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## **A Litigation Analysis of the Extraterritoriality of U.S. Federal Laws in International Education**

Sara M. Easler

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A LITIGATION ANALYSIS OF THE EXTRATERRITORIALITY OF U.S. FEDERAL  
LAWS IN INTERNATIONAL EDUCATION

by

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Submitted in Partial Fulfillment of the Requirements

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## DEDICATION

To Mark

*In life, it's not where you go, it's who you travel with.*

– Charles Schulz



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Without a doubt, there are many who helped me along this journey. Some loudly and some quietly, but each important in their own way. The time spent in this endeavor was not spent alone, but instead in the company of wonderful family, friends, and colleagues.

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## ABSTRACT

U.S. higher education institutions and international educators have sought to improve the level of engagement and participation in education abroad among undergraduate college students as well as to diversify the types of available experiences and the students that benefit from them. Yet, this programmatic investment in international education and study abroad has occurred without fully understanding the discrimination and litigation risks of such endeavors. This study examines the relevant federal statutes and their interpretation as defined by trial outcomes and Office of Civil Rights (OCR) opinions in an effort to inform the field of international education and its practitioners of their roles, responsibilities, and obligations. It also explores the extraterritorial extension of federal laws for discrimination occurring outside of the United States. Although the presumption against extraterritoriality emerged in many of the cases, it is not a blanket legal protection for institutions engaged in international education. Institutions can and should mitigate the legal vulnerability of their international education faculty and administrative staff through robust training and coordination with campus offices such as their general counsel and disability services.

Keywords: *international education, study abroad, extraterritoriality, federal law, statutes, discrimination*

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## LIST OF ABBREVIATIONS

AACSB.....	Association to Advance Collegiate Schools of Business
ADA .....	Americans with Disability Act
ADAAA.....	Americans with Disabilities Act Amendments Act
CEO.....	Chief Executive Officer
DOE.....	Department of Education
DOJ .....	Department of Justice
EAHCA .....	Education for All Handicapped Children Act
FERPA.....	Federal Education Rights and Privacy Act
FOIA.....	Freedom of Information Act
GDPR .....	General Data Protection Regulation
HIPAA.....	Health Insurance Portability and Accountability Act
IEW .....	International Education Week
IHE .....	Institution of Higher Education
IIE.....	Institute of International Education
LGBTQ.....	Lesbian, Gay, Bisexual, Transgender, Queer
NAFSA .....	Association of International Educators
OCR.....	Office of Civil Rights
PAE .....	Presumption Against Extraterritoriality
SDO.....	Standards Development Organization
STEM .....	Science, Technology, Engineering and Math

SWD..... Students with Disabilities  
VAWA..... Violence Against Women Act

# CHAPTER 1

## INTRODUCTION

Given the recent growth of study abroad, international educators have sought to improve the level of engagement in education abroad among undergraduate college students as well as to diversify the types of available experiences and the students that benefit from participation. With researchers, practitioners, and employers touting the benefits of the experience, ensuring that it is available to any student wishing to participate will be increasingly important in a globalized academic curriculum. Not only are international experiences linked to improved student outcomes, but now, too, the level of an institution's international engagement has been incorporated into university ranking rubrics and even some accreditation standards.

For these reasons, and certainly others, U.S. institutions of higher education have invested in international education and study abroad, but perhaps without fully understanding the discrimination and litigation risks of such endeavors. Understanding the reach and scope of federal regulation, particularly in situations where institutions may have limited control over all program aspects, will help institutions to develop appropriate programming that addresses the demand for increased participation while protecting its students, faculty, and staff from overreaching their legal limitations.

By examining and understanding the relevant federal statutes and their interpretation as defined by trial outcomes and Office of Civil Rights (OCR) opinions, the field of international education and its practitioners can be better informed as to their

roles, responsibilities, and obligations. This study will explore these statutes and outcomes as they apply to higher education and will investigate the extraterritorial extension of federal laws for discrimination occurring outside of the United States.

### *International Education Defined, History, and Key Goals*

International Education Defined. Often used interchangeably with “study abroad” or “education abroad,” international education encompasses a number of academic activities to include research, partnerships, scholarship, teaching, and certainly coursework taken outside of the United States. In 2015, Jane Knight proposed the following updated definition of internationalization: “...the process of integrating an international, intercultural, or global dimension into the purpose, functions or delivery of postsecondary education” (p. 2). This definition leaves open the location by which the education is being delivered; it could be either in the home country or abroad (Knight, 2004, 2015). For the purposes of this research, international education will refer to education in the variety of forms noted above taking place outside of the home country, unless otherwise indicated as “at home”.

History. International education and study abroad have become commonplace in the modern American collegiate experience, but this did not occur overnight. The earliest recorded international education activities can be traced back to affluent boarding and finishing schools or grand tours of Europe enjoyed by the elite members of society for the purposes of learning a foreign language and social pleasantries (Dessoiff, 2006). While organized travel in the academic context began in the 1870s when Indiana University sent students to study in Europe, the first formalized study abroad program was at the

University of Delaware in 1920 with the assistance of the newly formed Institute of International Education (IIE) (Freidheim, 2012).

With the guidance of mid-century U.S. movements, programs have grown over time and influenced numerous other activities. In reviewing the history of international education initiatives by the U.S. Government, a pattern of post-war proposals and international programs began to emerge. Perhaps most notably, the Fulbright Program was established in 1946, in an effort “to develop post war leadership and engage constructively with the community of nations” following World War II (CIES, 2016). Followed in 1961 and 1965, the Fulbright-Hays Act (known as the Mutual Educational and Cultural Exchange Program) and the Higher Education Act, respectively, were considered to be foundational measures that would increase internationalization through foreign language and area studies, among other initiatives (Smithee, 2012).

Again, in response to the ongoing Cold War and as part of President Lyndon B. Johnson’s “Great Society” legislation, the International Education Act of 1966 was introduced. The Act sought to “strengthen our capacity for international educational cooperation, stimulate exchange with the students and teachers of other lands, assist the progress of education in developing nations, and to build new bridges of international understanding” (Bredamas, 1966). In addition to the Act itself, a Supplement was developed that contained sixty-nine articles analyzing a variety of related issues and supporting international education across several themes (Smithee, 2012). Despite strong support for the Act in Congress and even passing in both the House and Senate, the measure did not progress beyond the appropriations committee, most likely because of the increased financial demands of the conflict in Vietnam (Smithee, 2012).

In 2005, Congress appointed the Commission on the Abraham Lincoln Study Abroad Fellowship Program (NAFSA, 2015). Grounded in the vision of the now late Senator Paul Simon, the bipartisan Commission was joined by Senator Richard J. Durbin (D-IL), a fellow proponent of international education and a mentee of Senator Paul Simon (Durbin, 2006). The Commission's final report set 2017 goals to have at least one million U.S. undergraduate students study abroad annually, to influence the demographics of the study abroad population to mirror that of the general U.S. undergraduate population, and for a substantial number of Lincoln Fellows to study abroad in non-traditional countries (Durbin, 2006). The program sought to fulfill Senator Simon's dream of "millions of American undergraduates studying abroad and carrying the name and values of Abraham Lincoln with them" (NAFSA, 2015 p. xv). The recommendations of the Abraham Lincoln Commission served as the basis for what would become the unratified Senator Paul Simon Study Abroad Fellowship Act (LOC, 2007; NAFSA, 2015; NAFSA, 2017a).

Yet, in 2006, Senate Resolution 308 named 2006 as the "Year of Study Abroad" and set a goal for American undergraduate study abroad participation to top one million students by 2017 (LOC, 2006). The Resolution was introduced to the 109th Congress by Senator Richard Durbin (D-IL.), and was passed by a unanimous vote (LOC, 2006). The Resolution cited strong support by the American people for study abroad, a shocking lack international and geographic skills by U.S. students, and confirmed that study abroad exposes students to "global knowledge and cultural understanding and forms an integral part of their education" (LOC, 2006). In addition to the federal-level resolution, by 2008, similar statements have passed in 18 different states to promote increases in international

education (Banks, 2008; Stroud, 2010). With approximately 200,000 participants in the 2005/2006 academic year, this goal aimed to increase participation by nearly five times, accounting for approximately half of all US undergraduates (IIE, 2006).

At the campus level, other initiatives have embraced international activities, like that of International Education Week (IEW), that serve to promote internationalization and allow foreign students to celebrate and share their culture with their host institutions. This annual nationwide event, initiated jointly by the U.S. Departments of State and Education, has gained momentum across the U.S., and many institutions devote considerable time and effort to its success (Smithee, 2012).

While Senate Resolution 308 and participation in IEW are not financially subsidized by the U.S. government, there has been some federal funding directed toward globally-centered educational development. A handful of high-profile grants have been developed in an effort to fund study abroad experiences of underrepresented populations, and increased flexibility in federally-funded grants have allowed students to utilize their existing aid for study abroad (IIE, 2009). In addition to the Fulbright, other programs such as the Benjamin Gilman International Scholarships and David L. Boren Scholarships seek to increase the participation of underrepresented populations visiting a more diverse set of locations.

Key Goals. The goals of the Congressionally-established Lincoln Fellowship program remain relevant to international education. They were clearly outlined: “to create a more globally informed American citizenry, to increase participation in quality study abroad programs, to encourage diversity in student participation in study abroad, to diversify locations of study abroad, particularly in developing countries, to create an

innovative partnership with higher education to open more doors for study abroad, and to internationalize U.S. higher education by making study abroad a cornerstone of undergraduate education” (NAFSA, 2015, para. 3). Beyond the stated educational objectives, the Commission also noted the intended influence of international education and study abroad on U.S. national security (Durbin, 2006). Each of these goals are aligned with the stated educational and global competitiveness goals of the U.S. government.

In addition to the U.S. government encouragement, U.S. institutions of higher education (IHEs) have also recognized the importance of an internationalized curriculum, and over the last 75 years, have steadily increased program options and student participation. Together, IHEs and the government have touted the benefits of study abroad as a valuable part of the higher educational experience (USDOS, 2017; IIE, 2017a). Skills such as adaptability, flexibility, openness, curiosity, and problem-solving are transferable into the workplace and help to create a global citizenry (European Commission, 2014). Countless studies have resulted in data on the employability of graduates with international experiences and global competencies (IIE, 2017a; IIE, 2017b, 2017c; European Commission, 2014).

Students develop and acquire these transferrable skills by being challenged in their planning, their environment, and in their everyday experiences. Studies have shown that students who study abroad have increased maturity, self-confidence, tolerance, emotional resilience, and greater independence (Salisbury, Umbach, Paulsen & Pascarella, 2009; Dwyer & Peters, 2004; Kitsantas, 2004). In reviewing the available literature for their 2014 work to better understand students’ willingness to study abroad,



Hackney et al point out that “by studying abroad, students get the opportunity to enhance their understanding of different cultures, races, customs, and business practices, which increases tolerance, respect and open mindedness” (Praetzel, Curcio & Dilozenzo, 1996).

Some specialists have cited a need for more globally-skilled personnel for specific positions in national security and international policy (Cantu, 2013). Others have determined that improvement of the U.S. education in and of itself would contribute to the global competitiveness of the nation due to increased innovation and marketplace desirability (West, 2012). As such, beyond the need for education in the development of the person, more than ever IHEs are judged for their ability to prepare students for the workforce. In doing so, they have integrated experiential learning such as internships, co-ops, and study abroad into the traditional college experience.

Supporters of international education and the variety of experiences that are encompassed therein have extensively researched the impacts and benefits to students that participate in or are exposed to such experiences. According to the Academy of Management, “Learning to lead... is not an abstract matter. The only way to do it is through experiences—of leading as well as of following—and ongoing reflection on those experiences to distil lessons that may in turn inform future practice” (AOM, 2016, p.1). Further, the Skills Model of leadership, developed by Peter Northouse and widely recognized as one of the key concepts in the management discipline, further supports the notion that “leaders can develop their abilities through experience” (Northouse, 2016).

Employers value such skills as independence, maturity, flexibility, autonomy, and cross-culture communication in making hiring decisions, and they overwhelmingly - over 90% for each characteristic - believe that these desired skills are likely to be possessed by

students that studied abroad (J. Walter Thompson Education, 2012). In 2003, the Rand Corporation studied what managers found to be the most desirable qualifications of new hires, and again many of the skills detailed above were noted (Matherly, 2005).

### *Background of the Problem*

Given the many benefits of study abroad and international experiences for personal, academic, and professional growth, it is easy to understand the drive behind many of the programs and initiatives to increase participation as well as the interest in engaging with increasingly diverse and underrepresented populations to include minorities and students with disabilities. Despite efforts at the federal, state, and institutional level, growth in study abroad participation has fallen short of benchmark enrollments. Midway through the period outlined in Senate Resolution 308, in the 2012-2013 academic year, the total number of participants was just over 300,000, only about a 100,000-student increase from the start of the initiative (IIE, 2015) and only an eighth of the way to their goal. However, according to the latest data available, 332,727 U.S. students studied abroad for academic credit in 2016/2017, a 2.3% increase over the previous year (IIE, 2018a). Participation continues to trend upward despite global threats such as terrorism, a resurgence in both domestic and foreign political nationalism, a refugee crises, and even epidemic or insect-borne illnesses such as ebola, zika, and denge, to name a few.

As institutions of higher education have stretched globally to meet the challenge of an international curriculum, they are engaging with new regions and populations – internal and external to the institution – in an effort to meet their goals. They are often

educational pioneers in their program designs and foreign locations. Today, the international relationships and partnerships that may have grown from a successful student exchange relationship could also offer research and other faculty collaboration opportunities. Strategic international research collaborations can help to bolster the quality, visibility, and the reputation of the work being done (Universities UK, 2008), and can benefit the international reputation of the respective institutions. It also allows researchers to identify and “tackle” some of the world’s most pressing shared issues by enhancing the research capacity in an expanded global knowledge society (Hudzik, 2010; Universities UK, 2008).

Innovative programs are important in the attraction and recruitment of students to maintain tuition revenues, in the development of a robust international reputation as a world-class institution, and in the increasingly-regarded university rankings process. Student participation in international education and a variety of program options are often seen as an indicator of academic and institutional quality and a stimulating learning environment (Stroud, 2010). Many of the top-ranked universities and institutions have requirements for study abroad as a facet of their degrees, and increasingly, an international component is woven into stated institutional strategic plans (Johnson, 2006; Stroud, 2010).

International programming is even tied to some institutional or programmatic accreditations. For example, the Association to Advance Collegiate Schools of Business (AACSB) is an accreditation sought worldwide by business schools to demonstrate their academic capabilities and global footprint. The AACSB-accredited schools share a common framework for academic rigor and excellence, and each member school shares a

vested and demonstrated interest in international education and the globalization of the business curriculum (AACSB, 2017). Further, once accredited, an annual report of international activity and student mobility is required in addition to the ten-year review and mid-review checks (AACSB, 2017). Maintaining accreditation requires the inclusion of global issues in the curriculum in recognition of global economic forces (Praetzel, 1996). To that end, it is not surprising that business students now account for more than 20% of all study abroad students, second only to students in the STEM fields (IIE, 2018b). It is growth and innovation that keeps institutions at the forefront of the field, but the race to the front often also puts the institution in uncharted risk territory.

In this time of growth, many are working to understand the complexities of an internationalized curriculum and study abroad, and in many ways, this learning is either experimental or retrospective. In 2012, the U.S. Department of Education (DOE) articulated its first international strategy entitled “Succeeding Globally Through International Education and Engagement” (USDOE, 2012a). The DOE detailed their rationale for creating the strategy as the importance of economic competitiveness, the ability to cope with global challenges, national security and diplomacy, and the importance of having a diverse society (USDOE, 2012a). These factors are well-known justifications for internationalization across the industry. The report identified the tactical objectives that make up their strategy; however, there are few actionable items, and in fact, many of the actions that are detailed are aimed at better educating the DOE itself on international assessments, benchmarking, success metrics, and relationships termed by the DOE as “educational diplomacy” (USDOE, 2012a). Little action is directed at the classroom level, and so while the DOE points out that these activities began prior the

release of its articulated strategy, it is not clear to what extent this strategy will directly effect students or curricula.

As mobility has expanded, and new populations have engaged with internationalization, the challenges have been addressed as they come, and comprehensive strategies have been developed over time, piecing together the latest resolution with the most recent crisis. Many study abroad professionals consider contingencies for those threats that are high profile, newsworthy, and that they fear will dissuade students and their parents from considering a study abroad experience. Robust health and safety plans and student preparation for the possibility of risk are now standard and routine in the outbound procedures of the more than 300,000 American students who study abroad each year (Fischer, 2010; Lee, 2010; Vossen, 2016). These external threats are the ones that study abroad professionals have been trained for, and for which institutions have developed procedures.

Beyond those risks external to the institution, institutions of higher education are often met with a variety of “domestic” liability issues, not least of which is their vulnerability to litigation under a variety of U.S. federal laws and statutes. Federal education laws that protect students from gender, race, and disability discrimination are well-known across U.S. campuses, reaching any institution that receives any form of federal funding (Rothstein, 2014; Schaffer, 2004). On American campuses, the framework for compliance with these statutes is under frequent review, and adherence to the related policies is clarified in the controlled campus environment. In other words, the necessary actions are generally clear, if not always followed.

Discrimination of students on any grounds is unethical, but discrimination on the basis of race, nationality, gender, and disability is illegal. The Civil Rights Act of 1964 protects students from racial discrimination; the Education Amendments of 1972 protects students from discrimination based on sex. The Americans with Disabilities Act of 1990, the Americans with Disabilities Amendment Act of 2008, and Section 504 of the Rehabilitation Act of 1973 protect students with disabilities (Sec. 601, Civil Rights Act of 1964; Bull, 2017; Olivarius, 2014; Section 504, 29 U.S.C. § 794(a)). Each of these protections are afforded to students on U.S. campuses, and each of these federally-mandated protections have been investigated and tried in the domestic context.

Yet it is not always clear the extent to which these U.S. laws will reach beyond the territorial boundaries of our country. The confusion on the applicability of U.S. federal law centers on the concept of extraterritoriality, or the actions “existing or taking place outside the territorial limits of a jurisdiction” (Merriam-Webster, 2017). As applied to study abroad and U.S. discrimination law, extraterritoriality is the determination of whether an institution can be liable for discrimination, perceived or real, when that discrimination did not occur within the territorial United States. Extraterritoriality is the framework by which institutions may determine whether or not accommodations are required or reasonable under the law. These issues have been considered to a much lesser extent on campuses than many other threats, and yet their consequences can be equally costly and damaging to the institutional reputation.

As with other legal precedents, one may think that turning to the existing case law or OCR opinions might prove clarifying. Unfortunately, results in both areas have been mixed in terms of decisions, varied greatly from case-to-case and by legal district, and

serve to further confuse the issue. In fact, in some cases, the concept of extraterritoriality itself and whether our laws extend to protect U.S. citizens beyond the physical country boundaries is what has been on trial with numerous legal experts chiming in on the interpretation of the law as specifically defined in the statute itself. This analysis has shifted over time with changes in political leaders, popular opinion, and in an increasingly digital and global world where physical borders are progressively blurred.

Similar to other threats to study abroad, each incident has been addressed as it has occurred, and the details between cases may be nuanced, which likely contributes to the confusion. The finer details of the individual cases and the statutory language, to include the lack of specific language, has been combed through by the courts, and yet a clear directive for citizen rights and institutional obligations remains elusive. In the absence of court and OCR guidance, interpretation has been left to professional organizations, the individual institutions, their international education professionals, and campus general counsel. Not only is this approach troublesome for students who are unsure as to what rights or accommodations they can expect on study abroad, but institutions, too, are unsure of the extent to which they must go and the cost that must be incurred to ensure protections outside of the territorial U.S.

### *Problem Statement*

In a field that has been growing and impacts 10% of undergraduates, there is little clarity of the applicability, or extraterritoriality, of U.S. laws and protections for those Americans that venture across our borders. The domestic interpretation of the federal antidiscrimination law is generally clear, and court cases and OCR opinions have

addressed many of the shortcomings in practice. However, during study abroad, many of the U.S.'s institutions of higher education are sending faculty, staff, and students abroad in record numbers without necessarily knowing their obligations for these federal protections in an environment that is mostly out of their control and with cultural norms and national laws that may be misaligned, perhaps even in direct conflict, with ours.

The extraterritorial application of federal law has been outlined in some areas such as employment and in trade securities. Yet, in the area of education, it was neither articulated by Congress initially, nor has it been revised to include specific guidance as to the reach of U.S. law, even though it has revised other aspects of these same laws. Courts and the OCR have been hesitant to address the issue directly, and so the presumption against extraterritoriality has been generally maintained – but not wholly. Some institutions, in specific circumstances, have lost cases involving discrimination in study abroad, leaving open this question of applicability abroad.

How then are study abroad practitioners, faculty, and students to understand the rights afforded to them as Americans, and are there circumstances in which this is limited? How might institutions ensure that they are making both ethical and practical decisions in situations where they may not have the same level of control as in domestic coursework? These questions are faced by institutions and international education professionals on a regular basis, and clarity on the matter would be an asset in the field.

