protections for
students. Education is the foundation of our society and while education is
not a fundamental right under the United States Constitution, all students
have a right to equal access to education.

Second, schools should draft their Title IX policies to encompass
specific strategies to support parenting students and to protect their
students from parental status discrimination. For example, the Nebraska
State Board of Education approved a policy that requires local school
boards to design and adopt a written policy to accommodate pregnant and
parenting students. The purpose of the policy is to ensure that pregnant
and parenting students remain in school by mitigating the hardships and
inconveniences that may arise, while simultaneously prohibiting
discrimination against them. Nebraska’s policy is a model policy that
strongly communicates to students that they have a right to education and
that they will be supported in pursuing that right. The policy specifically

155. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., supra note 19, at 55–56.
156. David S. Cohen, Limiting Gebser: Institutional Liability for Non-Harassment Sex
education is unconstitutional). While Brown v. Board of Education speaks specifically to racial
discrimination, the principle is similar—equal access to education for all students.
159. Joe Dejka, Nebraska Ed Board OKs Policy Requiring Local School Boards to
Accommodate Pregnant and Parenting Students, OMAHA WORLD-HERALD (Nov. 10, 2017), http://
article_4e4b7e9a-c58f-11e7-a9f9-5fac46f87e0.html [https://perma.cc/J7VB-R4JX].
160. Id.
mandates that parenting students cannot be penalized when absent because of doctor appointments for their children, allows for parenting students to make up missed school work, and provides students with alternative means to complete course work, such as online work, tutoring, or home-based study.161

Similarly, the University of Kansas specifically prohibits discrimination based on parental status.162 The University of Kansas even defines parental status discrimination on its website, stating that parental status discrimination “involves treating an applicant, staff employee, faculty member, or student unfavorably for being the parents of young children, caring for elderly parents and sick significant others. This also includes violations of the Pregnancy Discrimination Act (PDA) which forbids treating a woman unfavorably because of pregnancy, childbirth . . . .”163 By specifically naming parental status discrimination and defining it, the University of Kansas communicates to students that they cannot be discriminated against on the basis of their parental status.164 All educational institutions can easily include parental status discrimination and a definition in their student handbook or on their Title IX website in order to be strong advocates for their students’ success. All educational institutions should adopt similar policies that will protect the rights of their parenting students.

States themselves can go one step further by reaffirming Title IX’s protections in state law. For example, California Education Code § 66281.7 provides that “all persons, regardless of their sex, should enjoy freedom from discrimination of any kind, including . . . pregnancy discrimination as described in Title IX . . . in the postsecondary educational institutions of the state.”165 Section 66281.7 further requires educational institutions to allow graduate students “to take a leave of absence because she is pregnant or has recently given birth,” for “a period consistent with the policies” of the institution or for a period of twelve months, “to prepare for and take preliminary and qualifying examinations and an extension of at least [twelve] months toward normative time to degree while in candidacy for a graduate degree, unless a longer extension

161. Id.
164. See id.
165. CAL. EDUC. CODE § 66281.7 (West 2018).
is medically necessary." Section 66281.7 continues to provide that a
graduate student, in good standing, who chooses to take a leave of absence
because she is pregnant or recently gave birth "shall return to her program
in good academic standing following a leave period consistent with the
policies of the postsecondary educational institution or of up to one
academic year." Importantly, the law requires postsecondary
educational institutions to have a written policy for graduate students on
pregnancy discrimination. California’s progressive regulation carries
many benefits: (1) it puts educational institutions on notice that parental
status discrimination will not be tolerated; (2) it provides clear rights to
graduate students who are pregnant or parenting after recent childbirth;
and (3) it firmly communicates to students that they have rights under Title
IX.