In reviewing the casework in-depth as well as the political and cultural climate under which these decisions were made, we may be better positioned to serve our students and protect them from foreseeable litigation. Students, too, would benefit from a



clearer understanding of the federally-protected rights to which they are entitled and should therefore expect while studying abroad.

### *Purpose of the Study*

The purpose of this study is to develop an enhanced understanding of the federal laws governing discrimination in higher education and how they relate to study abroad as well as the concept of extraterritoriality as it applies to education. Given the continuous increase in education abroad by U.S. institutions, this study is both timely and relevant for education abroad practitioners seeking clarity on the issue. It will also offer insights for policy makers and general counsel at U.S. institutions of higher education as they develop their policies and procedures around emerging institutional internationalization strategies.

Traditional legal research and case law analysis will be used to investigate cases in which the plaintiff asserts a discrimination claim against the higher education institution or the study abroad organization in a way that implicates the higher education institution. As presented in greater detail in Chapter 2, discrimination claims generally arise pursuant to the Federal Civil Rights laws and protections. These laws and protections are codified in federal legislation and protect individuals from discrimination on the basis of race, sex, and disability. The domestic application of said laws has been litigated in numerous anti-discrimination cases, and higher education institutions have attempted to address their implications through institutional policy and improved student services. However, the legislative language arguably does not specify the territorial boundaries of these protections, leaving interpretation to the courts and the OCR.

By focusing on the cases that have addressed the extraterritoriality of U.S. federal laws, this study will explore how institutions have been regulated domestically and whether the same interpretation of the laws can be predictably applied abroad. Finally, by analyzing the cases that have been brought to the courts and the OCR, this study will investigate how their decisions reflect different cultural attitudes and political climates. This legal case analysis seeks to investigate which cases have been seminal in defining the extraterritoriality of federal case law in international education and then analyze the frequency and trends of these cases over specific points in time.

### *Limitations*

Given the volume of case law, there is certainly a possibility that some cases will be either unintentionally overlooked or not included as part of the analysis. While every effort was made to identify all cases that meet the stated criteria, evolving terminology among the vastness of court opinions may not yield all cases or may result in some being missed altogether. Additionally, not all cases and complaints are published or available to the public, which further impedes access to the unpublished and non-public court opinions.

To avoid the negative attention that is inevitable with a public trial, it is possible, likely even, that institutions may seek to settle some federal complaints outside of the courtroom (Johnson, 2006). These incidents would then not be included in the recorded case law or OCR opinions, making them unavailable for review. In fact, even while some of these cases may have been officially filed, some may have been withdrawn or

even rescinded on the basis of a settlement or on the supposition that the case was not strong enough to gain a successful outcome for the complainant.

Finally, given the sensitive nature of the types of complaints that could arise from some federal violations, particularly those that would fall under Title IX, victims may be hesitant to report the incident at all. For the same reasons known in domestic cases – embarrassment, shame, and fear that they would not be taken seriously or even believed – victims of sexual and other discriminatory crimes may choose to withhold their experiences rather than be forced to relive a difficult and traumatic experience again and again publicly at trial. By failing to report, not only are cases unheard at trial, investigation at the institutional level is impossible.

For these and other reasons, there may be incidents that would have met the criteria of federal violations occurring during study abroad that are not available for review and analysis. This research project then is focused primarily on the decisions of those complaints that did make it to trial and were accessible for review, and the circumstances by which institutions can anticipate future litigation given existing precedence. Given the responsibility of the OCR to investigate discrimination complaints, formal OCR opinions and complaints will also be considered and included if a final decree is published and available for review.

### *Research Questions*

The purpose of this study is to contribute to the understanding of the applicability of U.S. law in the foreign setting, known as extraterritoriality, and how it applies to international education so as to better inform the practice for study abroad professionals

and their respective institutions. Through a systematic review of the guiding anti-discrimination statutes and the concept of extraterritoriality, followed by an analysis of case law and OCR opinions, litigation frequency and trends, this investigation intends to grow the knowledge base for legal applicability in this context and improve the compliance of institutions participating in these kinds of educational activities. The study will be guided by the following research questions:

- 1) What are the judicial outcomes for federal discrimination claims arising as a result of participation in international education experiences?
- 2) How has the issue of extraterritoriality been addressed in these cases?
- 3) What sociocultural and political influences might have been at play during these trials?

### *Key Terms*

This study will narrow the scope of investigation to *higher education*, meaning the optional education sought after completing and exiting the compulsory K-12 system. In doing so, the subject-matter can be reviewed in a slightly different light than when considering education as a whole – students are typically legal adults and therefore not minors with a certain level of vulnerability as is the case in K-12. This level of education, while desirable and sought by many Americans each year, is not mandatory as defined by the state or federal government. Higher education is also known as postsecondary education and includes two- and four-year colleges, universities, vocational schools, and community or junior colleges.

More specifically, this study will focus on educational activities that are organized by a U.S. institution, but occurring outside of the territorial borders of the United States. This kind of educational activity has been referred to as *international education*, *study abroad*, *education abroad*, and *foreign study*. Engagement in this kind of activity may be led by the faculty, staff, or students, and could be for a range of purposes to include, but not limited to, coursework, internships, research, volunteering, and even service work, and can be over any duration of time from a week to an academic year or more. The above terms are often used interchangeably in the field for outbound study abroad, and so similar interchange has occurred in this study.

In exploring the institutional obligation for non-discrimination, this study will refer to *federal acts*, *laws*, and *statutes*. According to the Library of Congress, “Statutes, also known as acts, are laws passed by a legislature” (LOC, 2015, para. 1). The federal acts are passed by Congress and when enacted become the laws that govern all states in the United States of America. State laws, on the other hand, can vary from state to state and are limited geographically to the state, unlike federal laws that apply unilaterally.

Federal statutes are interpreted by the federal court system; this study will explore how parties have sued institutions of higher education claiming discrimination as defined by law. The cases gathered will be further limited based on the specific claims made by the plaintiffs and appellees. Thus, federal cases will be included if the plaintiff/appellee has named a higher education institution as a defendant, and if the case involves a federal discrimination claim.

These court cases, also known as *case law*, will contribute to the understanding of the legal precedent, and the subsequent judicial opinions will guide the rationale for the

final decisions. Depending on the importance of a case and the particulars of the trial itself, it may be heard in the federal district or federal appellate courts, with many outcomes resulting in an appeal from either party. In some cases, the U.S. Supreme Court may have weighed in on a case, and in doing so, would have best defined the matter at hand for other courts to enforce henceforth. The OCR may also establish the standards guiding statutory interpretation and application. Thus, OCR investigations will also be reviewed.

Finally, the concept of *extraterritoriality* will be explored at length, but in general terms, this term simply means beyond the borders. For the purposes of this study, it will be used in the context of jurisdiction or the application of law beyond the borders of the enacting entity. More specifically, this study examines the application of U.S. federal laws for discrimination and violations that occur abroad or outside of the United States to students who would otherwise, while in the U.S., be afforded the specified protections.

## CHAPTER 2

### LITERATURE REVIEW

This study will examine the relevant federal statutes and their interpretation as defined by trial outcomes and Office of Civil Rights (OCR) opinions in an effort to inform the field of international education and its practitioners of their roles, responsibilities, and obligations. It will also explore the extraterritorial extension of federal laws for discrimination occurring on higher education programs outside of the United States.

The purpose of this literature review is to detail the growth in the field of international education, specifically in the development and progression of policies and standards in the U.S. at both the institutional and governmental level. It will identify some of the challenges faced by institutions and explore the role of professional organizations in the field of study abroad, as well as institutional-level policies and offices of general counsel that inform practices around and institution's international programming. Finally, it will explore the federal statutes and guiding legal theories as they relate to discrimination, extraterritoriality, and international higher education.

#### *Challenges for Study Abroad Programs*

Over time, the number of overall student participants in international education has grown, and diversity in the number of subjects studied and locations visited has grown to the point that students now have an extensive range of public and private

options. By 2012, there were over 9,000 study abroad programs registered in the Institute of International Education (IIE) directory (Freidheim, 2012) that ranged from the social sciences to language or cultural experiences to STEM to business programs.

As noted, despite the development of new and larger programs, institutional support offices and staff, and funding options in the nearly ten years since Resolution 308, growth in study abroad participation has fallen short of the resolution's goals. While accounting for modest increases, still only one in ten U.S. undergraduates study abroad while seeking their degree (IIE, 2017d). Congress has struggled and failed for nearly a decade to pass legislation such as the Senator Paul Simon Study Abroad Foundation Act that would increase funding for and set institutional mandates for additional reach and diversity in study abroad programming.

Further, the profile of the study abroad participant has largely remained unchanged: junior-year female, Caucasian, studying in Europe (IIE, 2018b; Penn, 2009). Women still account for more than 67% of all students, a statistic that has been wholly unchanged since the 1993-1994 academic year. Overall, international education participation increased by over 300% in the last 15 years (89,242 participants in 1995 grew to 332,727 in 2016-2017), yet lesser gains were made by minority students (IIE, 2006; IIE, 2018a). While minority rates in college enrollment were also increasing, their participation in study abroad experiences has been nearly stagnant (Salisbury et al., 2009; 2010; 2011; Stroud, 2010) growing by a mere 12% since 2006 (IIE, 2018b). Of minority student participants, Hispanic students made up the largest group at 10.2% of students in the 2016-2017 academic year, followed by Asian, Pacific Islanders and Native Hawaiians at 8.2%, Blacks and African-Americans at 6.1%, multiracial students at 4.3%, and



American Indian or Alaska Natives at less than a percentage point (IIE, 2018b). These figures demonstrate only a 5% change for Hispanic students and less than a 3% change for Blacks or African-Americans since the first Open Doors Report of the 1993-1994 academic year (McLellan, 2007).

Across all races, majority and minority, female students still demonstrate a greater likelihood and intent to study abroad (Salisbury et al., 2009; 2011; Stroud, 2010). This gender gap is especially pronounced in male Asians and Pacific Islanders (Salisbury, Paulsen, & Pascarella, 2010), which is interesting given their relatively high participation rates in higher education as a minority class as compared to African Americans. While some have suggested that higher attrition rates in the degree seeking of minority students may be a contributing factor to the lack of participation (Hembroff, 1993), a similar argument could be made for female versus male participation, given the higher rates of female persistence toward degree attainment (Lopez & Gonzales-Barrera, 2014). These two factors compounded together could further explain the unimpressive numbers among minority males.

Finally, beyond the lack of diversity in the race and gender of students participating in international education, the engagement of students with disabilities (SWDs) has been modest. In the ten academic years between 2006-2007 and 2016-2017, the percentage of these students studying abroad increased from 6.2% to 9.2%, a percentage that at first glance seems anemic, but accounts for over 30,000 students in 2016-2017 (IIE, 2018b). In only the last three academic years, 2014-2015 to 2016-2017, the number of student participants reporting a disability increased by nearly 4%, or nearly 12,000 students. At more than a third of respondents, students with learning

disabilities make up the largest SWD group (34.3%), followed closely by mental disabilities as the second largest response group (32.4%) (IIE, 2018b). Interestingly, as the population of SWDs has grown in study abroad, the data collection has also been modified with IIE now tracking separately “Chronic Health Disorders” and “Autism Spectrum Disorder” into separate categories in beginning with its 2017 report. Perhaps even more interesting is that in doing so, IIE revealed that more than 16% of students reporting a disability are identified as having a chronic health disorder (IIE, 2018b).

From the national to the institutional level, greater attention has been placed on the recruitment of diverse students – race, gender, ability, and socioeconomic status – into study abroad programs. In understanding the need to improve diversity among participants to better mirror the overall improving, yet still underrepresented, minority college enrollment rates, funding and tailored recruiting initiatives have grown to attract underserved populations to study abroad. Federal grants such as the Benjamin Gilman International Scholarships and the David L. Boren Scholarships have been developed in an effort to fund study abroad experiences of underrepresented populations, and increased flexibility in federally-funded grants have allowed students to better utilize their existing aid for study abroad (IIE, 2009).

If the goal is to grow participation to historic numbers, the inclusion of all populations is not only important to have the desired critical mass, but more importantly, for diverse inclusion in what is consistently considered to be an important facet of education. In light of the growth of new and different student populations, an understanding of the federal protections afforded to all study abroad participants is increasingly important. To engage with these populations and not understand their rights

or the institutional obligation to provide all students with equal and equitable educational opportunities is both naïve and risky.

### *National Organizations, Their Roles and Contributions*

There are a number of actors that have the potential to have great influence on internationalization of higher education. Leadership positions in the study abroad field are occupied by individuals who represent a range of interests from the institutional organizations and advocacy groups to state and federal interests, such as governmental entities (Smithee, 2012). A number of professional groups have organized in support of international education, many of which are involved in advocacy and some are even involved directly in government lobbying. For the most part, these groups are nonprofits that have a membership based in the field of international education either from a faculty or practitioner standpoint, and see the promotion of internationalization throughout the curriculum as integral to U.S. education, the globalized workforce, and contributing to world peace.

According to Andrews and Edwards (2004), the hallmark of such organizations and advocacy groups is the “pursuit of a collective good framed in the public interest” (p.485). This definition holds true among international education groups as well. Many view themselves as improving quality, equity, and access to international programming as a means of serving the educational community and students alike, and their views and missions are clearly articulated in mission statements. Some define themselves as more practitioner-based and consider their mission to be to “identify and facilitate best practices and standards for education abroad” (Forum, 2016). Others take a more

ideological approach and define their goal as facilitating “a more engaged and welcoming United States, more responsive and participatory government, and a more secure and peaceful world” (NAFSA, 2016a). Ultimately, they are contributing to the field of international education in meaningful ways, and they often have great influence because of the size of their membership base, their connections to government entities, and the passionate pursuit of their cause.

The U.S.-based international education organizations and advocacy groups, like NAFSA: Association of International Educators, The Forum on Education Abroad, and the Institute of International Education (IIE) are perhaps the largest and best known of the international education and study abroad organizations. They are in a unique position to train faculty and practitioners, promote comprehensive research, execute worldwide studies, and inform lawmakers of the issues and opportunities in international education. They can also lobby directly to Congress in an effort to bring international to the front of the education conversation. Armed with the data collected and presented by these organizations, lawmakers at each level of government have the opportunity to impart legislation and direct funding to improve both program availability and accessibility.

NAFSA, in particular, has an aggressive and deliberate role in advocacy and public policy, and in fact, they view this as part of their core mission. Often expanding into linked causes such as immigration reform and foreign policy (NAFSA, 2016a), NAFSA actively drafts policy and lobbies members of Congress. Former longstanding NAFSA CEO Marlene M. Johnson met on more than one occasion with former President Barack Obama and former Vice President Joe Biden, addressing initiatives such as the 100,000 Strong Campaign (NAFSA, 2016b). The current NAFSA CEO, Esther

Brimmer, previously served three appointments with the U.S. Department of State (NAFSA, 2018). In terms of legislative visibility for international education, NAFSA's strategy is one that keeps them in the forefront of policy-making and government influence.

Others have taken a more subtle approach in their respective areas of influence. For example, IIE, with its Annual Open Doors Report, provides some of the most comprehensive and frequently-cited research in the field (IIE, 2015). The Forum is recognized by the U.S. Department of Justice and the Federal Trade Commission as the Standards Development Organization (SDO) for the field of education abroad (Forum, 2016). While their approach to influencing change may not mean that they are a daily physical presence on Capitol Hill, they are informing the international education community, institutions, and the government through their research and training functions.

Finally, and perhaps most importantly, these organizations have a role in the determination of best practices. They have the advantage of scale and reach and can assist the field in the identification of international education trends through data collection as well as the issues being faced by institutions across the U.S. Their professional staff has the ability and resources to draft papers and policy statements by collaborating with practitioners, and to disseminate policy findings through professional magazines, research journals, and white papers. A quick search on the NAFSA website, for example, would return recommendations on practice as well as a number of policy, advocacy, and professional recourses ranging from Congressional Recommendations to Health & Safety to Inclusion and Diversity (NAFSA, 2017b). In fact, each of the major

international education organizations regularly address discrimination in their publications and in sessions during their annual meetings. Their vital role in informing those in the field cannot be underestimated.

### *University Guidelines*

Many institutions have developed best practices that have been guided by the professional organizations dedicated to international activities. Typically, these professional organizations are significant sources of influence and provide direction when higher education develops policies and processes to manage international activities. Additionally, higher education institutions themselves are contributing to the professionalization of the field through degree-granting programs in international education or practicums as part of the larger higher education administration and student services field. Through organizational support and specialized training, the field of international education has evolved over time into a legitimate and professionally-managed area of student services.

Policies Developed Alongside Growth of Programming. As noted, the number of participants and available programming has grown in number and in type. Responding to the students' needs and desires, programs have changed over time – they have become more functionally specialized, they are serving new academic communities, and in some cases, they have been shortened to better accommodate academic degree progression and student interests (Stroud, 2010). In fact, as of the 2016/2017 academic year, STEM and business programs account for nearly half of all study abroad, and short-term programs –

those over the summer and/or less than eight weeks in duration – make up 64.4% of all activity, the highest ever recorded (IIE, 2018b).

These and other programmatic and administrative changes over time have occurred alongside the student and institutional pressures to engage in experiential learning while earning credit toward the degree and while maintaining the pace to graduation so as not to extend the time in college and presumably increasing the overall cost of the degree. Additionally, as previously noted, institutions are also driven by reputation and accreditation demands to develop and diversify their program portfolio to progressively interesting, exotic, and academically challenging locations. College students are more globally-minded, and are seeking experiences that will prepared them for the globalized job market, while employers are seeking a globally-acquired set of skills (Chalmers, 2011; Hudzik, 2010; Stroud, 2010).

As part of this growth, institutions and the colleges within them, may have either aligned or competing interests. Depending on the university, the centralization/decentralization of administrative responsibility may contribute to a variety of policies, standards, and processes that range from stated guidelines on duration and content to a proposal process for new or repeated programs to financial models that either incentivize or de-incentivize faculty or collegiate engagement. Typically, however, the institution at large is legally responsible for any complaints or issues that could occur, and as such, risk management has a natural home at the institutional level.

Universities and program providers have been sued for a number of reasons – negligence, breach of fiduciary duty, and discrimination – and in response, university offices of general counsel have advocated for “aggressive risk management and a well-

enforced set of policies and requirements” (Lee, 2010, p. 678) for departments offering study abroad programs (Johnson, 2006; Lee, 2010). Protecting the institution from a federal suit that may jeopardize their federal funding or even tort litigation that could result in expensive damages depends on a number of factors including the specific reach of the law, the location that the case would be heard, and contractual obligations of those involved (Johnson, 2006). The university’s interpretation of the law and its obligations, however, depends on the specifics of the complaint and is at the discretion of its general counsel and compliance coordinators when taking into account the nuances and context of the circumstances (Forum, 2017; Johnson, 2006).

During this time of growth and change in education abroad, students have also changed in the way that they engage with the institution, and since the current traditional undergraduate has never known a time when discrimination legislation did not exist, they are better trained and versed on their rights (Forum, 2017). Students have been engaged in an ongoing and increasingly public conversation on discrimination in all of its forms in the educational setting, and with near-daily news coverage of many of the issues on U.S. campuses, the student population is perhaps better educated than any of their predecessors. To that end, many institutions, even without the requirement of the law, apply their home policies and standards on student misconduct and campus inclusion to their education abroad programs (Forum, 2017).

Risk Tolerance and Student Safety. In the development of its policies, institutions have to balance the safety of their students with the academically-compelling activities and locations in study abroad. This leads to varied levels of risk tolerance. Defined by the Higher Education Funding Council for England, risk is “the threat or possibility that



an action or event will adversely or beneficially affect an organisation's ability to achieve its objectives" (HEFCE, 2000; Huber, 2011, p.6). Risks could be financial, organizational, and/or reputational, but each are faced through the variety of teaching and research decisions made by an institution of higher education (Huber, 2011). Minimizing risk for any given project is ideal, but some projects have inherent possibilities for poor or adverse outcomes, and institutions are then forced to decide whether or not the risks outweigh the benefits. In some instances, recognition of risk as high, yet still deeming it as acceptable given the benefits of innovative academic programming, can be difficult for the institution or even degree field to determine (Kwak & LaPlace, 2005).

International programming and study abroad are areas where institutions open themselves up to inherent risk (Huber, 2011). They may seek to reduce or eliminate special or unnecessary risk from organized programming, but by engaging in the international realm of education, institutions must embrace circumstances that they may not be able to control (Johnson, 2006). Yet by not engaging in internationalized curricula, they may risk the institutional reputation and even their market position with their higher education competitors (Huber, 2011). It is ultimately impossible to provide a risk-free experience, nor is it reasonable to exert so much caution that key features of the program are diluted, reducing the value of the foreign experience to something that far too closely mimics that of being in America (Johnson, 2006).

While some institutions may restrict certain locations or activities, others may see it as central to their academic mission or institutional identity. For example, given the ongoing and perhaps perpetual high U.S. State Department Travel Rating for Israel, some institutions may choose not to engage in that location or substantially limit activities or

increase the liability waiver process; others, perhaps those teaching innovation and entrepreneurship or those with a large Jewish student or alumni population, may feel differently about their role in the region. These decisions may fluctuate over time and may be influenced by current events, reports on the ground, or even insurance claims, but they are often tied to the unique identity of the institution. Institutions may explicitly ask students to acknowledge their risk in such locations by signing a statement of risk, but it is also legally plausible that by volunteering to participate in a dangerous or risky location, the student is already assuming the inherent risk (Johnson, 2006). Key to this interpretation and determination of institutional negligence is whether the risk was indeed known and/or foreseeable (Johnson, 2006).

Institutions may opt to engage in education abroad in a combination of ways – institutional exchange agreements, for- or not-for-profit program providers, or even foreign branch campuses. Each of these methods represent different levels of support by a contracted partner, but also different levels of control over the operation itself. The institutional ownership of a foreign branch campus, for example, would seemingly have the highest level of control, but the institution must then navigate and adhere to local laws, comply with U.S. laws and standards particularly as it pertains to American faculty, staff, and students while maintaining the academic and ethical standards of the home campus (Chalmers, 2011). In contracting with third-party providers, whether they be for- or not-for-profit, the institution may be able to either share or layer the risk responsibility. These unique contractual relationships deserve an investigation of their own as it relates to the liability of the higher education institution. However, this is a suggested area of future research and not within the scope of this study.

Regardless of the risk tolerance or risk aversion of the institution, it is impossible – neglectful, even – to ignore safety measures for the protection of students. The role of the institution in ensuring student safety from any “foreseeable” risk has been tried in the court system. Courts have found middle ground between in loco parentis, or the institutional assumption of parenting responsibilities, and a landlord bystander role, and have most recently settled on the identification of a “special relationship” (Lee, 2010). In this relationship, institutions are held accountable for risk that they should have foreseen and may be ultimately negligent (Lee, 2010).

Additional training of faculty, staff, and students prior to departure is essential (Fischer, 2010; Lee, 2010; Vossen, 2016). Training exercises should be mandatory with attendance tracking, begin prior to departure with formalized workshops, and continue with on-site and arrival orientations (Forum, 2017; Vossen, 2016). Training should also be in place for those “first-responders” to student safety issues and violations to institutional codes of conduct to ensure a swift and compliant response that has student safety at the forefront of the protocol (Forum, 2017; Pfahl, 2013; Vossen, 2016). Supplemental insurance policies over and above standard healthcare to cover illness, injury, and evacuation abroad have become the norm with risk assessment officers and similar full-time and dedicated positions exist to coordinate with general counsel, mitigate the risk, and improve response times in the event of an issue (Vossen, 2016). Engaging with each of the possible stakeholders for the establishment of a crisis management response – campus entities, partner institutions, program provider contacts, faculty and students – will ultimately benefit those involved in the event of an incident.

Ultimately, student health and safety risks increase the vulnerability of the institution to scrutiny and litigation. The level of exposure that institutions are willing to bear for their academic programming could be reduced by appropriate planning, training, and situational modeling. Additional risks include those that are related to decisions over which the institution may have had some level of control, but failed to demonstrate proper judgement concerning their international programming.

Institutional Sensitivity Toward Inclusion with External Limitations. With all of these measures in place, and with the desire to engage with a variety of student profiles, institutions are better positioned than ever to combat the threats to health and safety. And yet, every threat cannot be predicted nor can it necessarily be safeguarded against. Even with the best intentions, not every case can be controlled in the way that the student or institution would like. This is often the case abroad – ancient physical spaces that may not be wheelchair accessible, local cultures that engage differently with different genders and races, have different views and laws concerning LGBTQ students, healthcare systems that may not be equipped to support chronic illness, and government policies that limit or restrict information sharing.

Setting the scene for what the environment may entail can help to manage expectations and reduce anxiety, culture shock, and disappointment. In attempting to match as closely as possible the reality with the expectation, the greater the likelihood of a successful experience. Some on-the-ground challenges are known or could be learned through an investigation of the site and its respective resources, but others may be learned on site. Some may be worked around, but others may be too costly or unreasonable to do so. Tensions arise when an institution is unable to support all of a student's requests and

thus may lead the student to feel that their expectations were unmet (McLean, Heagney, & Gardner, 2003).

Study abroad and educational professionals alike tout the importance of inclusion, but not every environment is suitable, or hospitable even, to every student and their unique set of circumstances. Students, study abroad professionals, and institutions “must be prepared that not every site can accommodate every student” (Katz, 2007, p. 55).

When an institution is unable to fully provide an equitable learning environment, are they then at risk for possible litigation? It is in this unknown space where the ambiguity of the extraterritoriality of the law needs clarification so that the expectations for responsibility are understood by the students and the institution.

### *Enforcement of the Law*

Organizations and universities have developed best practices or institutional policies and procedures that are influence by federally-mandated laws. Typically, the laws are drafted and enacted by the U.S. Congress, but enforced through the court system, or in the case of civil rights, by the OCR. The process of court and OCR interpretation may take years and require that numerous discrimination cases be heard for the statutes to be fully clarified so as to be properly applied on campus.

Role of the Legislature and the Courts. Since educational rights are not protected as a core tenant in the U.S. Constitution, it is the responsibility of the legislature and the courts to adopt and interpret education statutes (Bon, 2012). Federal laws such as the Civil Rights Act and landmark cases such as *Brown v. Board of Education* (1954) have reflected the societal reforms of the time and guided change in classrooms at all levels

(Bon, 2012). It is this cooperative system of law and order that guides the American education system.

In the American government system, the legislative branch, consisting of the Senate and House of Representatives and collectively referred to as Congress, is granted the power of drafting and enacting the laws that govern the United States, among other powers. Laws begin simply as ideas that are researched and drafted in either the U.S. House of Representatives or the Senate under the sponsorship of a representative or group of representatives in an effort to address a need for their constituents (U.S. House of Representatives, 2017). If originated and approved in the House, a bill is progressed into the Senate for a similar review, debate and eventual vote before being finally edited for any differences that may have arisen through the Senate review and eventually progressed to the President of the United States. Either with their approval or with sufficient votes to override, the bill is then law (U.S. House of Representatives, 2017).

Once enacted, it becomes the role of the judicial branch of government, the U.S. Supreme Court and inferior courts, to hear and decide the cases that emerge from efforts to interpret and apply our nation's laws (U.S. Supreme Court, 2017a). The U.S. Supreme Court plays a significant role in policymaking (Bon, 2012) given its powerful influence over the interpretation of laws. In taking up any issue, the general roles of the legislature and the courts are to define the law and interpret the application of said laws, respectively. The guidance provided by the Supreme Court as supplemental to the statutes themselves helps individuals understand the implications of the statutes on day-to-day educational operations.

The Supreme Court selects cases that involve Constitutional interpretation and validates, or invalidates, legislation and executive actions (U.S. Supreme Court, 2017b). The majority of cases heard by the Supreme Court are reviews of previously tried and appealed cases, and as such there is no jury and the decisions are “virtually final” (U.S. Supreme Court, 2017b). The Supreme Court Justices’ opinions on each case, concurring and dissenting, clarify the rationale for their vote on a case’s outcome, and by calling in legal theory and decades of precedent-setting cases, may be thousands of pages in length (U.S. Supreme Court, 2017a).

The branches of government work together to enforce human affairs justice in the United States, and have leaned on one another over time to refine and hone statutes so that they might address the pressing issues in our country. Following a conferred Supreme Court decision, the legislative and executive bodies of the U.S. government may choose to alter the law as written or even create a new legislative action in response. This volley of legislation serves to clarify the language of law so as to be interpreted by the courts as well as to be precise in intent and enforcement.

With respect to discrimination, the Supreme Court has chimed in several times so as to clarify the legislative intent or express language for the purposes of real-world application. This act of precedent-setting often reflects the philosophical make-up of those Justices appointed to the Court and can change over time as newly appointed members are confirmed (Lee, 2010). The Supreme Court may consider the Congressional discussions that contributed to the enactment of the bill in the event that intent is not expressly stated in the legislative language (Silver, 1987). However, the Supreme Court has also pointed out that if Congress intended legislation to include

specific uses or exclusions, then they would have included that language to begin with (Kanter, 2003; Masinter, 2011; Schaffer, 2004).

As the courts have heard more and more cases related to higher education over the last fifty years, institutions have expanded their offices of legal counsel beyond that of simple contract or transactional law (Lee, 2010). The need to have access to a university attorney as a response to an accusation or in the mitigation of possible issues proactively has grown with the need for increased institutional protection (Lee, 2010). It is no longer uncommon for universities to find themselves at the center of a complaint or even to have a suit brought against them for any of the different modes of discrimination. If not in the courtroom, complaints may also lead to an OCR investigation.

Office of Civil Rights (OCR). The OCR is the enforcement arm of the Department of Education and is responsible for overseeing and enforcing federal civil rights laws pertaining to discrimination - race, color, national origin, sex, disability or age. The OCR has jurisdiction over any institution, including colleges and universities, that accept federal financial assistance (USDOE, 2010; Bull, 2017). Following the enactment of the Civil Rights Act of 1964, Congress addressed the enforcement of civil rights originally in the Department for Health, Education, and Welfare and in collaboration with the Department of Justice (Murphy, 2017). During the Carter administration, Congress outlined the need for a cabinet-level department to oversee the nation's education system at large as well as the implementation of the different civil rights statutes as it related to education equality. In 1979, Congress enacted the Department of Education Organization Act to formally establish the Department of Education, and subsequently, the Office of Civil Rights therein and outlined its



administrative structure and Presidential and Congressional reporting responsibilities (93 STAT. 668, 1979). The office has gained influence over time with the interpretive expansion of the defined areas of discrimination. Figure 2.1 presents the timeline of the key enforcement areas overseen by the OCR (USDOE, 2015a).

Headed by the Presidentially-appointed and Congressionally-confirmed Assistant Secretary, the office maintains a headquarters in Washington, D.C. as well as 12 regional offices (USDOE, 2015a). In addition to those cases brought before a trial court where a precedent is set by upper and lower court decisions and opinion statements, higher education institutions could gain guidance directly from OCR through technical assistance for voluntary compliance, data collection and reporting, policy guidance statements, and complaint decisions, also known as compliance reviews.

Through technical assistance, data collection, and policy guidance statements, the OCR fulfills a proactive function of education and prevention. Technical assistance may come in the form of sessions, workshops, videos, and webinars (USDOE, 2015a). These outreach initiatives are offered to a number to stakeholders outside of the higher education institution, such as parents and advocacy groups. For each of the civil rights areas of discrimination, the OCR has also drafted and frequently updated policy guidance statements that addresses institutional obligation and clarifies the requirements for a variety of related topics such as resource equity, bullying, and even vaccination and disease prevention (USDOE, 2015a). These policy guidelines have either been issued as implementation pamphlets or as “Dear Colleague” letters intended to promote equal educational opportunity (USDOE, 2015a).

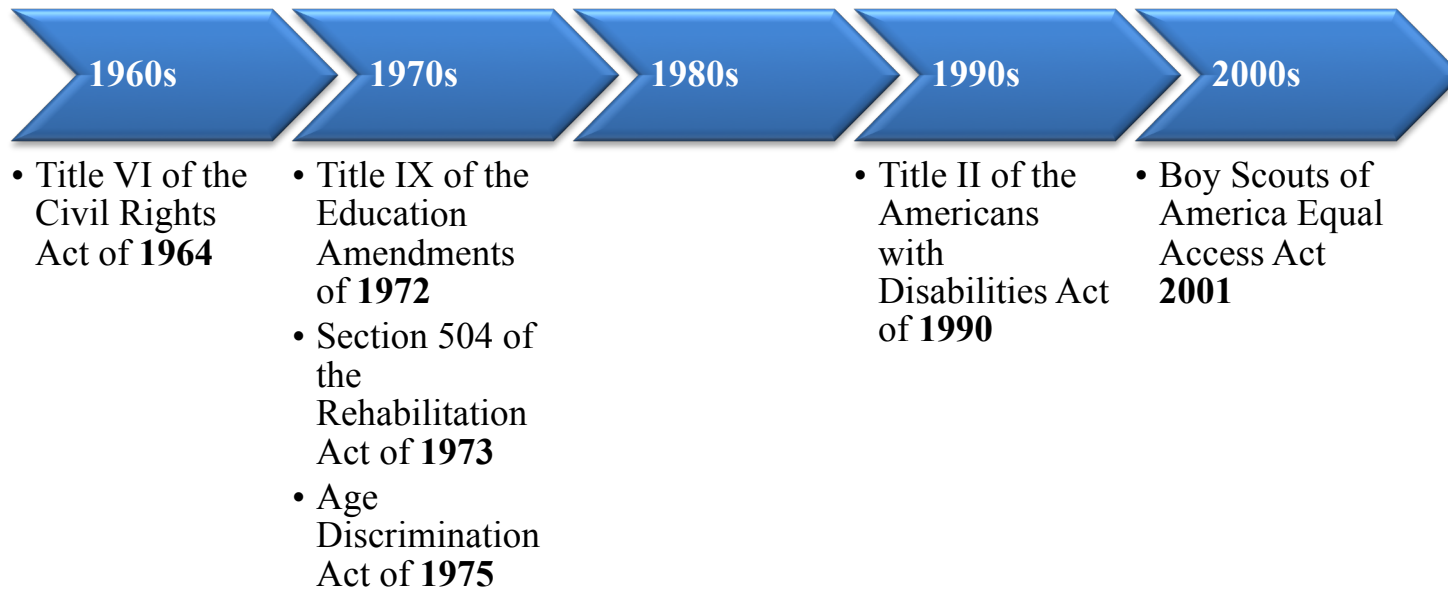


Figure 2.1. Timeline of the key enforcement areas overseen by the OCR (USDOE, 2015a).

Alternatively, in filing a complaint, individuals, or someone acting on behalf of an individual victim or a group of victims, can bring attention to a possible civil rights violation retroactively through a formal investigation (USDOE, 2017a). In this approach, a complaint must be filed to the OCR within 180 days of the alleged discrimination (USDOE, 2010). The complainant may choose to also file a complaint with the institution itself through its formal grievance process; if this is the case, the complaint to the OCR must be submitted within 60 days of the completion of the institutional process (USDOE, 2010). After a review of the details, the OCR will first make a decision on whether or not it has jurisdiction in the matter and whether the complaint meets the standards as outlined by the OCR process (USDOE, 2015b).

Following an investigation where statements of the parties involved and any other appropriate sources are reviewed, a determination is made on the applicability of antidiscrimination legislation, its interpretation of the legislation, and articulates an opinion as to whether a violation has occurred. Generally, the OCR will work with the institution to resolve a complaint through a formal resolution agreement that details any prescribed remedial actions, but if necessary, the OCR has the ability to enforce its primary punishment capacities, which are to withhold federal funds and/or to refer the complaint to the Department of Justice for prosecution (USDOE, 2015b). Some investigations are ended prior to a decision when the parties come to an independent, but OCR-monitored, agreement. Regardless of the outcome of an OCR investigation, individuals retain the right to file a suit for damages in federal court (USDOE, 2015b).

Complaints to the OCR have dramatically increased over time, reaching over 10,000 across all levels of education in 2015, nearly three times the number of complaints

received in 1980 (USDOE, 2015a). Certainly, the enactment and implementation of ADA in 1990 and ADAA in 2008 and the progression of newly protected students into the education system contributed to the increase in reported incidents of discrimination violations. While the agency fielded complaints in each of the discrimination areas, disability complaints accounted for nearly half of those received 2015 at 46%, followed by sex discrimination at 28%, and race discrimination at 21% (USDOE, 2015a). Sadly, these decisions are also somewhat limited as it pertains to study abroad, and the existing decisions remain somewhat indecisive and leave room for interpretation. Further, the growing level of complaints have made it difficult for the agency to resolve cases in 180 days as is their goal (Green, 2017).

As an agency with a presidentially-appointed head, the role and scope of the OCR can and has changed with the different political parties in office. Most recently, under the Obama administration, the role of the OCR was expanded in what some saw as a legal overreach of the office to further expand their investigations under a broadened interpretation of the statutes. With the appointment of Betsy DeVos as education secretary of the Trump administration, the new office guidelines and protocols are aimed at quicker resolution of complaints to ensure that “every individual complainant gets the care and attention they deserve,” according to Education Department spokeswoman, Liz Hill (Green, 2017). Facing mixed reviews by political and advocate leaders, the Commission on Civil Rights announced in June of 2017 that it will conduct a two-year review of the civil rights enforcement of what some have identified as “overzealous” and “overstepping” investigations and enforcement by the OCR (Green, 2017).

Fines and Funds Restriction as a Means of Enforcement. In addition to the possibility of public investigation and litigation, institutions face the risk of having their federal funding reduced or revoked. The level of dependence that institutions now have to federal funding was initiated with the Higher Education Act of 1965, where the portfolio of federal financial aid programs was dramatically expanded in an effort to open access to education to historically marginalized populations (Lee, 2010).

Adherence to federal antidiscrimination laws is mandated based on receipt of federal funding. The Civil Rights Act of 1964, Title IX of the Education Amendments Act of 1972, Section 504 of the 1973 Rehabilitation Act, the Americans with Disabilities Act (ADA), specifically Title III of ADA, stipulate that recipients of federal funding are responsible for compliance with these statutes. The OCR states that it has the authority to enforce anti-discrimination standards through the suspension or revocation of federal funding, and yet they have also drawn criticism for not enforcing monetary penalties that might increase compliance (Setty, 1999). Too, often institutions and their general counsel prefer to settle disputes through arbitration or mediation rather than be faced with a costly alternative (Lee, 2010).

The process for revoking funding is timely and complicated. To do so, the OCR would need to first try to ensure voluntary compliance, and only after proving to be unsuccessful may they move forward with the administrative proceedings (Silver, 1987). In doing so, the OCR would issue notice of an “opportunity for hearing” before an administrative law judge (Silver, 1987, p. 512) who would enforce the order from there. Alternatively, the OCR has the option to refer cases directly to the Department of Justice (DOJ) where a court could decide on fines or other monetary measures to enforce

antidiscrimination law. Historically, this has been the more traveled path, but even in this approach, the DOJ may choose not to pursue or will settle as it has with the majority of cases (USDOJ, 2009; Silver, 1987).

Despite threats of funding restrictions for even high profile cases, such as Title IX violations by Tufts University and even by the state of North Carolina, to date, no such action has occurred (Kingkade, 2017). Besides having to engage in a lengthy administrative process, by revoking federal funding, the OCR would be restricting student scholarships, grants, and funded research, thereby potentially harming countless students from lack of access to needed assistance. In fact, the OCR has never exercised this enforcement technique (Edwards, 2015). Instead, they have operated under the less adversarial approach as dictated by their statute, and have sought voluntary compliance (Edwards, 2015).

### *Study Abroad and Key Federal Legislation*

Beginning with the Civil Rights Movement of the 1950s and 1960s, changing public opinion about equal rights for all individuals began to be reflected in Congress, specifically with the ratification of the Civil Rights Act of 1964 by Congress (Yell, Rogers & Rogers, 1998). Since that time, significant, federally-mandated, gains have been made toward eliminating discrimination in the United States. Discrimination based on race, gender, and disability were no longer allowed under the law, and over time these mandates were improved, amended, and in many cases addressed by the courts for the purposes of clarifying how the laws apply in the workplace, education setting, and across

aspects of daily American life. The specific governing statutes, their influence on education, and their applicability abroad are summarized below.

Title VI – discrimination based on race, color, national origin. Following a long history of race discrimination in the United States, the Civil Rights Movement addressed head-on the inequalities among the races in a number of facets from employment to education to business (Harper, Patton & Wooden, 2009). In 1964, with the ratification of the Civil Rights Act, Title VI explicitly provided for equal treatment of all Americans regardless of the color of their skin, expanded educational opportunities for minorities, and restricted federal funding to any schools that remained segregated (Harper et al, 2009). Title VI states that

No person in the United States shall, *on the ground of race, color, or national origin*, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance... (Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d)

Title VI is interpreted to include offenses such as harassment, segregation, discriminate discipline, denial of service, and retaliation based on any of the above grounds (USDOE, 2015c). If, and when, any such discriminatory behavior is known (or reasonably should be known) to have occurred in the educational setting, institutions are required to take immediate steps to investigate and eliminate the threat while offering services to remedy the effects (USDOE, 2015c).

While in higher education, Title VI was interpreted as a response to U.S. domestic race relations, others have referenced its benefits in the equitable development of international programming, both from an inbound and outbound student perspective. For those students seeking entry into U.S. institutions either as degree seekers or as transient

students, Title VI has afforded protections through nondiscriminatory admissions processes regardless of national origin, religion, or language proficiency (USDOE, 2012b, 2015c).