Last, the language of the enforcing regulations of Title IX should be
reconsidered to make clear that Title IX can protect students from parental
status discrimination. The Department of Education Office for Civil
Rights is the enforcing entity of Title IX and is responsible for evaluating,
investigating, and resolving complaints of sex discrimination. Further,
the Office for Civil Rights provides information and guidance to
educational facilities on how to comply with Title IX. As the regulations
are currently written and combined with the lack of case law regarding
parenting students, it appears that discrimination based on parental status
is only prohibited if a rule is applied differently against a female parent
than a male parent. However, as federal case law has begun to establish,
that is not the case.

Further confusing this situation, critics have labeled Title IX as an
ineffective enforcement tool because while Title IX broadly prohibits
discrimination “on the basis of sex,” parental status is only specifically

166. Id.
167. Id.
168. Id.
169. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 42.
170. Id.
171. See Tingley-Kelley v. Trs. of the Univ. of Pa., 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010). But see Gough, supra note 60, at 252 (“[C]omparison” is an area in which the scholars agree that
there is little to no case law. Those who characterize the case law as little are correct; however, students seeking to assert claims are not without guidance. . . . [I]n the context of athletics, Title IX ‘involves
a comparison of the availability, quality, and kinds of benefits, opportunities, and treatment afforded
members of both sexes.’ . . . [A]lthough not in the specific context of . . . parenting students, the court
in Newberg v. Board of Public Education . . . . looked at ‘court offerings, type of degrees available,
class size, teaching qualifications, academic and recreational facilities . . . .’).
protected in the regulations. Courts then turn to other civil rights statutes to supplement their analysis, like Title VII, as discussed above. While it is unlikely under the current supervision of Secretary Betsy DeVos that the Department of Education will increase protection under Title IX for students, advocates should call for reform and increased protections. A revision of the law, combined with efforts from the Office for Civil Rights, will further protect the rights of parenting students. Specifically, Title IX regulations should explicitly state that comparative evidence is not necessary, that sex-based stereotyping is appropriate evidence of sex discrimination, and that parenting students are protected from discrimination for more than the duration of their pregnancy or the immediate period following the birth of their child.

CONCLUSION

As illustrated, gender discrimination is prevalent, and a subset of that discrimination is parental status discrimination. Under Title VII or Title IX, distinctions based on parental status are a violation if the impact is to discriminate on the basis of sex. Gender stereotyping theory allows students to bridge that gap and illustrate that discrimination on the basis of parental status is sex discrimination.

Further, the Supreme Court has stated that “[b]ecause Congress did not list any specific discriminatory practices in Title IX, its failure to mention one such practice says nothing about whether it intended that practice to be covered.” This interpretation leaves the door open for increased protections to parenting students under Title IX. However, compliance with Title IX and dissemination of information must be

172. Hady, supra note 138, at 103.
173. Id.
174. Secretary DeVos has rescinded Obama-era protections for sexual assault victims under Title IX on college campuses across the nation. Phil McCausland, DeVos Rescinds Obama-Era Title IX Protections, Drawing Mixed Reactions from Advocates, NBC News (Sept. 22, 2017), https://www.nbcnews.com/news/us-news/devos-rescinds-obama-era-title-ix-protections-drawing-mixed-reactions-a803976 [https://perma.cc/J2RY-JEL9]. Although, no guidance has been rescinded that specifically targets parenting students, this is an attack on Title IX protections all the same. While outside the overall scope of this Comment, protections for women and parents have been under attack by the Trump administration in general. See Lenora M. Lapidus & Vania Leveille, Why Trump’s Newest Parental Leave Proposal Still Doesn’t Cut It, ACLU (June 1, 2017), https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/why-trumps-newest-parental-leave-proposal [https://perma.cc/F4RA-ZXRN].
transparency and accessibility to students in order for Title IX to become a successful tool for students facing discrimination. Educators, lawyers, and courts can help pull down these barriers that are currently in place and inhibiting many parenting students from obtaining an education. Applying the gender stereotype theory in disparate treatment claims under Title IX can help do just that.