As college campuses have diversified their student populations following such legislation as the Civil Rights Act and Title VI, the field of study abroad and international education has been slower to adapt (Salisbury et al., 2009; 2011). As previously noted, the number of minority students, particularly African-American students, participating in education abroad has lagged significantly behind that of the White student population. Studies that examined multiracial and multicultural participation have confirmed the low participation rates of minority students, while also seeking to identify influencing factors (Brux & Fry, 2010).

Among the five distinct factors identified by Brux and Fry (2010) that include finances, family concerns and attitudes, institutional factors and access to relevant study abroad programs, minority students have a fear of racism and discrimination that contributes directly to their decisions to not participate. Apprehensions based on their American experiences with racism contribute to the fear of experiencing it in a new and foreign context (Brux & Fry, 2010). While few studies have been conducted to quantify incidences of racism or ethnic discrimination of study abroad students, some qualitative studies have identified such encounters by students of color (Malewski & Phillion, 2008; Trilokekar & Kukar, 2011). It is important to note, though, that incidences of perceived racism were not isolated to minority students, but were experienced by those considered to be “outsiders” of the local culture (Malewski & Phillion, 2008).



Yet, the literature provides little information on the applicability of Title VI abroad in the educational context. Research has been conducted on the extraterritoriality of Title VI in the context of employment discrimination, trading, and anti-trust laws; however, a review of the literature yields not a single return on the educational application of this landmark section of the Civil Rights Act. Perhaps this can be attributed to the pervasively low number of minority U.S. citizens participating in the available education abroad programming. With the intended expansion to greater diversity, this is an area of future discussion.

Title IX – discrimination based on sex. Title IX of the 1972 Education Amendments of the Civil Rights Act, 20 USC § 1681, provides protection against discrimination based on sex. Written using nearly identical language to other Civil Rights statutes protecting against discrimination, Title IX states

No person in the United States shall, *on the basis of sex*, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance... (20 USC § 1681)

While Title IX addresses the admissions to and inclusion in academic and educational activities without discrimination, over time and through legal interpretation and litigation under the statute, it now also provides for a hospitable learning environment free from harassment and intimidation and protects against disparate treatment and retaliation (Bull, 2017; Olivarius, 2014). This includes the prohibition of sexual harassment to include unwanted or unwelcome sexual behavior that significantly interferes with a student's access to educational opportunities (Hamill, 2012).

Initial interpretations of the statute by the OCR focused on the conduct of educational institutional employees, but in its 1997 Revised Pamphlet and Sexual

Harassment Guidance, the scope of those included as Title IX perpetrators was expanded (Bull, 2017). Harassment or sexual violence resulting in a Title IX violation wherein a student's academic endeavors have been interfered with or limited could now be perpetrated by not only those working for the institution such as faculty or administrators, but also by fellow students and even strangers to the student (Bull, 2017; Hamill, 2012; Olivarius, 2014). Title IX requires that the institution take immediate action to both stop the action and prevent future incidences, as well as to address the effects of the harassment and hostile environment (Creighton, Storch & Mello, 2015; Hamill, 2012). Title IX also prevents an institution from "in house" investigating and reporting (Creighton et al., 2015).

For those that believe an infraction to Title IX has occurred, the above interpretations of the statute have opened the door for students to file a complaint or sue for damages (Lee, 2010). Additionally, many states have articulated that it is no longer legal to discriminate on the bases of sexual orientation or gender identity (Lee, 2010). Due to the involvement of the OCR and its contributions to the interpretation of the statute, the protections that should be provided by an institution of higher education have changed over time. The guidance and Dear Colleague letters from the OCR, specifically the Dear Colleague letter issued on April 4, 2011, have addressed their changing views on sex discrimination and the ways in which the OCR has broadened the scope to include new ways in which harassment presents itself in modern society (Bull, 2017; Edwards, 2015; Hamill, 2012). Yet in September 2017, the DOE withdrew the April 4th guidance letter noting its lack of due process and fundamental fairness (USDOE, 2017b). A new

Q&A replaced the letter to serve as guidance to campus leaders in the interim while new guidance is developed (USDOE, 2017b).

In the context of study abroad, confusion related to Title IX and its applicability could occur in a number of ways. Thus, questions that may be easier to answer in the U.S. educational setting, are not easily answered in the different study abroad locations in other countries. Such questions include, for example, is the victim and/or perpetrator a U.S. citizen, are unwanted advances culturally acceptable in the foreign location, is the harassment or action even a crime, or have mandatory reporters met their obligation for the protection of victims and the educational environment. Answers to these questions may result in nuanced threats to Title IX compliance, which reveal a grey space in terms of expectations and statutory obligation.

ADA/Title II/Title III/Section 504 – discrimination based on disability. As early as 1918 with the Smith-Sear Veterans Vocational Rehabilitation Act, the federal government began making accommodations for a vocational rehabilitation program for soldiers returning from World War I (Klein, 2008). Fifty-five years later, serving as arguably the first major civil rights attempt by Congress to protect persons with disabilities from discrimination, Section 504 of the Rehabilitation Act of 1973 laid the groundwork for disability legislation as we know it. Originally intended as an amendment to the Civil Rights Act of 1964 as educational protections for disability discrimination, Section 504 had been left out of other similar acts in front of Congress (Yell et al, 1998). The language in Section 504, for what is primarily a labor statute, protects any person whose handicap or impairment substantially limits a person's major life activities (Yell et al, 1998), and states that

no otherwise qualified handicapped individual in the United States . . . shall solely *by reason of his handicap*, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any activity receiving federal financial assistance. (Section 504, 29 U.S.C. § 794(a))

Other educational amendments for the protections of students with disabilities, such as the Education for All Handicapped Children Act (EAHCA) of 1975, were passed in the years to follow, but each addressed the elementary and secondary education of Americans (Yell et al, 1998) and had little influence on higher education. It was not until the Americans with Disabilities Act (ADA) of 1990 that landmark change was fully addressed and Congressional protections broadened beyond the scope of only federal agencies to all public entities (Kanter, 2003). Title II applies to state and local government-operated programs, while Title III of the ADA goes further yet to include any entity, private or public, that receives federal funding, therein accounting for nearly all institutions of higher education (Rothstein, 2014; Schaffer, 2004). This act and the specific sections therein, coupled with the Rehabilitation Act of 1973, specifically Section 504, sought to support and better protect Americans with disabilities (Myers, Lindburg, & Nied, 2014). These are primarily the statutes under which higher education protections have been applied (Rothstein, 2014).

To address shortcomings in implementation of the ADA, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA) in 2008 (Madaus, 2011), which further solidified the U.S. commitment to continued improvements in our accommodation of disabled Americans that are “otherwise qualified”. The ADAAA refined a vague definition of the term “disability”, expanded the interpretive meaning of a

substantially-limited major life activity, while better defining what constitutes a major life activity (Long, 2008; Simon, 2011).

While widely regarded to be documents to govern employment discrimination, the ADA, ADAAA, and its predecessors have served to protect those in higher education. Specific educational regulations, that extend beyond the simple denial of benefits, apply to now all public and private institutions. ADA restricts 1) the imposition of eligibility criteria unless otherwise unnecessary for the function of the degree that could be used to eliminate applicants with disabilities, 2) requires that universities make reasonable policy or procedural modifications and accommodations assuming they do not “fundamentally alter” the program, 3) requires the provision of auxiliary aids and services as long as the provision does not fundamentally alter the program or “result in undue burden” to the institution, and 4) mandates the removal of architectural and communication barriers, again assuming that these alterations do not result in an undue burden (Schaffer, 2004; Simon, 2011).

The ADA and Section 504 of the Civil Rights Act offer substantial protections, but some pieces of the language and terminology have remained difficult to define by the courts. Specifically, terms such as “fundamentally alter”, “undue burden”, and “readily achievable” can be open to interpretation and have thus been left to the judgement of the courts, with undue burden being perhaps the most difficult to define in the context of study abroad. In fact, under Section 504 and Titles II and III, universities are required to provide services even if it means that they will incur financial or administrative costs (Kanter, 2003). However, at no point does the statute define when the provision of

auxiliary services, for example, is elevated beyond a reasonable accommodation to being one that creates an undue burden (Schaffer, 2004).

These three terms and their resultant ambiguity have been difficult to define in the domestic context, and yet when coupled with an abroad location and activities over which an institution may have limited control, the challenges are further heightened. The added cost of providing an aid, such as an interpreter, over the course of a semester, could certainly be seen by some as an undue financial and administrative burden. The selection of ADA-compliant housing as defined in the U.S. context, may not be possible, and certainly the modification of the architecture is beyond the scope of the visiting program.

Further, it remains unclear as to whether any of this legislation follows Americans outside of our national borders. It has been argued that it applies only within the U.S. (Masinter, 2011) as neither 504 or Titles II or III make any mention of the protection of Americans overseas or on programming that extends to foreign soil (Kanter, 2003). This creates a gap in defined obligation for study abroad. Aside from their likely desire to contribute to the student experience and the many reasons that a college or university would want to provide for a study abroad, U.S.-based institutions are mandated to serve SWDs.

Institutions must look to the limited case law and OCR opinions to better understand their role in this specific area of higher education, but as noted by Michael Masinter (2011), legal experts do not always agree on this particular issue. In 1993, J. Wodatch, prominent civil rights pioneer with a 42-year career as a lawyer for the DOJ (USDOJ, 2017), stated in a letter that there is “reasonable reason to doubt” Title III’s applicability to public accommodations outside of the U.S. (Meers, 2011, p. 13), and

again in 1999 a DOJ letter further advised that Title III “may not” provide provisions for accessibility in the foreign context (Meers, 2011). Yet, in 2000 (*Bird v. Lewis & Clark College*) and again in 2010 (*Tecza v. University of San Francisco*), the courts heard cases on accommodations for student during study abroad, and asserted that ADA did apply in each foreign setting (Meers, 2011). These cases are examples of those that have been collected as a source of data and will be among those analyzed in depth as part of this study. Thus, an extensive analysis of the case details is included as part of the presentation of results in Chapter 4.

Even the OCR opinions on the matter have varied regionally (Meers, 2011). Given these numerous contradictions, the applicability of federal laws and protections in foreign countries when students participate in study abroad programs has been characterized as an “unresolved” issue (Kanter, 2003; Schaffer, 2004). Perhaps the only clear guidelines are those that occur as part of the on-campus procedures. As with other academic or educational programming, the recruiting, application, screening, and acceptance procedures should comply with Section 504 and ADA. Students must still disclose their disability to receive accommodations, and any post-admission inquiries about the nature and scope of the disability can occur confidentially (Hamill, 2012). The question remains, however, that even with the disclosure of a disability by a study abroad student, to what administrative and financial lengths should an institution go to accommodate a student, and what exactly constitutes “reasonable” accommodation or excessive program alteration in the international context.

Clery Act – disclosure of safety. The Clery Act as it is known today, was originally passed as the Crime Awareness & Campus Security Act of 1990 (20 U.S.C. §

1092(f), 34 C.F.R. § 668.46). Amended and revisited a number of times, the Act has been updated as campus crime reporting has been newsworthy for numerous campus incidents (Creighton et al., 2015) and has remained the standard by which campuses have been evaluated (Layton, 2014). Through the successful advocacy of her family, the act was renamed for Jeanne Clery, who in 1986 at the age of 19 was raped and murdered in her residence hall room. The Clery family championed for the provision of timely and transparent campus safety information to families and students (Bowles, Tsantir & Powers, 2011; Clery Center, 2012).

The Clery Center, the organization started by the Clery family, produces a *Handbook for Campus Safety and Security Reporting* that details the requirement for an appropriate campus-wide alerting system, offers guidance on how to draft policies, and addresses common challenges as well as suggested solutions to assist colleges (Clery Center, 2012; USDOE, 2016). In addition to the resources provided by the Clery Center, the Department of Education also provides resources for the development of campus emergency planning, to include grants, action guides, and planning centers (OPE, 2014).

Perhaps best known for the mandatory reporting of crime and sexual violence data on college campuses receiving federal funding, the Jeanne Clery Campus Security Act (20 USC 1092 § (f)(3)) also mandates that colleges outline specific safety and security policies, including a plan for “disseminating timely warnings and emergency notifications” in the event of an ongoing health and safety threat (Bowles et al, 2011; Clery Center, 2012; Nobles, Fox, Khey & Lizotte, 2012). It governs the requirement for institutional disclosure of campus crimes – tracking/reporting of crime, maintenance of a crime log, policy statements, and timely warnings of crimes occurring in a defined



geography that is deemed serious or continuous that may prevent further, similar crime (Bowles et al, 2011; Creighton et al, 2015; Hamill, 2012; Nobles et al., 2012). As with other federal laws, compliance is mandatory for any institution receiving federal student financial aid or other federal funding (Meers, 2011). Noncompliance with Clery requirements can result in substantial fines, or in extreme cases, the loss of Title IV funding (Bowles et al, 2012; Layton, 2014).

Reporting of criminal offenses (homicide, robbery, aggravated assault, burglary, motor vehicle theft, and arson), hate crimes, and arrests/referrals for disciplinary action (weapons, drug violations, liquor law violations) as defined by local law where the offense occurred is required (Hamill, 2012; Storch, 2012). Unlike Title IX that is concerned with *who* violations are committed against, the Clery Act is concerned with *where* crimes occur – 1) on campus, 2) non-campus property, and 3) campus adjacent public property (Creighton et al, 2015; Hamill, 2012; Storch, 2012). Reporting is only required for the specific leased space and any common spaces therein (lobby, stairwell, etc.) and only for the time period, constricted by specific dates and times of the agreement itself (Creighton et al, 2015).

The original versions of the statute made little mention of abroad or overseas locations other than recommending that locations owned and operated by a U.S. institution make a “good faith effort” to know the local crime statistics (Storch, 2012). As of February 2011, revised Clery guidance detailed in the 2011 Handbook for Campus Safety and Security Reporting applies to a foreign educational operation, if owned or maintained by a domestic institution (Creighton et al, 2015; Hamill, 2012; Meers, 2011). In the abroad context, reporting is mandatory if the U.S. institution owns (purchased

property) or controls (rents or leases, or has some other type of written agreement for a building or portion of the building or property) the property, regardless of duration of the agreement, to include classrooms, housing, and student gathering spaces (Bowles et al, 2012; Hamill, 2012; Storch, 2012). However, Congress amended the Clery Act to clarify that the Act does not apply to foreign institutions (Meers, 2011).

To compound and expand the reporting the requirements of the Clery Act, the Violence Against Women Act (VAWA) of 2013 added a Section 304 which mandates that institutions also report incidences of domestic violence, dating violence and stalking (Olivarius, 2014). For the purposes of sexual misconduct, Title IX, Clery, and VAWA now provide overlapping legislation for protection of students (Forum, 2017). While students cannot sue a university directly, the fines for violations under each of these acts are increasing for each violation (Olivarius, 2014).

While abroad, the nuances in what may be considered owned or leased property may very well be called into question when a Clery violation is pursued. Different institutions may take a different stance on what kinds of events warrant the submission of a formal report. As with other federal statutes, these gaps in the language of the law compounded with amendments that may give way to a variety of interpretations complicates the understanding of how an institution measures its risk and develops its reporting strategies.

FERPA/HIPAA – privacy protections. The Federal Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a federal law pertaining to the privacy of educational records at any institution receiving federal funding (Hamill, 2012; USDOE, 2015d). It provides access to students to their own educational records

and protection from the disclosure of academic or personally-identifiably educational information to a third party without the student's written consent (Hamill, 2012; Meers, 2011). This information applies to all components of the federal-fund receiving institution and includes admissions, program or course-related materials, billing, housing, and academic scheduling; essentially any information not categorized as a directory entry (DiGrazia & Mason, 2014; Meers, 2011). For students over 18 years of age or attending an institution of higher education, this affords them access rights to their own student records, to request that a record be corrected or amended, to submit documentation to an academic record (i.e. regarding a contested record or piece of information), while protecting them from others seeking information to include their parents (USDOE, 2015d).

Exceptions to FERPA include information sharing within an institution or between institutions when legitimate educational or financial aid interests or enrollment are involved, when legally requested as part of the judicial process, or when the health or safety of a student is concerned (Hamill, 2012; USDOE, 2015d). Many schools have also developed a FERPA waiver process by which students can designate specific individuals and allow either partial or total access to their records (DiGrazia & Mason, 2014).

While abroad, students often need to share academic information across parties such as transcripts, course requests, and financial aid or payment information to facilitate their program. In most cases, these records remain protected by FERPA from the home institution's perspective, and many of these records processes must be managed by the student directly, thereby negating the need for a release. Often, however, study abroad offices may request or even require that students sign a FERPA release so that they might

act on the student's behalf for the necessary functions of their program (DiGrazia & Mason, 2014). This waiver also gives freedom to the institution to share disciplinary records across the university or to better serve the student in the event of an emergency, although it may not be necessary as in most cases the information is shared either among "school officials with a legitimate educational interest" or in the safety interests of the student (Hulstrand, 2013).

Where privacy concerns and information sharing becomes challenging in international education is often with urgent needs of a student and parent and with conduct or law enforcement. Institutionally, programs directors have become increasingly adept at creating mechanisms for the emergency contact involvement. However, local privacy laws may prohibit the sharing of information to anyone other than the student. In addition to U.S. laws regulating the sharing of private or privileged information, the EU Commission enacted the General Data Protection Regulation (GDPR) in May 2018 (European Commission, 2018). U.S. IHE's must now consider both domestic and European privacy regulations when transmitting and retaining private citizen information.

Many countries have a version of the U.S.'s Health Insurance Portability and Accountability Act (HIPAA), and may be restricted on what they are legally able to disclose, making information gathering and decision-making difficult. HIPAA restricts information sharing and protects the privacy of medical records (USDOHHS, 2017). Disclosure of protected medical information can only occur with the patient's written consent, even among health care providers (USDOHHS, 2017). Similar to the FERPA waiver, some institutions have begun to require a HIPAA waiver so that parents may be

given information on their student's healthcare and any treatments (Vossen, 2016). For education administrators that may be privy to a student's protected health information by nature of their work with the student, maintaining privacy and confidentiality while working in the best interest of the student can be challenging, but remains as critical, if not more so, as FERPA.

### *Legal Theories*

In considering the legal implications for institutions of higher education that are facing complaints for noncompliance with federal antidiscrimination laws, two legal theories will be explored further – the presumption against extraterritoriality and Kirp's Legal Theory. By better appreciating the basis and historical context of extraterritoriality, the challenges for law enforcement, even with nuanced examples, are better understood. In considering the influence of public and political forces on the timing and outcome of tried cases, Kirp's Legal Theory will serve as the framework for legal trends.

Extraterritoriality – implication of US laws outside of our borders. In the simplest of terms, extraterritoriality refers to “whether national law extends outside of national borders” and whether a government has the authority to investigate or prosecute violations to those laws (Bull, 2017, p. 452; DePue, 2007; Williams, 2014). It calls into question jurisdiction, or who has the geographic authority of law enforcement once an offense has been committed (DePue, 2007) and even the determination of whether an action is considered an offense in that particular location. As U.S. law is written with the intent to be enforced nationally, Congress has been careful to avoid potential conflict

with foreign nations' laws and to avoid jurisdiction conflict. U.S. law is expressly meant to be enforced within the United States unless expressly stated in the statute itself (Kanter, 2003; Schaffer, 2004). In legal terms, and in cases where the conduct in question occurred in another country, the hesitation to enforce legal statutes abroad has been coined the "presumption against territoriality" (Klein, 2008). In fact, courts have referred to the statutory language to determine whether the Congressional intent included the extension of the law beyond U.S. territory (Bull, 2017). In cases where the language is unclear, courts have traditionally enforced the presumption against extraterritoriality, assuming that the absence of expressed extraterritorial intent indicates that Congress intended for the law to apply domestically only (Bull, 2017).

Originally based on the principles of sovereignty and governmental encroachment, early legal scholars felt that no nation could justly extend laws beyond their own nation or territories (DePue, 2007; Kanter, 2003). Unless an international agreement or treaty exists that includes a provision authorizing extraterritorially, there are only five recognized circumstances where extraterritorially can be considered – 1) when an offense occurs in one country but affects another, 2) the offender is a citizen of the prosecuting state, 3) the victim is a citizen of the prosecuting state, 4) the offense is vital to the interests of the prosecuting state, or 5) the offense is universally condemned by the international community (DePue, 2007). Yet, the concept of extraterritoriality has been examined by the courts and even Congress several times. While these cases most certainly precede anti-discrimination legislation, their outcomes are important in understanding the legal precedent for the argument against extraterritoriality as applied in the education setting.

The first court case to address extraterritoriality was in 1804 in *Murray v. The Charming Betsy*, wherein a Dutch merchant ship was intercepted by an American frigate near Martinique for allegedly having violated the U.S. trade embargo on French goods (Kanter, 2003; *Murray v. The Charming Betsy*, 1804). By refusing to punish a Dutch citizen for conduct outside the U.S., the Supreme Court set the first standard for interpretation of U.S. law in the foreign context. This legal concept would be tried again and again over the next two centuries.

In 1909, extraterritoriality was again addressed in *American Banana Co. v. United Fruit Co.* In this case, two banana plantations operating in Costa Rica and Panama were involved in an antitrust dispute. The court determined that all conduct in question occurred on foreign soil and therefore was outside the scope of the statute (*American Banana Co. v. United Fruit Co.*, 1909). This came to be known as the “conduct test” wherein the court would first review the physical location of the events to determine whether further proceedings were necessary (Bull, 2017, p. 453).

The conduct test was later replaced by the “effects test” during the 1968 case *Schoenbaum v. Firstbrook*. In *Schoenbaum*, the Court applied the Securities Exchange Act of 1934 extraterritorially following misrepresentations of a Canadian company because of the resulting effects on U.S. exchange and investors (Bull, 2017). The court concluded that the ruling was necessary to protect the U.S. securities; it directly affected the U.S. economy.

Later, in 1983, the two previous tests were combined to become the “conduct-and-effect test” in *Psimenos v. E.F. Hutton & Co.*, allowing extraterritoriality of domestic law when either of the two above tests – conduct or effect – occurred territorially. This

interpretation was the most liberal to date, weakening the two above individual tests substantially and allowing for legal interpretation when neither would have been sufficient when considered separately (Bull, 2017). It appeared that where American economic interests were involved, the courts were willing to consider extraterritoriality more generously (Kanter, 2003).

However, in the 1991 *EEOC v. Arabian American Oil Co. (Aramco)* case, the court heard arguments on employment discrimination on the basis of race, religion, and national origin that occurred in Saudi Arabia (Bull, 2017; Masinter, 2011). The court ruled that Title VII – as applied to employment and as written at the time of the suit – did not require accommodations overseas (Masinter, 2011). The decision illustrated the more traditional view of extraterritoriality than had been heard in other recent cases, like that in *Psimenos*. In the written opinion, the Supreme Court noted that the “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” (*EEOC v. Arabian American Oil Co.*, 1991; Bull, 2017; Schaffer, 2004). However, because of the court’s interpretation of federal legislation in that case, Title VII was amended by Congress that same year, in 1991, to expressly apply to U.S. employers of protected U.S. citizens working abroad, revoking the court’s decision (Kanter, 2003; Masinter, 2011; Schaffer, 2004).

More recently, in the 2010 case *Morrison v. National Australian Bank*, the court unanimously rejected the more liberal effects and conduct-and-effects interpretations and reaffirmed the presumption against extraterritoriality. Citing the *Aramco* case in the opinion, the Supreme Court decidedly noted that “unless the statute clearly defines an



extraterritorial application, it has none” (*Morrison v. National Australian Bank*, 2010; Bull, 2017 p. 455). In this case, neither the statute states an extraterritorial intent despite the use of boilerplate language around commerce, nor did the conduct occur on U.S. soil, leaving the court no grounds other than to enforce the presumption against extraterritoriality (Bull, 2017). This same “two-part extraterritoriality test” was applied in 2013 in *Kiebel v. Royal Dutch Petroleum* and again determined that the statute itself did not address extraterritorial application nor was there domestic conduct (Bull, 2017, p.454). The *Keibel* cases remains the most current interpretation and decision on the matter of extraterritoriality (Bull, 2017).

The Supreme Court has pointed out that when Congress intend extraterritorial application, they are fully capable of plainly stating so in the statute. The above cases are merely a sampling of those heard, wherein most have upheld the presumption. Further, as demonstrated in the *Amaraco* case, when Congress feels as though the courts have identified a shortcoming of the statute, they have the ability to amend it as such through the legislative channels. “When it desires to do so, Congress knows how to expand the jurisdictional reach of a statute” (499 U.S. 244, 248). In legislation where Congress intended to expand the scope of a statute beyond the territorial borders, they have expressly addressed it in the statutory language (DePue, 2007). When not otherwise stated, the courts recognize that Congress has domestic intents and presumes its territoriality (DePue, 2007).

*Amaraco* remains the case that is most often cited when arguing that federal discrimination protections to not apply extraterritorially (Schaffer, 2004). The amendment of Title VII and Title I of the ADA following the *Amaraco* case is the only

incident in which Congress has readdressed the issue of extraterritoriality in federal law, and in that case, they were selective in its application by only amending the language related to specific circumstances such as discrimination in employment and not in the many other areas addressed, to include Title VII discrimination in education. At no point has Congress amended any of the other statutes, including Title IX, to express intent for extraterritoriality (Bull, 2017). This legislative history and the lack of statutory language and action, in and of itself, given the reaction in *Amaraco*, serves for many to indicate that Congress' intended for the laws to only apply domestically.

Currently, there are no stated circumstances in which federal antidiscrimination laws might apply abroad, and in fact, if they did, could pose potential conflicts with a variety of foreign laws (Bull, 2017). In *Benz v. Compania Naviera Hidalgo* in 1957, the majority opinion even cited the early decision in *Murray* that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains” (Bull, 2017; Kanter, 2003; *Murray v. The Charming Betsy*, 1804). More than two hundred years later, the philosophy outlined in that opinion remains valid.

Despite cases before the Supreme Court addressing extraterritoriality, and even one case confirming the employment portion of Title VII, they have not heard a case regarding other antidiscrimination laws' applicability abroad. A number of cases have been heard and appealed in the lower courts, complaints have been filed and investigated by the OCR, and yet each of these legal avenues have done little to clarify the intent in the field of higher education. In fact, the courts have had mixed rulings related to the matter and have even addressed cases in such a way that they seem to be avoiding the issue of extraterritoriality altogether (Klein, 2008).

Some legal experts suggest that institutions should err on the side of prudence and assume that the law applies in the same way that it would domestically (Pfahl, 2013). Because extraterritoriality has been applied in at least one higher education case, *King v. Board of Control of Eastern Michigan University*, universities should be reasonably aware that it could again be applied in similar circumstances, particularly given that educational statutes apply to “any program or activity receiving Federal financial assistance” (Pfahl, 2013, p.2). While perhaps not yet fully tested by the courts, both the recent OCR “Dear Colleague Letter” and recent editions of the Clery handbook identify extraterritoriality for the purposes of international and overseas programs (Lee, 2010; Pfahl, 2013; USDOE, 2015a).

Yet, at the heart of the presumption against extraterritoriality is the concern that U.S. law might conflict with local law or custom. Many countries observe differing laws and rights between men and women, concerning sexual orientation or same-sex relationships, regarding drugs and alcohol use, freedom of speech, and even for the protections of persons with disabilities. With these inter- and intra-national differences, the need for a clear code of conduct and university judicial process at the institutional level is perhaps just as important as clarity on legal extraterritoriality (Pfahl, 2013). Where legal grounds may be murky, disciplinary action for violations of codes of conduct, regardless of whether the student is on the main campus, have been upheld by the courts when written in a way that extends their authority beyond their physical grounds (Pfahl, 2013). This approach to justice for victims may be assistive when the institution is working with the student to seek remediation.

Kirp's Legal Theory. In considering the ways in which the various laws and federal statutes have come to be enacted and subsequently litigated, it is impossible to understand their implementation without also considering the public opinion and political climate under which they were borne and ratified. David Kirp termed this “policy framework” as a tension between different policy actors and the reasons for their pursuit of problem resolution (Kirp, 1982; Riddell, Adler, Mordaunt, & Farmakopoulou, 2000). He noted in 1982 that “they have distinctive potentialities and equally distinctive pathologies, and tend to fall in and out of favour with policy makers over time” (p.138).

Modern education policy is very much a coordination of politics and the law. Kirp (1981) articulated the key difference between the law and politics as authoritative and analytical versus negotiated and pragmatic, respectively. It is perhaps in these differences that the two function as a more complete whole. Without the framing and buy-in for the legislative idea, support for the subsequent enforcement will remain contested. Yet while politics are constantly shifting as part of this negotiation with constituents and short-term appointments, the courts have had to maintain a balance between being predictably stable yet adaptive (Kirp, 1981).

In assuming this push and pull of ideology, political framing, and judicial outcomes, Kirp's policy framework assumes a climate for brokered support of legislation and litigation. The policy framework is made up of five possible paths – professionalization, politicization, legalization, bureaucratization, and market regulation (Kirp, 1982). While certain frameworks serve different issues best – crimes typically fall under legalization, while treatment of the sick typically falls under professionalization – often they are working in conjunction with one another (Kirp, 1982). Many situations

must draw on the elements of more than one of the above frameworks. In framing a policy in one of the above categories, one not only defines the characteristics that will be used to gain consensus, but how the problem itself will be resolved (Kirp, 1982).

In education, the frameworks of choice have tended to be politicization and legalization, with a rights-centered approach to policy, while the other frameworks have played supporting roles in U.S. education policy development (Kirp, 1982).

Politicization relies on ideological judgment and bargaining among interested parties; legalization focuses on fair decision making while enforcing accountability (Jung & Kirp, 1984; Kirp, 1982). Through the political and legislative process, new laws have emerged that have greatly altered the equitable education landscape, while the courts have worked to ensure individual rights under the legislation and institute normative practices. Political majorities have come and gone, but their influence on policy, or lack thereof, is reflected in the interpretive decisions of the courts.

This historical waxing and waning in public favor of governmental regulation has been observed throughout U.S. history. In the field of education, this is equally true. Early opinions of education regulation were clear that the federal government had no place in education; it was a state and local government issue (Kirp & Jensen, 1986). In fact, the government paired its limited oversight with limited funding. Even Roosevelt's 1930s New Deal expanded educational programs without threatening the decentralized system of control (Kirp & Jensen, 1968). It was only in the mid-twentieth century that the vast expansion of federal education funding began to have a growing effect on the American classroom, and for the first time, this funding came with strings attached (Kirp & Jensen, 1986). By growing its financial scope, the U.S. government was also better

able to enforce its regulatory requirements on education, influencing the course of education policy nationwide (Kirp & Jensen, 1986).

The Civil Rights movement marked a change in the level of government regulation in the U.S. Previously unregulated areas of daily American life were beginning to experience government oversight in the post-World War II era. Beginning with the 1954 Supreme Court ruling on *Brown v. Board of Education*, the courts began addressing the rights of Americans against discrimination in the classroom, particularly as it related to racial inequality. Leading up to *Brown*, Congress had maintained somewhat of a hands-off attitude as it related to school segregation and civil rights (Kirp, 1981). The eventual Supreme Court ruling illustrated the changing atmosphere for centralization and legalization as the new court decision was immediately met by an inundation of lawsuits (Jung & Kirp, 1984; Kirp, 1981; Kirp & Yudof, 1982; Kirp & Jensen, 1986).

Over the next decade, the movement continued to grow in political strength, culminating in the enactment of the Civil Rights Act of 1964 and beginning with racial inequality (Jung & Kirp, 1984). This Act reflected a growing national interest in the rights of previously marginalized populations and marked a turning point in American government oversight, having greater reach than any legislation before it and further codifying antidiscrimination in education (Jung & Kirp, 1984; Kirp & Jensen, 1986). This legislation was shortly thereafter followed by the Rehabilitation Act of 1973 and eventually by the Americans with Disabilities Act of 1990. By 1990, the American education system now had more government regulation in the span of 45 years than it had in the previous two hundred.

Yet not all of this regulation was welcomed or evenly gained. Different political parties contributed to the centralization and decentralization of the time. In fact, many at the state level saw the Civil Rights era of government reach as imperialistic meddling and found it to be as undesirable as it was unwelcome. Education cases heard during the mid-1970s, such as *San Antonio Independent School District v. Rodriguez* and *Milliken v. Bradley*, were mixed in their enforcement of constitutional reach and even served to maintain state authority over policy implementation (Kirp & Jensen, 1986).

Growing government regulation as a political point of contention flourished during the Reagan administration when the political climate was such that the desire for decentralization began to spawn a counterrevolution to the previous two decades' administrations (Kirp & Jensen, 1986). Reagan's New Federalism sought to return responsibility to the states and reduce the federal government's footprint in the area of education, among other things (Kirp & Jensen, 1986). Where previous government growth saw increased government funding, this reduction in government influence also yielded a reduction in federal aid. Yet, in the very next presidential administration, Reagan's Vice President turned Commander-in-Chief, George H.W. Bush enacted the ADA in 1990, a landmark and sweeping regulation of both public and private enterprise's treatment of persons with disabilities. This volley of regulation and deregulation continues even today in modern politics.

Political actors and their weight on different issues filters down from the legislature to the courtroom and finally to the local entity. Costly and inefficient bureaucracies emerge to exert control over newly regulated industries. Legislation that is enacted in one administration, but then falls out of favor must either be readdressed by

Congress or moderated by the courts. As the courts have heard new cases of discrimination, the constitutional framework for the legislation has been better defined. This dynamic and periodic review of education policy and practice serves to maintain stability over time while also considering the evolving and contemporary cultural norms.

But just as regulation has waxed and waned, so has the approach for justice between litigation in the courts and legislation itself. While certain points in time saw legislation as the favorable approach, like in the Civil Rights movement of the 1960s, other points have favored litigation (Kirp & Jensen, 1986). As Kirp noted in 1986, “the less that Washington does politically, the more the courts will be asked to do judicially” (Kirp & Jensen, p. 374).

Using Kirp’s Legal Theory, and specifically the politicization and legalization frameworks, education policy can be better understood as we consider court outcomes over time. The “legally enforceable rights” (Kirp, 1982, p. 168) as articulated in the federal antidiscrimination laws and confronted through the legal process have drawn from the statutes themselves as well as the changing cultural definitions of discrimination. These definitions, and respectively, the court decisions have evolved over the last sixty years. By continuously challenging the statutes in court, Americans have been able to publicly reform education and its approach to discrimination while defining the rights of citizens (Kirp, 1982). How court decisions have mirrored the modern political and cultural landscape may help us to better predict future decisions as well as our obligations under the law.



### *Rationale for Current Study*

The growing impact and influence of international education on U.S. higher education is easily observed and cataloged above. And yet, for an educational activity that serves more than 300,000 students annually, many legal risks remain under-appreciated and unaddressed by the courts and by the field itself. Specifically, the applicability, or extraterritoriality, of U.S. laws and protections for those Americans that venture across our borders remains undefined, and while many have attempted to develop policy and best practice concerning these risks, it is to some extent based on assumptions tied to the domestic interpretation of the law.

There is essential knowledge to be gained from a systematic review of the specific statute language, a deeper understanding of the court-imposed limitations on extraterritoriality, and a comprehensive and exhaustive review of the case law and court and OCR opinions. This analysis, when coupled with contextualization of the cultural and political influence on statute interpretation and government reach, will serve to inform practitioners of international education, university legal counsel, and faculty, staff, and student participants of their rights and obligations in this emergent field. By understanding the past and current trends in frequency of complaints, litigation, and legal decisions, future violations may be avoided.

Traditional legal research and case law analysis will accompany critical reflection on the existing and potential discrimination risks being faced by institutions of higher education that are providing international experiences to their students. By focusing on the cases that have addressed the extraterritoriality of U.S. federal laws, this study will explore how institutions have been regulated domestically and whether the same

interpretation of the laws can be predictably applied abroad. This study will employ multiple methods of qualitative and quantitative analysis – Creswell and Poth’s (2018) adapted five-step process for case analysis and Baldwin and Ferron’s qualitative method of simple box scoring (Baldwin & Ferron, 2006) – to understand which key case details have been considered in hearing the applicable cases and what external forces may have been at play to contribute to the case outcomes.

There is no question as to whether we should be serving and protecting the rights of all of our students, regardless of the ways in which they may be unique, different, or diverse. Yet, not every environment is or can be as inclusive as a domestic campus. Some locations will remain overtly challenging for institutions and students alike, and many barriers are likely to remain despite knowledge and awareness of discrimination issues. But by understanding the laws in place that govern anti-discrimination and the ways in which we can work within the spirit and the intent that brought about such civil rights legislation, we have an opportunity to engage with traditionally underrepresented populations in a way that is both meaningful and just.

## CHAPTER 3

### METHODS

This chapter will describe in detail the selected methodological approach and execution of the study. The rationale for this research design will be explained, and each step will be outlined to include the details of data selection and analysis. Study limitations, validity, and reliability will also be addressed.

#### *Rationale for Selected Method*

Despite previous discussion as to the defined research questions of this study, at its core, this and other traditional legal research intends to answer one question – “what is the law?” (Lee & Adler, 2006). In the broadest sense, the law is the federal, state, and local legislative statutes that have been enacted by various levels of government (Permuth & Mawdsley, 2006). The law is the application of legislation in American life as it pertains to real-life situations that are reviewed and tried by the courts (Permuth & Mawdsley, 2006). This study explores “what is the law?” for claims of discrimination that occur in the higher education setting when it occurs outside of the territorial bounds of the United States of America.

Law itself is a social construct that reflects the collective values of a society and is cultivated over time (Lee & Adler, 2006; Oxford, 2018). The evolutionary nature of law requires that legal research explore the history of an issue to understand the timeline of events that have resulted in its current legal application (Russo, 2006). This historical

perspective is employed by the courts themselves through its reliance on precedence or *stare decisis* (Russo, 2006). This legal principle requires that courts abide by prior higher court rulings, acknowledging the judicial reasoning and authoritative nature of prior court decisions on similar legal issues and in similar jurisdictions (Russo, 2006). *Stare decisis* establishes a review mechanism to ensure that similar cases are decided with similar outcomes, and sets an expectation that previously decided cases will be left at peace (Decker, 2010; Barkan, Mersky, & Dunn, 2009).

Through legal research, historical assessment adds context to our understanding of not only *what* happened, but *why* and *how* (Lee & Adler, 2006). *What* was the judicial reasoning that led to court decisions, *why* have (or have not) these decisions evolved over time, and *how* can we anticipate the application of the law today and in the future? The purpose of this study is to understand the extraterritorial application of antidiscrimination law in international education and to examine litigation trends to inform practitioners and university stakeholders of the rights of students and obligations of the university. This research is needed not only to promote understanding of the laws and litigation trends, but also is necessary to improve equitable educational opportunities abroad while reducing institutional liability through decreased vulnerability to litigation.

To achieve the intended purposes of this study, a mixed method of qualitative and quantitative research approaches was adopted. A mixed method approach was selected because it is imperative to understand not only *what* court decisions have been reached, but also *why* and *how* these decisions were reached and what may have influenced the outcomes. In learning more about both the *why* and *how*, a more complete picture of the data emerges, one of the primary benefits for selecting a mixed methods design (Bryman,

2006; First, 2006; Kemper, Stringfield & Teddlie, 2003). Together, the quantitative and qualitative data complement each other and fill in the gaps in each other's methodologies, strengthening the conclusions drawn by serving to validate the two data sets (Bryman, 2006; Merriam & Tisdell, 2016).

Through qualitative analysis, I examined each of the cases and identified the nuanced details that led to different judicial outcomes. Additionally, quantitative data was gathered for each case and analyzed to determine whether the legal disputes are changing in frequency and outcome over time and whether they are aligned with the cultural and political values present at the time of the decision. By employing Creswell and Poth's (2018) adapted five-step process for case analysis and Baldwin and Ferron's (2006) quantitative method of simple-box scoring, this legal trend analysis investigates in descriptive detail *what* cases are seminal to understanding this issue, and *why* and *how* the issue may be evolving over time (Lee & Adler, 2006).

### *Research Design*

This study has been designed as an exploratory sequential study. The exploratory sequential design is unique because of the two distinct phases, wherein the qualitative set of data informs the second phase of the project (Creswell, 2014; Ivankova, Creswell & Stick, 2006; Kemper et al., 2003). It is also distinctive in the order of the type of data collected – qualitative followed by quantitative data – with an integration of the data after the completion of quantitative study (Creswell, 2014). In the exploratory sequential design, I first collected the body of cases that met the defined criteria, analyzed qualitatively the cases using the traditional legal method and guided by Creswell and

Poth's case study process, used the analyzed results to determine possible cultural and political drivers to develop a simple-box score framework, and then determined how the collection of the two data sets together contributes to the understanding of the policies (Appendix A).

Qualitative. The qualitative phase of the study sought to better understand the rationale for decisions made in discrimination cases brought by American faculty and students against U.S. institutions of higher education while studying abroad. During this phase, I explored in depth the details of each legal case and OCR investigation to identify commonalities and differences that may have contributed to different interpretations and applications of the law. In considering extraterritoriality, the cases were also analyzed and coded to identify how extraterritorially was determined, or if the case was decided on the basis of non-discrimination before extraterritorial application was even considered.

Russo (2006) notes the limitations of employing only the traditional method of law such as its inability to do more than predict outcomes based on existing legal precedent and recommends that it be complimented by other modes of inquiry. By combining the traditional method of legal research (Russo, 2006) and the five-step case study procedure adapted by Creswell and Poth (2018), a historical approach will be taken to identify, collect and examine the different primary and secondary sources of law. For the purposes of this study, only primary sources of law – statutes, cases, court opinions, OCR decisions – were coded as official outcomes (Russo, 2006). Secondary sources of law – scholarly articles, critiques, reviews – were considered as well. These secondary resources were also examined in an effort to identify and locate other possible primary

sources, such as possible dependent variables for inclusion during the quantitative phase of the study (Russo, 2006).

Creswell and Poth based their process on Stake's (1995) and Yin's (2014) case study approaches, defining the following five steps: 1) determining whether a case study is the appropriate approach to answering the research questions, 2) defining the intent of the study and the case selection criteria, 3) developing procedures for data collection, 4) specifying the analysis to be used for optimal integration of context and themes, and 5) organizing and reporting the findings (Creswell & Poth, 2018). Data collection methods will be addressed in detail below.

By coding and comparing the themes across multiple cases, emergent patterns or commonalities, as well as outliers, were observed and documented. A careful examination of these patterns contributed to the determination of what is the law and how is it being applied (Creswell & Poth, 2018; Lee & Adler, 2006).

Quantitative. The quantitative phase of the study sought to highlight the frequency and trends that may be occurring in the legal outcomes of the selected cases. As Baldwin and Ferron (2006) noted, quantitative research can bring legal analysis beyond simple description to identification of relationships between the social construct of law and the social powers that influence case outcomes. This knowledge about relationships serves to enhance the traditional method of legal research beyond understanding case outcomes to perhaps also gaining a better understanding of why courts issued a particular ruling in the case.

When engaging with studies of the past, Baldwin and Ferron (2006) recommend simple box scoring to quantify the numerical data. This quantitative research tool

organizes numerically the outcomes by different characteristics or variables. For this study, those variables were periods of time, win/loss records, types of discrimination, level of involvement of the U.S. institution, immunity defense strategies, and the presumption against extraterritoriality (Appendix B). The outcomes have been tabulated for the different possible variables, and frequency of the different variables has been analyzed. Unfortunately, due to the sample size, statistical analysis such as a chi-square and logistic regression, the two most appropriate methods of analysis for this study (Permuth & Mawdsley, 2006), were not reliable, resulting in exceptionally high p-values (Baldwin & Ferron, 2006). Nonetheless, by analyzing the available decision trends, I was able to examine the progression of case decisions and predict the likelihood of current or future case outcomes.

Integration and Priority. There were two points at which the data was integrated: 1) the qualitative data was used to determine the quantitative variables, and 2) the complete data was compared and contrasted after the quantitative analysis. Priority, or the extent to which one type of research is emphasized over the other, was equal among the two data sets as both are imperative to answering the research questions and understanding the purpose of this study.

### *Data Sources*

Traditional legal research draws from three categories of information – primary sources, secondary sources, and research tools (Russo, 2006). Primary sources of law are the federal, state, and local laws, whether they appear as constitutions, statutes or regulations, as well as case law (Russo, 2006). The United States Constitution as



interpreted and enforced by the Supreme Court is the primary source of American law, and the laws therein cannot be limited by any other law (Russo, 2006). While the Constitution does not address education, a number of federal statutes have been enacted that directly impact the delivery of education in the United States. As detailed in Chapter 2, federal legislation and the Department of Education anti-discrimination regulations and policies are considered to be primary sources, along with the various court cases that have been decided on the topic.

Secondary sources of law are “writings about the law rather than the law itself” (Russo, 2006, p. 16). Examples of secondary sources are materials that summarize the law and critiques of the law that provide arguments regarding legal outcomes such as law review articles and journals (Russo, 2006). These forms of secondary sources do not have any authority on the outcome of cases, but they have been known to facilitate outcomes and they are often cited in court opinions (Russo, 2006). However, because secondary sources cite primary sources, their review was important in identifying pertinent primary sources on a topic; this cross-referencing between primary and secondary sources served as a triangulation of data, an important step in qualitative inquiry (Russo, 2006).

Russo (2006) defines the third source as “finding tools”, or the legal databases that provide access to the other two sources of law. Online research and access to large legal databases or electronic digests has become increasingly the norm in legal research, even though access to these databases is often costly (Russo, 2006). Accessing databases such as LexisNexis, Westlaw, and Fastcase allows researchers quick and ready access to numerous primary and secondary sources of legal data. Additionally, using citation

software such as Shepard's and techniques such as "Shepardizing" to trace the history of a case, researchers can improve their ability to identify a comprehensive list of related cases and secondary sources (LexisNexis, 2001).

For the purposes of this analysis, only primary sources of the law were considered for investigation. However, as previously noted, secondary sources of the law were utilized both in an effort to identify additional pertinent cases, to understand the context of case outcomes, and to identify possible independent variables for the quantitative portion of the analysis.

#### *Data Collection Procedures*

Each of the sources of law noted above were utilized in the collection of data for this study. Primary sources, particularly the case law and OCR opinions, were accessed using the different finding tools, but primarily through LexisNexis. Secondary sources were extensively reviewed to ensure the exhaustive collection of case outcomes and an understanding of the context of these decisions.

As the Civil Rights movement was the turning point for anti-discrimination legislation in the United States, a comprehensive review of the applicable statutes starting with the Civil Rights Act of 1964 to include Title VI, Title IX, ADA/Title II/Title III/Section 504, the Clery Act/VAWA, and FERPA/HIPAA, has been researched and described in depth to include their current interpretation and application in the education setting. As the law is dynamic and influenced by political forces, changes to the above statutes, such as the recent changes to Title IX as a result of the DOE's new direction under Secretary of Education Betsy DeVos, have been addressed where applicable.

While the first race discrimination cases in higher education were filed shortly after the 1964 legislation, the first case that met the criteria for having occurred during a study abroad was in 1980 with *Selman v. Harvard Medical School* and served as the starting point for this study. The most recent case that met the criteria occurred in 2018 was *Doe v. Baylor University*. The narrow nature of the research study resulted in a similarly narrow population of cases. The methods for data collection and analysis were aligned with Creswell and Poth's (2018) five-step process as detailed below.

Step One. In keeping with Creswell and Poth's (2018) five-step process, the first step was to determine whether a case study is the appropriate approach to answer the research questions. The study was guided by the following research questions:

- 1) What are the judicial outcomes for federal discrimination claims arising as a result of participation in international education experiences?
- 2) How has the issue of extraterritoriality been addressed in these cases?
- 3) What sociocultural and political influences might have been introduced by either plaintiffs or defendants during these trials?

As this research employed multiple methods, case analysis was the foundation of both the qualitative and quantitative phases. Qualitatively, the case analysis took into account the historical perspective and case details that are key in traditional legal research. Quantitatively, the extensive review of cases resulted in a catalog of judicial outcomes that account for the nuances of the study abroad experience, the alleged discrimination, and the application of extraterritoriality of these cases. The cases themselves – specifically the judicial opinions – are at the core of understanding how the law has been interpreted and applied. Too, while not addressed as part of Creswell and

Poth's qualitative process, these cases and their outcomes were also used in the quantitative phase of the study.

Step Two. By defining the intent of the study through the above research questions and recognizing the courtroom as the legal authority through which these decisions are made, the case selection criteria, Creswell and Poth's (2018) second step, can be defined by key words and themes. The study employed purposeful criterion sampling in that selected cases met specific pre-determined criteria (Teddlie & Yu, 2007). Specifically, complete collection, or criterion sampling, was used so that all cases that meet the pre-determined criteria will be used (Teddlie & Yu, 2007). While qualitative research seeks to gather data until the point of saturation where no new information presents itself, this study attempted to identify all cases that met the stated criteria (Merriam & Tisdell, 2016).

In an effort to capture as many of the relevant cases as possible, the search began with those cases recorded, brought to trial, or submitted for OCR investigation, using the predefined keyword combinations (Figure 3.1) that occurred between 1964 and the present date. The cases were then reduced to only those cases initiated in the court by a student or faculty where the alleged discrimination occurred outside of the U.S. during an education abroad experience. Cases that did not meet these criteria were retained, but not included in the analysis.

Step Three. As recommended by Creswell and Poth (2018), the development of procedures for data collection should be the next step. Utilizing the aforementioned finding tools, any cases with the above-stated criteria were researched. The cases that were returned were also Shepardized, or electronically analyzed for any linked previous

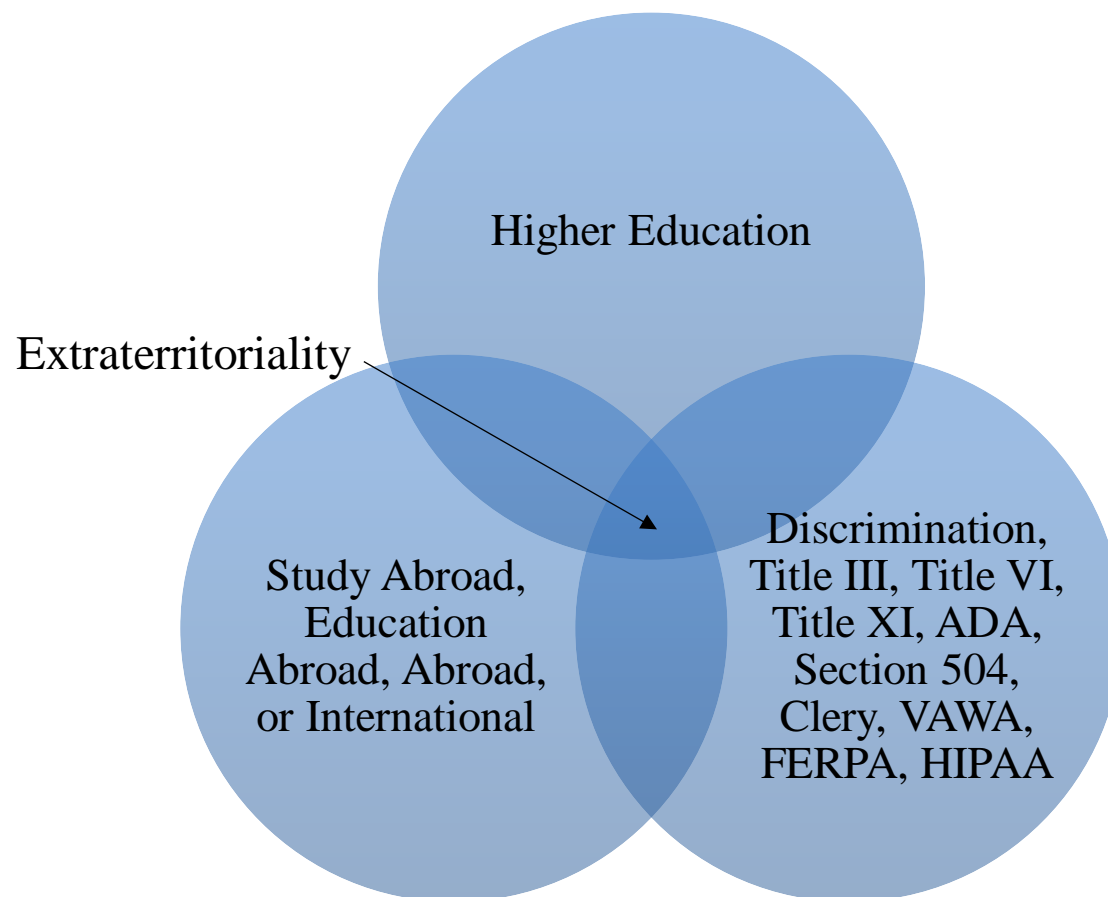


Figure 3.1. Search criteria used to identify pertinent cases for review.

or appellate decisions or citing cases, to identify any related cases such as appeals or those that may have been mentioned as precedent-setting in the cases returned.

Secondary sources were evaluated for any of the topics that may be related either independently or in conjunction with one another to determine if any cases had been missed or if additional keywords should have been included. In legal sources, primary and secondary resources in the field of international education were also scoured to determine cases that may have proved influential to practice in the field.

This process yielded 100 total court cases and 43 OCR investigations (Appendix C) that met the broad search terms for initial review. These were reduced to 14 court cases and 1 OCR investigation after a more detailed examination of the case details, conduct circumstances and location, and after eliminating cases in which a federal claim was not made. For example, *Doe v. Middlebury College (2015)*, the plaintiff was accused of sexual misconduct by another participant while on a study abroad managed by a third-party provider. The provider's investigation exonerated the student, but a second later investigation by Middlebury was prompted by the accuser, a student at another university, and Middlebury found the plaintiff in violation of their code of conduct. The plaintiff brought suit against his home college, alleging a Title IX violation, but ultimately the conduct in question was the on-campus investigation and sanctions, and not the events that occurred abroad (*Doe v. Middlebury College, 2015*). While many of the case criteria are met, this case was rejected from the data set because the details of the case did not fit the intent of the study.

Additionally, in *Bloss v. University of Minnesota Board of Regents (1999)*, an American student was raped by a taxi driver while studying abroad in Mexico. The

student sued for damages, alleging that the university failed to provide appropriate, safe housing in proximity of the campus and other attractions, and initially, the court agreed, denying the university's claim for statutory immunity. However, upon appeal, the Court of Appeals of Minnesota found in favor of the university's statutory immunity defense based on the university's right to make discretionary decision on issues such as housing and adequate safety warnings had been provided to the student in pre-departure training sessions (*Bloss v. University of Minnesota Board of Regents*, 1999). While this case meets most of the selection criteria, it was not included in the data set because the case failed to include a federal claim against the university.

Similar judgements were exercised in the retention of some cases. Two in particular, *Selman v. Harvard Medical School* (1980) and *Ortiz-Bou v. Universidad Autonoma de Guadalajara* (2005), which are discussed at length in Chapter 4, were included in the data set despite having nuanced differences from the other cases. In *Selman*, a foreign student brought suit against a U.S. IHE with federal discrimination claims, and the extraterritorial application of these claims were expressly discussed as part of the case and its subsequent appeals. In *Ortiz-Bou*, a Puerto Rican student enrolled in a Mexican IHE alleged violations of the Civil Rights Act and argued that the IHE should be held accountable because of its acceptance of U.S. Federal Financial Aid and the maintenance of a university administrative and recruiting office in Puerto Rico. Again, in this case, the extraterritorial application of federal law was explicitly discussed as part of the proceedings, and so the case was retained in the data set.

As many of the incidences of alleged discrimination were heard multiple times through the appellate process, some of the individual lawsuits resulted in multiple cases

that could have had – and some did have – mixed or conflicting outcomes. Since jurisdiction and sovereignty were discussed in a number of these appeals, each of trials where the case is heard were included in the final data set. The final data set for this study included 15 individual incidences of alleged discrimination, 21 specific cases, and 1 OCR investigation (Appendix D) between 1980 and 2018. In legal research, where each case has a judicial opinion and is precedent-setting, this number of cases remains significant for litigation analysis. A summary of each of these 15 incidences is included in Chapter 4.

Step Four. This step in Creswell and Poth's (2018) process identifies the need to specify the analysis to be used for optimal integration of context and themes. This study, as with other qualitative studies, utilized the constant comparative method, wherein analysis of each new piece of data was completed prior to collection of the next so that any needed adjustments can be made and an early emergence of patterns can be identified (Merriam & Tisdell, 2016). The continuous closeness with the data facilitated the identification of themes within the case dialogue.

Each case was examined closely and coded using *a priori* themes or categories developed from the research questions and literature review to classify or sort the data (Merriam & Tisdell, 2016). The data was also coded using axial or analytical coding for emergent themes from the cases themselves; this left open the possibility of themes that may reveal unintended consequences or gaps in the legislation itself (Merriam & Tisdell, 2016). This coding method resulted in the identification of 25 *a priori* codes and 9 additional axial codes for a total of 34 possible codes (Appendix E). The final data set



was evaluated for extraterritorial considerations; many determined no discrimination occurred, and in doing so, never needed to go as far as determining extraterritoriality.

Step Five. Finally, the last step recommended by Creswell and Porth (2018) is to organize and report the findings. Once each of the cases were collected they were organized into a data set spreadsheet (Appendix F). They were organized under headings such as case number, case name, citation, date decided, location of origin, brief case description, discrimination claimed, relief sought, remedy awarded, findings, and clarifying comments. They were also marked for presence of qualitative coding and identified as having argued for or against the extraterritorial nature of the judgement. By organizing the cases in this way, they were then more easily entered into the simple box scoring spreadsheets for further analysis related to their timing, frequency, and trends.

#### *Credibility, Transferability, Dependability, and Confirmability*

Permuth and Mawdsley (2006) note the importance of determining the trustworthiness of legal research, in general, and policy research, specifically. Citing Lincoln and Guba (1985) and Guba and Lincoln (1989), they recommend criteria for assessing credibility, transferability, dependability, and confirmability.

Credibility, or internal validity in traditional quantitative research, has been addressed through the triangulation of sources (Creswell & Poth, 2018; First, 2006; Lincoln & Guba, 1985; Merriam & Tisdell, 2016; Permuth & Mawdsley, 2006). By utilizing the case databases, the primary sources were found using the established key words as defined from an extensive literature review. Each case that emerged in the research was pulled and assessed for the research criteria; those that met the criteria were

retained, regardless of whether or not they supported the presumption against extraterritoriality. Every case that was identified in the case databases was subsequently Shepardized to determine possible appeals as well as other linked or cited cases. Secondary sources such as law reviews, journal articles, and conference proceedings on the topic were then combed to determine whether additional cases had been identified by other authors and warranted a final examination.

Transferability, or external validity, was addressed with the intentionally narrow case criteria (Creswell & Poth, 2018; First, 2006; Lincoln & Guba, 1985; Merriam & Tisdell, 2016; Permuth & Mawdsley, 2006). Given the desire to apply the legal theory of extraterritoriality to otherwise often domestically-litigated federal statutes, the search terms and the case selection were strict and defined. This resulted in cases that could only inform the issue at hand, rather than having broad applicability across multiple educational contexts. The case analysis can then only be applied to similar cases that meet similarly-strict criteria – higher education cases that involve federal violations while outside the U.S. in education abroad programs. Generalizability, in the statistical sense, to other situations outside of the narrow confines of the study, as is often possible in quantitative research (Merriam & Tisdell, 2016), was not sought. However, application or consideration of the research to other similar topics is still possible.

Dependability, or reliability or replicability, was sought through detailed explanation of the process utilized as well as through an audit trail (Creswell & Poth, 2018; First, 2006; Lincoln & Guba, 1985; Merriam & Tisdell, 2016; Permuth & Mawdsley, 2006). The audit trail was maintained as a research diary, where each step in the case search process was recorded until all exhaustive efforts to identify cases, or data

saturation, had been achieved. This detailed diary was summarized in the research steps above with pertinent pieces included as appendices so that replication of this study is possible. Too, by using a priori in addition to the axial coding, the literature objectively guided the majority of the qualitative analysis which lends to improved reliability (Creswell & Poth, 2018). However, as is true in qualitative research with the investigator as the instrument, exact replication may be impossible (Merriam & Tisdell, 2016). Another researcher may interpret the findings through their own personal lens, leading to alternative coding structures and analysis while the cases themselves remained the same. This is a known hallmark of qualitative research and cannot be avoided entirely (Merriam & Tisdell, 2016).

Confirmability, also referred to as objectivity or neutrality (First, 2006; Merriam & Tisdell, 2016; Permuth & Mawdsley, 2006), “require that information is confirmable at each step in the research process” (First, 2006, p. 156). Using the above-noted processes for validity and reliability, in addition to a thorough and extensive literature review, the study and its data were approached with openness and impartiality. Motivations for exploring such a topic have been identified above, and while clarity is sought as an international education practitioner, one outcome over another was not sought or preferred in search of that clarity. All steps of the process were guided by the literature and the data itself and recorded herein.

### *Positionality*

With all qualitative inquiry, the researcher is the instrument in data collection and analysis (Merriam & Tisdell, 2016). Qualitative researchers should reflect on the biases

that they may bring to the study and monitor the ways in which their biases may influence the study. Merriam and Tisdell (2016) noted that the researcher's exploration of their own experiences for an awareness of any prejudices, or "epoche," is important so that they may be "bracketed or temporarily set aside" (Merriam & Tisdell, 2016, p.27). It is important that the researcher reflect on and understands their own biases so that they may understand the ways in which it may influence the study itself (Van Manen, 2014).

To understand my researcher identity and the biases that I may bring to the study, I have reflected on the ways in which my experiences may influence my collection and interpretation of the data. I have spent my career working in international education and study abroad. I have worked with hundreds of students that have both successfully and unsuccessfully pursued an international experience. I am aware of the barriers - real and perceived - that are faced by students as both identified by the literature and in my personal experiences. I believe that international experiences are important and a high impact activity in higher education, and yet I can also appreciate the institutional risk that is undertaken by the expansion of such activities. In addition to the risk of discrimination, or the accusation of such treatment, I have had limited encounters with students that disclosed to me their registered disability – physical, mental, or otherwise – as part of their planning stage in pursuing study abroad. This is perhaps because of the limited size of the population as noted above in the national statistics or because students have chosen not to disclose this to my office or have self-selected out of the activity entirely.

Despite my insider experience in the field of international education and my interest in better serving all students, I have not personally overtly been discriminated

against as part of my education or workplace that would constitute legal remedy, although I am aware of and sensitive to the gender bias in the American workplace and certainly in university leadership positions. Because of this, in some ways, I approach the content area as an outsider. This etic, or outsider's perspective (Merriam & Tisdell, 2016), may have advantages in that I have no prior experiences to draw from. However, it may also have its limitations in that my understanding of students who have experienced discrimination is limited to my literature review; I may lack the proper or preferred terminology, and I may risk insulting the very population that I hope to impact.

### *Limitations*

By employing multiple methods, the limitations of the study were three-fold. In legal research, access to the data can be limited, and cases can be overlooked. While every effort was made to access all of the relevant case law, the volume of case law is vast and growing daily. It is possible that cases were overlooked because of scope of the pool or that opinions were overlooked because of lack of database for efficient research. Perhaps even more likely is that more cases exist than were able to be researched because they were never brought to trial or were settled out of court and therefore were never recorded (Baldwin & Ferron, 2006; Johnson, 2006). Many complaints may have never been filed for fear of scrutiny, shame, or further discrimination.

As only available and published cases and opinions are considered precedent-setting (Lee, 2010; Permuth & Mawdsley, 2006; Russo, 2006), access to some of the OCR cases was limited and often difficult to find. Beginning with complaints during or after 2013, OCR investigation findings are obtainable through their online database.

However, cases prior to 2013 have limited availability. Some older opinions can be found through a variety of online sources, such as advocacy organizations web postings. However, those not found must be formally requested through a Freedom of Information Act (FOIA) inquiry. Even still, as discovered during the FOIA process, the DOE has a records retention policy that reaches back only 20 years. Documents, complaints, findings that occurred earlier than 20 years prior may not have been retained.

Additional limitations were the limited number of cases and OCR opinions, which could affect the ability to make conclusions or determine trends. By narrowing the focus to discrimination cases in an emergent area of higher education, other areas of law and the impact of extraterritoriality may be missed. Similarly, by adopting a historical perspective with narrow criteria, it may be difficult to predict future outcomes in emerging areas of law, particularly when agencies such as the DOE are more vulnerable to political appointments based on the existing presidential administration and their respective priorities.

## CHAPTER 4

### RESULTS

This chapter presents the results of the cases identified and analyzed using the research methods described in the previous chapter. A chronological synopsis of each of the 15 unique incidences and any resultant appellate decisions is followed by the quantitative data and analysis. Any trends discovered through the data are discussed in detail.

#### *Case Law Summaries*

Understanding the law and its limitations is critical to traditional legal research and in this study. While a review of selected federal statutes was included in the literature review, the meaning of these statutes “may not be clear until they are interpreted by judges or applied in particular circumstances” (Permuth & Mawdsley, 2006, p.14). By examining the selected cases in depth, the case nuances that may have led to specific outcomes become more evident. When explored both individually and as a whole, patterns and nuances help researchers and practitioners to anticipate future opinions and consider their role in protecting their students and their institutions.

The purpose of this study is to understand the extraterritorial application of federal antidiscrimination law in international education and to examine litigation trends to inform practitioners and university stakeholders of the rights of students and faculty

and obligations of the university. The following data set is comprised of cases that met specific, predefined criteria: 1) they occurred between 1964 and 2018, 2) they were published, 3) there were precedent-setting decisions with opinions written after having been brought to trial or investigated by the OCR, 4) they involved at least one federal claim, and 5) they were brought by a student or faculty member whose alleged claim(s) occurred while abroad engaging in an international education program with a U.S. IHE.

The initial case search using the above method and aforementioned keywords yielded 100 unique incidences and 43 OCR investigations. These were reduced to 15 incidences after a more detailed examination of the case details and circumstances and after eliminating cases in which a federal claim was not made. Cases that were heard multiple times through the appellate process were considered individually as long as a federal claim continued to be made as some of the individual lawsuits resulted in mixed or conflicting outcomes. The final data set for this study included 15 individual incidences of alleged discrimination, 21 specific trials that resulted from those incidences, and 1 OCR investigation. These 22 decided cases occurred between 1980, when the first case that met the criteria was decided, and 2018.

Each case was examined and coded, resulting in the identification of 25 *a priori* codes and 9 additional axial codes for a total of 34 possible codes. Case details and codes were collected into a data set spreadsheet and organized by case number, case name, citation, date decided, location of origin, brief case description, discrimination claimed, relief sought, remedy awarded, findings, and clarifying comments. They were also marked for presence of qualitative coding and identified as having argued for or against the extraterritorial nature of the judgement.



Findings are further detailed in this chapter, beginning with a summary of each case and its outcomes. Quantitative analysis will follow and will consider the number and frequency of cases, prevailing parties, geographic distribution, examination of the federal claims and the interpretation of applicability of extraterritoriality, and any sociopolitical considerations.

Selman v. Harvard Medical School (1980). Burton Selman, a medical student enrolled at the Universidad Autónoma of Guadalajara in Mexico, after several failed attempts to transfer to numerous U.S. medical schools, claimed that this was both in violation of the “Federal Transfer Program” to support entry into U.S. medical schools and was effectively ethnic discrimination based on his Mexican heritage. He brought his suit on behalf of himself and other similarly-qualified students enrolled in foreign medical schools that had applied and were rejected. He asserted that unequal and arbitrary admissions criteria were applied to students like himself, and that this was both illegal and unconstitutional. His suit claimed five federal violations and an additional two state violations: federal - 1. challenge against defendant's tax exempt status; 2. violation of private right of action under the Public Health Service Act; 3. violation of the 14th Amendment for lack of due process; 4. violation of 42 U.S. Code § 1985 for conspiracy to interfere with civil rights; 5. violation of the Sherman Act; State - 6. breach of contract; and, 7. intentional misrepresentation and intent to deceive and defraud. The plaintiff sought monetary damages a relief for his claims.

The U.S. District Court for the Southern District of New York found that the plaintiff failed to demonstrate how the New York forum held jurisdiction in the case, or that any of the federal claims met the expressed or implied nature of the law.

Additionally, the defendant was protected from all state claims by sovereign immunity. The case was dismissed in favor of the defendants for lack of personal jurisdiction, subject matter jurisdiction, and failure to state a claim for which relief could be granted. Subsequently, the plaintiff's cross-motion to certify the class was also denied.

Within four months of this decision, Selman filed an appeal to the court outcome in October of 1980. He again argued the above claims, but the Second Circuit Court of Appeals affirmed the lower court's decision. This case and its subsequent appeal resulted in a ruling in favor of the IHE. At no point in the case was extraterritoriality addressed as the claims were all found to be without merit.

*Bird v. Lewis & Clark College (2000)*. Arwen Bird, a wheelchair-bound student on a faculty-led program in Australia, felt that the college failed to reasonably accommodate her disabilities in compliance with ADA and the Rehabilitation Act. The student claimed that she was subjected to unsafe and unsanitary medical supplies and denied participation in program activities despite assurances by the college that she would be reasonably accommodated. The defendants argued that when the program was considered in its entirety, it had made reasonable accommodations to ensure the student's participation, such as the hiring of teaching assistants to assist her, arranging for alternate transportation, arranging alternate activities, and providing alternate accessible housing.

Bird disagreed with each of the stated accommodations provided by the defendants, and asserted that the college violated federal disability law and was in breach of contract for having promised accommodation that did not, in her opinion, conform to her requirements. In her initial lawsuit, Bird identified nine federal and state claims: federal - 1. violation of the Rehab Act; 2. violation of Title III and ADA; state - 3.

breach of contract; 4. breach of fiduciary duty; 5. defamation; 6. negligence; 7. fraud; 8. negligent misrepresentation; and, 9. intentional infliction of emotional distress. The plaintiff sought a declaration that the college discriminated against her on the basis of her disability, an order requiring the college to change its overseas program to prevent future discrimination against disabled persons, and an order enjoining the college from releasing her grades for the semester abroad. The defendant's motion for summary judgement in this case was denied as was the plaintiff's cross-motion for summary judgement as to liability. Judgement was against Bird on the defamation and intentional infliction of emotional distress claims, but in her favor for each of the other state and federal claims.

Bird then again sued Lewis & Clark College for equitable relief under the Rehab Act and Title III, where the district court denied her claims as well as that for a new trial. Her remaining claims for damages under the Rehab Act were tried in front of a jury, who found against her on all but one claim. The jury did, however, award her \$5,000 for her breach of fiduciary duty claim.

Both parties subsequently appealed the rulings, and the case was then heard in the Ninth Circuit in September 2002. On appeal, Bird asserted two federal and one state claim: federal - 1. violation of the Rehab Act; 2. violation of Title III and ADA; state - 3. breach of fiduciary duty. The defense in this appeal claimed lack of jurisdiction on the Title III claims because it would require extraterritorial application of the statute. However, since the decision to affirm the previous ruling was made on the findings of fact in the case, the court chose not to address the issue. The court found that Bird could not demonstrate that she suffered an injury, nor that the threat for ongoing discrimination was real or immediate. However, it was reasonable for her to allege that her grades

suffered from not being in attendance at all program events. All other decisions were affirmed.

With more than 100 references to *Bird* in other cases, it is perhaps the most frequently cited case in study abroad discrimination litigation. Despite being heard several times and with sometimes conflicting judgement, only during appeal was there discussion in the case on the extraterritorial application of the law. As noted above, this was introduced by the defense, and the court actively chose to not address the issue or extraterritorial application of the law. All discussion was centered around the accommodations themselves and whether or not they were deemed reasonable and sufficient under the ADA. The importance of this case in setting the precedent for extraterritorial cases in study abroad cannot be under-emphasized. Bird later appealed to have her case heard before the Supreme Court, however, her petition was denied.

*Arizona State University (AZ); Region VII; Complaint No. 08-01-2047, 22 NDLR P 239 (2001).* The complainant was an ASU student applying to study abroad, who requested that the university provide a sign language interpreter for his program at a partner institution in Ireland. The university refused to pay, yet the complainant applied and was accepted to the program. In the student's OCR complaint, he cites this as a violation of Section 504 and the Rehab Act based on the denial of auxiliary services, specifically a sign language interpreter, while abroad.

The OCR reviewed the claims as well as the available case law and found that neither of the statutes applied extraterritorially. In its Letter of Findings, the OCR states its position that neither Section 504 or Title II of the Rehab Act requires the provision of auxiliary aids and services in overseas programming, and therefore the University was

not bound to comply. They also noted that neither statute otherwise prohibited disability discrimination in overseas programming citing specifically the issue of extraterritoriality, and effectively closed the case.

King v. Board of Control (2002). In 1999, six African-American female Eastern Michigan University (EMU) students were sexually harassed by other male students and the male teaching assistant (TA) on their five-week faculty-led program to South Africa. The program was administered by two EMU faculty, only one of which accompanied students abroad. The group was also accompanied by a male TA that was hired by EMU to assist a disabled student and to serve as the faculty's assistant.

Within the first week of the program, the conduct of two of the male students began to deteriorate. They allegedly entered female students' rooms without permission, referred to the female students publicly using gender-specific slurs, exhibiting sexually-explicit behavior, and soliciting South African women for sex from the tour bus. When the female students called a meeting with the program's TA to object to the behavior, they were told that the male students would do as they pleased and that they should "stop bitching." The female students also asked the faculty directly for an audience to hear their complaints, but after agreeing, he failed to attend and sent his TA in his stead.

Similar instances continued to occur in and out of classroom settings, and at one point, one of the male students offered to sell one of the women to the program's bus driver. The behavior eventually led to a violent altercation between the male EMU students and a number of male South African students, allegedly because of the ongoing abuse of the female students. The violent clash resulted in the injury of several South African students and one of the female EMU students. Following this incident, the six

plaintiffs and another female student decided to depart for the U.S., cutting their program short by a week. The program faculty finished the program with the remaining students, six males and one female.

The plaintiffs filed a single federal claim - violation of Title IX. The court found cause to apply Title IX, and explicitly addressed the issue of extraterritorially in this case. It found that to not apply judgement and to allow the sex discrimination to go unremedied would otherwise discriminate against access to educational programming such as study abroad. Focusing on the language in the statute, the court recognized its applicability to “any education program or activity.” The court denied the defendants’ motion to dismiss.

Sparkes v. Norwich University (2005). Jeffrey Sparkes, a Canadian student was seeking an accounting degree from Norwich University in Vermont. Toward the end of Sparkes’ degree, he participated in a semester-long study abroad program in England. Sparkes discovered that two courses he needed to graduate were not being offered as part of that study abroad program, but he did find them being offered at a Canadian institution. Norwich agreed to accept the transfer credit from the Canadian institution, but Sparkes ultimately failed the courses there and dropped out, never receiving the necessary credit to graduate.

Following the failed semester and despite attempts to return to Norwich to complete his degree, Sparkes suffered an emotional break down. As part of his medical examination, Sparkes learned that he was seriously dyslexic. The Sparkes family shared this evaluation with Norwich, but the University found it was insufficient documentation

as it lacked the required diagnosis. Further evaluation included recommendations on coursework exemptions and needed accommodations.

Upon returning to Norwich, Sparkes delayed interacting with their Learning Support Center and completing the required paperwork. He did continue with classes unsuccessfully, and he again left campus. Seeking to have his degree conferred, he identified three federal and state claims in his suit: federal - 1. violation of the Rehab Act; 2. violation of ADA; and, state - 3. breach of contract. He requested damages and accommodation in the form of correspondence courses, claiming that Sparkes' academic performance should have served as notice to Norwich of his disability. The university countered that it was unaware of his disability while the plaintiff was a student, learning of it only after his return from his semester in Canada. The court found that the discrimination claim was unsupported by evidence, and judgement was in favor of the defendant.

Ortiz-Bou v. Universidad Autónoma de Guadalajara (2005). The plaintiff Osvaldo Miguel Ortiz-Bou was a Puerto Rican medical student enrolled in a Mexican university. The Mexican institution held an office in Puerto Rico, which is where Ortiz-Bou applied and was later interviewed and eventually admitted. Ortiz-Bou claims that during the course of his degree, the terms and requirements for his continuation/completion were altered, and that only students of non-U.S. background were required to complete such altered requirements.

Ortiz-Bou claimed that these degree requirement changes were a violation of the Civil Rights Act of 1991, and that as an institution receiving federal financial aid through the Federal Family Education Loan Program and in agreement with the United States

Department of Education, it is subject to U.S. enforcement. He also claimed that the IHE retaliated against his complaints and notified the Mexican immigration authorities that he had failed to maintain his academic requirements, which resulted in his student visa being canceled, thus ending his studies in Mexico. His lawsuit stated three federal and one Puerto Rican Constitutional claim: federal - 1. violation of Title VI; 2. Higher Education Act violation of Program Participation Agreement with U.S. DOE and for cancellation of his student visa; and Puerto Rico Constitution - 3. damages to dignity, honor, and reputation; declaratory and injunctive relief. The presumption against extraterritoriality was discussed as it relates to the Civil Rights Act. The District Court for the District of Puerto Rico specifically pointed to language in the statute that recognizes rights as valid “in every State and Territory” and noted that the Supreme Court has enforced the presumption against extraterritoriality for federal statutes. It was therefore enforced on all claims as the plaintiff was seeking relief for protections under statutes that did not extend; the case was thereby dismissed.

Mattingly v. University of Louisville (2006). Amanda Mattingly was an American anthropology student studying abroad on a faculty-led program in Portugal during the summer of 2004. During dinner with classmates, Mattingly met a Portuguese man who was unaffiliated with the program and did not speak English. Following dinner, the group went together to a bar, and Mattingly was offered a ride home by the man. However, instead of returning Mattingly to her dorm, the Portuguese man drove her to a secluded area and raped her. Mattingly reported the incident the following day to the program supervisor, an assistant professor of anthropology. Mattingly claims that the professor questioned the validity of her story and did not address her situation



immediately by contacting the police or seeking medical attention. Only after two days of continued cramping and bleeding did the faculty take Mattingly to the hospital. Days later, the faculty helped Mattingly to report the assault to the Portuguese police. Two weeks later, Mattingly left her program early to return to the U.S.

Mattingly believed the university failed to prevent or respond to her rape, and she sought monetary damages for their deliberate indifference to her sexual assault. Her lawsuit issued two claims: federal - 1. violation of Title IX; and state - 2. neglect; breach of contract. The District Court for the Western District of Kentucky found that despite their failure to respond to the assault, a single incidence of sexual assault perpetrated by a third party does not support a claim under Title IX, nor does Title IX explicitly provide for a remedy. Further, the university was protected by sovereign immunity in the state claims, and so judgement was in favor of the defendant. Extraterritoriality was not discussed as part of the proceedings for this case.

Dean-Hines v. Ross University School of Veterinary Medicine (2006). Bridgette Dean-Hines, the plaintiff, was an American student enrolled in the St. Kitts campus of the Ross Veterinary School in 2004. Following academic problems, Dean-Hines withdrew from the program under the assurance from an academic dean that she would be readmitted the following semester. Along with her application for readmission, she submitted a copy of her diagnosis of Attention Deficit/Hyperactivity Disorder. Her request for readmission was denied.

Following conversations with an academic dean at Ross, Dean-Hines took courses at Sylvan Learning Center believing that she would then be successfully readmitted, and that the dean would write a letter of recommendation on her behalf. However, her

application for readmission was again denied, and according to Dean-Hines, the dean instructed her to never apply again.

Dean-Hines claimed that her requests for accommodation of her learning disability were not met, resulting in her poor academic performance and ultimate dismissal from the program. Her lawsuit relied on three federal and four state claims: federal - 1. violation of the Rehab Act; 2. violation of ADA; State - 3. violation of the New Jersey Law Against Discrimination (NJLAD); 4. and 5. two common law causes of action for promissory estoppel; and, 6. breach of an actual or implied contract. She sought reinstatement to Ross, an order compelling Ross to provide reasonable accommodations, an injunction preventing Ross from discriminating on the basis of her handicap, compensatory and punitive damages, and attorneys' fees and costs.

The defendants claimed, among other arguments, that the court did not have jurisdiction because the Ross campus in question was located in St. Kitts, and extraterritorial application of federal law is unstated in the legislation. The District Court for the District of New Jersey found, however, that the administrative control of the campus was housed in New Jersey. As such, the court asserted there was sufficient domestic control to claim jurisdiction. Further, the court found that the defendant's request for removal of the case to St. Kitts would result in an inadequate forum. The defendant's motion to dismiss on all accounts was denied. This is one of the few cases where extraterritoriality was addressed and the presumption against extraterritoriality was overcome based on the facts of the case.

*Phillips v. St. George's University (2007)*. Plaintiff Erika Phillips was an American student enrolled in the St. George's University Veterinary School, located in

Grenada, West Indies in 2005. During her enrollment, Phillips was repeatedly sexually harassed on campus by a university mailman, and despite numerous complaints to the university, no actions were ever taken to resolve the harassment. The Senior Associate Dean of Students assured Phillips that she would immediately rectify the situation, yet harassing telephone calls continued within days of the complaint being filed.

Following a second complaint, Phillips was dismissed by the same Senior Associate Dean of Students and told to “suck it up”. Phillips then sought counseling at the campus counseling center where she was informed that this behavior was common among men in Grenada. Phillips’ request for a letter excusing her from midterm exams was denied, and Phillips ultimately failed one of her exams.

Phillips filed only one claim in her lawsuit: federal - 1. violation of Title IX. However, the District Court for the Eastern District of New York found that the IHE in question was not within the territorial boundaries of the United States (West Indies) and therefore was not subject to U.S. law, despite its having administrative and recruiting offices in New York. The court discussed the extraterritorial application of Title IX in this case, and determined that all conduct occurred outside of the U.S. and the jurisdiction of the legislation. The defendant pointed out that in only one case had Title IX been applied extraterritorially in *King v. Bd. Of Control of Mich. Univ.*, but that in that case full programmatic control was held by the domestic IHE and not by a foreign educational facility. The plaintiff did not counter with the result of the *Dean-Hines* case, and Phillips’ case was dismissed.

*Tecza v. University of San Francisco (2009)*. Jason Tecza was a law student at the University of San Francisco when he enrolled in a study abroad program in Dublin and

Prague for the Summer of 2007. While abroad, he encountered difficulties in receiving his testing accommodations, and he felt that his privacy had been violated by the public exposure of his disability. Allegedly, while in Dublin a faculty member at the host university publicly asked Tecza to accompany him to his isolated testing location. Also during the exam period, a custodial worker interrupted his testing and required that he vacate the room even though time remained on his examination period. Additionally, during the Prague portion of his program, distributed course materials indicated to other students that he was receiving testing accommodations.

Tecza's first filed action in the Superior Court in 2009, but shortly amended it seeking compensatory and punitive damages for his injuries, alteration of policies and procedures for improved security, modification of challenged materials to include the textbook used and the student handbook, as well as attorney's fees. The defendant requested the case be removed to federal court and dismiss the amended claim, which was granted with leave to amend. Tecza then submitted a second amended complaint, removing only one of his federal claims for violation of FERPA, and alleging two federal claims and nine state claims: federal - 1. and 2. violation of Rehab Act, ADA; - state - 3. violation of California Unruh Civil Rights Act; 4. invasion of privacy; 5., 6. violation of information practices act and California Public Records Act; 7. breach of contract; 8. unfair business practices; 9. intentional infliction of emotional distress; 10. and 11. negligence and negligent misrepresentation. The court found that the plaintiff failed to persuade the court on any of the necessary elements for any of the claims, that the alleged discrimination was limited in scope and not systemic as described by the plaintiff, and

given the ample opportunity for amendment, the case was dismissed without leave for amendment.

Tecza appealed the court's decision and in 2013 brought the case before the Ninth Circuit. His appeal maintained the same claims as in his second amended complaint: federal - 1., 2. violation of Rehab Act, ADA; - state - 3. violation of California Unruh Civil Rights Act; 4. invasion of privacy; 5. and 6. violation of information practices act and California Public Records Act; 7. breach of contract; 8. unfair business practices; 9. intentional infliction of emotional distress; 10. and 11. negligence and negligent misrepresentation. The court reversed the district court's dismissal of the claims for breach of contract, public disclosure of private facts, and invasion of privacy under the California Constitution, but affirmed as to the other claims and remanded.

Tecza later presented his case for the remaining claims in the District Court for Northern California. His action was dismissed in its entirety, with prejudice, pursuant to Federal Rules of Civil Procedure, Rule 41(a)(1)(A)(ii), wherein all parties have signed off on the dismissal. At no point in any of the court proceedings was extraterritoriality considered or addressed.

Whitaker v. New York University (2011). Barbara Whitaker was a non-traditional student at New York University (NYU) from 2001 to 2008. During that time, Whitaker wanted to share on-campus housing with her minor son. As she was a part-time student for all but one semester, she was not eligible for on-campus housing. However, during the Fall 2004 semester while on a study abroad in Prague, Whitaker was a full-time student and again requested to have her son live with her in NYU-arranged housing.

Whitaker was told that her son could not live in university housing, and as such, she received permission to secure her own off-campus housing.

Whitaker claims that NYU's housing policy prevents parents from living with their children and that she was discriminated against because of her familial status. She submitted one federal and three state claims in her suit: federal - 1. violation of the Fair Housing Act through familial-status and retaliation; state - 2. violation of New York State Human Rights Law; and, 3. violation of the NY City Human Rights Law. The District Court for the Southern District of New York issued summary judgement in favor of the defendant and dismissal of plaintiff's claims of familial-status housing discrimination, and declined supplemental jurisdiction of claims brought under New York State and City Human Rights Laws. The judge also found that Whitaker's allegations of attorney failure did not warrant relief from judgement.

Whitaker filed an appeal with the Second Circuit in August 2013 stating the same three claims: federal - 1. violation of the Fair Housing Act through familial-status and retaliation; state - 2. violation of NY State Human Rights Law; and, 3. violation of the New York City Human Rights Law. The court found that the Fair Housing Act does not identify non-student status as a protected class and the lower court's judgement was affirmed.

Whitaker again filed suit in the Court of Appeals for the Second Circuit in November 2013, this time seeking relief from the summary judgement based on the district court's abuse of discretion. The appellate court concluded that the district court did not abuse its discretion and affirmed the decision in the original motion for relief. At no point in any of these proceedings was extraterritoriality addressed.

*Archut v. Ross University School of Veterinary Medicine (2012).* Katherine

Archut was an American student enrolled in the St. Kitts campus of the Ross Veterinary School in 2008. During the application process, Archut mentioned her learning disability in her personal statement, but did not disclose the kind of accommodations she had received during her undergraduate degree. Following admission, Archut began the process for securing her requested accommodations, but her documentation stated the benefit of general audio accommodation and not specifically a live reader. While the school did approve extra time on exams and a testing room with minimal facilities, it did not provide Archut with a live reader.

After less than a year at Ross, Archut was dismissed for poor academic performance. Archut appealed her dismissal and was conditionally readmitted under the requirement that she retake any failed first-year classes. She declined the admission offer and applied to another domestic program.

Archut claims that her requests for accommodation of her learning disability, specifically that of a live reader, were not met, resulting in her poor academic performance and ultimate dismissal. As administrative support for the St. Kitts school is housed in New Jersey, Archut included state violations in her complaint. In her lawsuit, she states three claims: federal - 1. violation of Rehab Act and ADA; state - 2. violation of New Jersey Law Against Discrimination (NJLAD); and, 3. common law claim of breach of contract. She sought compensatory and punitive damages for her injuries.

The District Court for the District of New Jersey directly addressed the presumption against extraterritoriality and exercised the presumption in the federal and NJLAD claims, but denied motion for summary judgement and determined that it did not

have jurisdiction over the breach of contract claim. Archut cited the extraterritorial application of federal law in both *Bird v. Lewis & Clark College* and *King v. Bd. of Control*, but the court countered that in each of those cases, complaints were being made against domestic institutions and not institutions that are accredited and operated in a foreign country. The court's holding in the *Dean-Hines* case was not referenced or considered in the outcome.

Archut refiled her state complaint for breach of contract and requested the court also reconsider its earlier summary judgement for federal discrimination claims. The District Court for the District of New Jersey would not reconsider earlier summary judgement on discrimination claims and dismissed the remaining breach of contract claims, asserting the case could be tried in St. Kitts, so long as it was submitted within 90 days.

Archut sought appeal of the district court judgement and filed in the Third Circuit in 2014. She again submitted three claims: federal - 1. violation of Rehab Act and ADA; State - 2. violation of New Jersey Law Against Discrimination (NJLAD); and, 3. common law claim of breach of contract. The lower court's decision was affirmed due to a thorough and well-reasoned argument in summary judgement.

*Drisin v. Florida International University Board of Trustees (2017)*. Adam Drisin was a professor and associate dean in the College of Architecture and the Arts. After a sexual encounter with a graduate student while on a study abroad program in Italy, the faculty member was investigated for Title IX violation and ultimately terminated. He alleges, however, and student witnesses support his claim, that he was in fact the victim - not the perpetrator - of the sexual assault. Drisin filed his own complaint of sexual



misconduct against the graduate student. Drisin's complaint was investigated by the university and determined to be unfounded. When challenged, the university ratified and concluded the investigative report. The university then began the formal process of termination on the grounds of the investigation.

The graduate student complainant filed a civil lawsuit against Drisin in the District Court for the Southern District of Florida alleging sexual batter and infliction of emotional distress. The university student newspaper then published the lawsuit in what Drisin determined to be a defamatory article that damaged his reputation.

Drisin believed that he had been the one sexually violated and that not only were his claims not taken seriously, the investigation was flawed, and his termination was the result of discrimination. His lawsuit alleged six federal claims and one state claim: federal - 1. violation of title IX against institution; 2. violation of title IX against individuals; 3. violation of title VII (gender-based employment discrimination); 4. violation of section 1983 for lack of procedural due process resulting in deprivation of liberty; 5. violation of section 1983 for lack of procedural due process resulting in deprivation of property; 6. disparate treatment discrimination; and, state - 7. defamation. Drisin sought as relief back pay, front pay, loss of benefits, consequential damages, compensatory damages, prejudgment and post-judgment interest, reasonable attorneys' fees, punitive damages, pecuniary damage, non-pecuniary damage.

The university argued that Drisin's Title IX claim must be dismissed because it was preempted by Title VII because of his role as an employee seeking relief for employment discrimination. The defense also claimed immunity against most of the claims. While most of the claims were dismissed without prejudice, three of the counts

were maintained – procedural due process for deprivation of property, equal protection, and the Title VII claim.

Drisin subsequently filed a Second District Court case for the maintained claims: federal - 1. violation of Section 1983 for lack of due process resulting in deprivation of property; and state - 2. hostile work environment. The hostile work environment claim was dismissed without prejudice, but the motion to dismiss the due process claim was denied.

Harbi v. Massachusetts Institute of Technology (2017). In 2012 when MIT entered into its partnership with edX to deliver a series of online courses, also known as a MOOC, defendant Walter Lewin was a professor emeritus and was asked to teach an online introductory to physics course. During the Summer of 2013, plaintiff Faiza Harbi enrolled in Lewin's course. During the course, the student, who lived permanently in France, and faculty member began corresponding electronically. Although they never met in person, their online communications became increasingly explicit and sexual in nature. Harbi did not end the relationship out of fear that it would jeopardize her successful completion of the course. She alleged that Lewin suggested it was conditional on their continued correspondence.

As a result of the correspondence, Harbi became distressed to the point of needing hospitalization. She eventually reported the conduct to MIT, and an investigation was launched. The investigation determined that Lewin had violated MIT policies, and MIT severed ties with Lewin, prohibiting him from accessing university resources.

Harbi was never offered counseling or remediation by MIT. Her lawsuit against the university stated nine claims: federal - 1. violation of Title IX; State - 2. and 3.

negligence against MIT and Lewin; 4. and 5. negligent infliction of emotional distress against MIT and Lewin; 6. intentional infliction of emotional distress against Lewin; 7. assault against Lewin; 8. violation of Massachusetts Gen. Laws ch. 214 section 1C against MIT; and, 9. breach of contract. The District Court for the District of Massachusetts determined that the plaintiff at all times during the relationship was residing in France and was never in the United States despite enrollment in a U.S. IHE. It thoroughly examined the language of the statute and considered the physical location of the sexual misconduct but determined that the statute was not intended to be applied outside the U.S. and therefore, it could not extend the protections of Title IX extraterritorially. Other state motions were granted in part and denied in part based on their individual merit. In 2018, the court filed notice that the case had been settled.

*Doe v. Baylor University (2018).* This case is one sub-part of a large class action Title IX lawsuit against Baylor University. Four plaintiffs are listed in this particular case – Jane Doe 12, Jane Doe 13, Jane Doe 14, and Jane Doe 15. Of note for the purposes of this study is Jane Doe 13, who was a Masters student at Baylor due to graduate in 2017. She claimed that despite having notified Baylor of Title IX sexual assault on campus, the school allowed her perpetrator (a rugby player) to travel alongside her on a study abroad program, where she was then assaulted by him for a second time.

As part of this suit, the plaintiffs each make three claims: federal - 1. violation of Title IX; state - 2. negligence; and, 3. breach of contract. The District Court for the Western District of Texas, Waco Division determined that Jane Doe 13's claims were beyond the statute of limitations with the timeline having expired earlier in the year of

filing (2017), despite her reporting these to the university at the times that they occurred. Her case was dismissed.

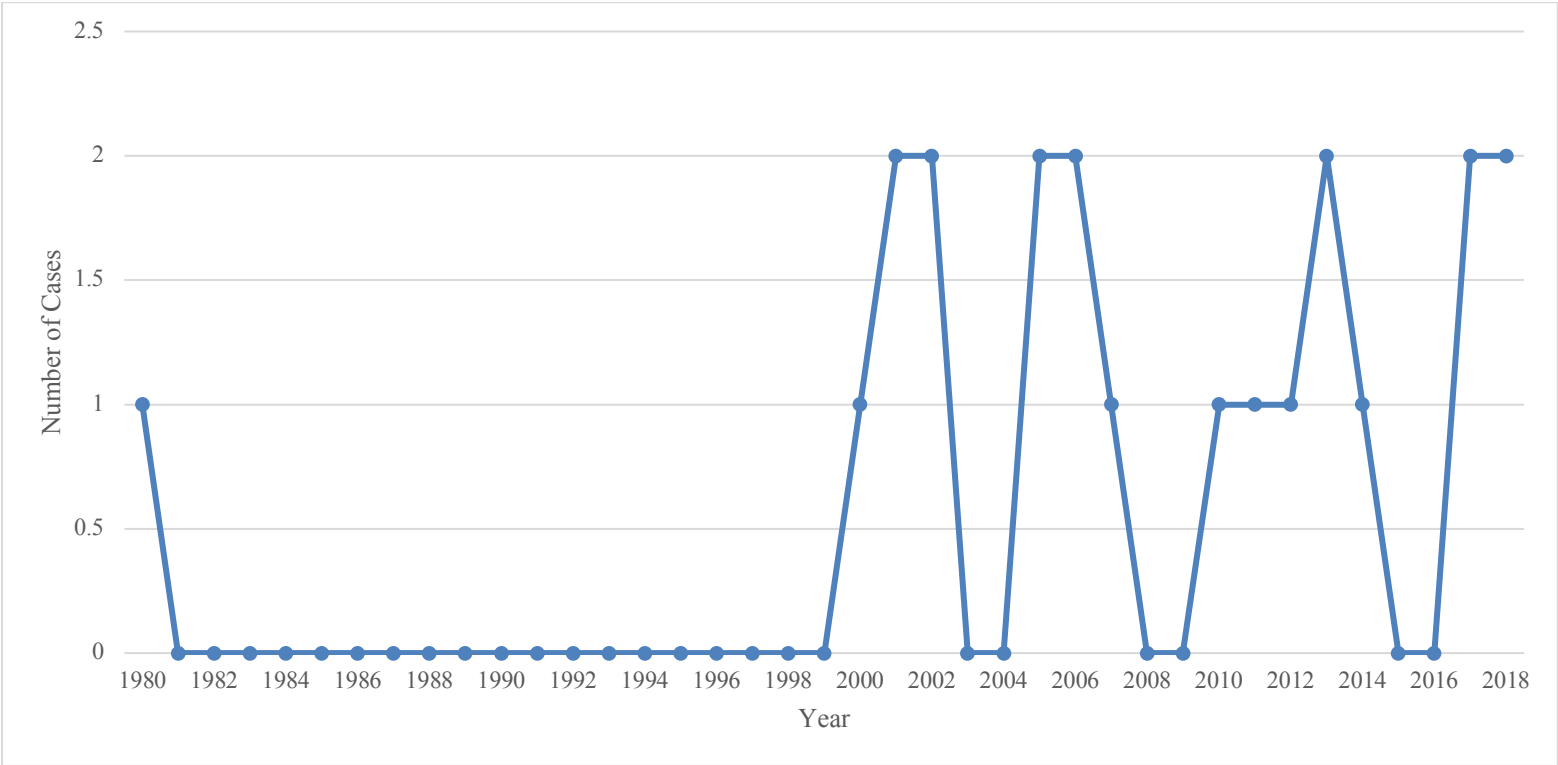
### *Litigation Trends*

As evidenced in the cases above, the nuances of each unique situation contribute to the complexity of the issues faced by study abroad professionals. The following data will explore the cases further individually and as a whole in an effort to identify trends among certain case-types and across time, as well as any geographic or outcome distributions.

Number and Frequency of Cases. As noted, the final data set included 15 instances of alleged federal violations, resulting in 22 case outcomes over the 38 years between 1980 and 2018 (Table 4.1). Following the case in 1980, *Selman v. Harvard Medical School*, no other available cases that met the criteria were decided until 2000, a twenty-year gap in litigation. Of note, two OCR investigations for disability discrimination that occurred in 1990 and 1992, and likely meet the case criteria, appear in secondary sources, but were not available online or in print. These cases were requested from the DOE through a Freedom of Information Act (FIOA) request. However, these cases were not returned in a timely manner and were therefore not included in the final data set. Of the published cases, in any given year between 2000 and 2018, either zero (n=6), one (n=7), or two (n=7) cases were decided.

As revealed in the data, the bulk of the available case law occurred since 2000. This is perhaps not surprising when one considers the correspondence of cases with the enactment of legislation, specifically, the 1990 ratification of the ADA, which made

Table 4.1. All cases by year.



higher education and study abroad more accessible to SWDs, and the 1997 Title IX Revised Pamphlet and Sexual Harassment Guidance, which expanded the scope of Title IX to include violations by fellow students and even strangers to the student (Bull, 2017; Hamill, 2012; Olivarius, 2014). Both of these pieces of modified policy increased the rights of students and presented pathways for litigation of discrimination claims.

With such an increase in cases beginning in 2000, to better understand where groupings of cases were occurring, the cases were disaggregated into four-year blocks that coincide with U.S. presidential terms (1977-1980; 1981-1984; 1985-1988; 1989-1992; 1993-1996; 1997-2000; 2001-2004; 2005-2008; 2009-2012; 2013-2016; 2017-present). When considered this way, cases are shown to be most frequent in the 2001-2004 (n=4), 2005-2008 (n=5), and 2017-present (n=4) terms, with cases leveling off in the following three terms (Table 4.2). The two consecutive, high-frequency, four-year blocks, 2001-2004 and 2005-2008, coincide with the eight-year presidential term of George H.W. Bush.

Prevailing Party. While the number of cases heard increased in 2000, it was not necessarily the case that these lawsuits were favorable to the plaintiffs. In fact, despite an increase in cases litigated, the prevailing party was still most frequently the defendants, or the IHEs against whom the cases were brought. Overall, 82% (n=18) of federal violation claims were found in favor of the defendant, with only 18% (n=4) being found in favor of the plaintiff. In fact, no more than one case in any four-year block was found in favor of the plaintiff (Table 4.3).

In 67% of incidences (n= 10) and 68% of cases (n=15), the university had full control over the programming aspects and details. Of the cases where the university had

Table 4.2. All cases disaggregated by four-year presidential terms between 1977-present.

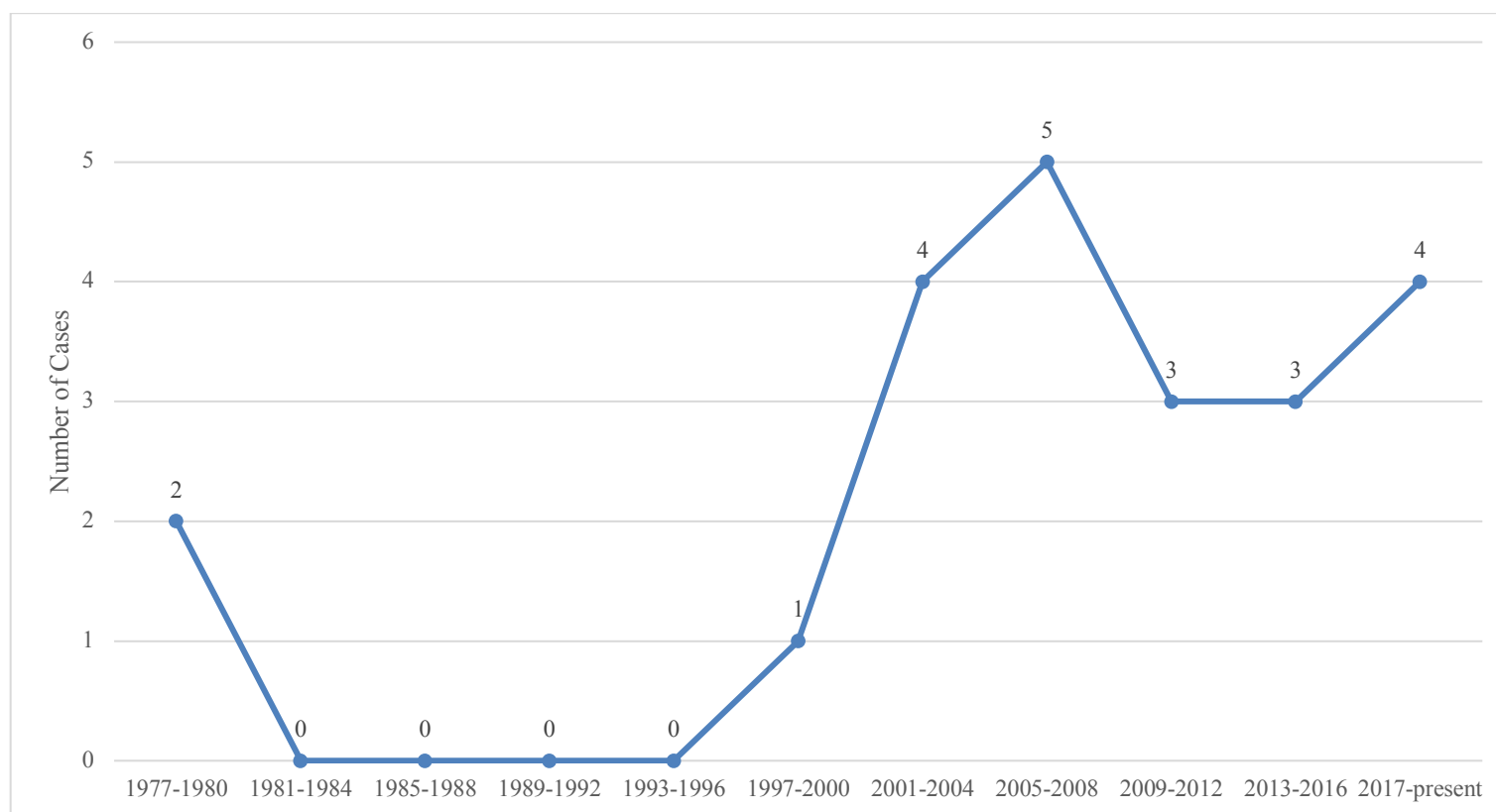
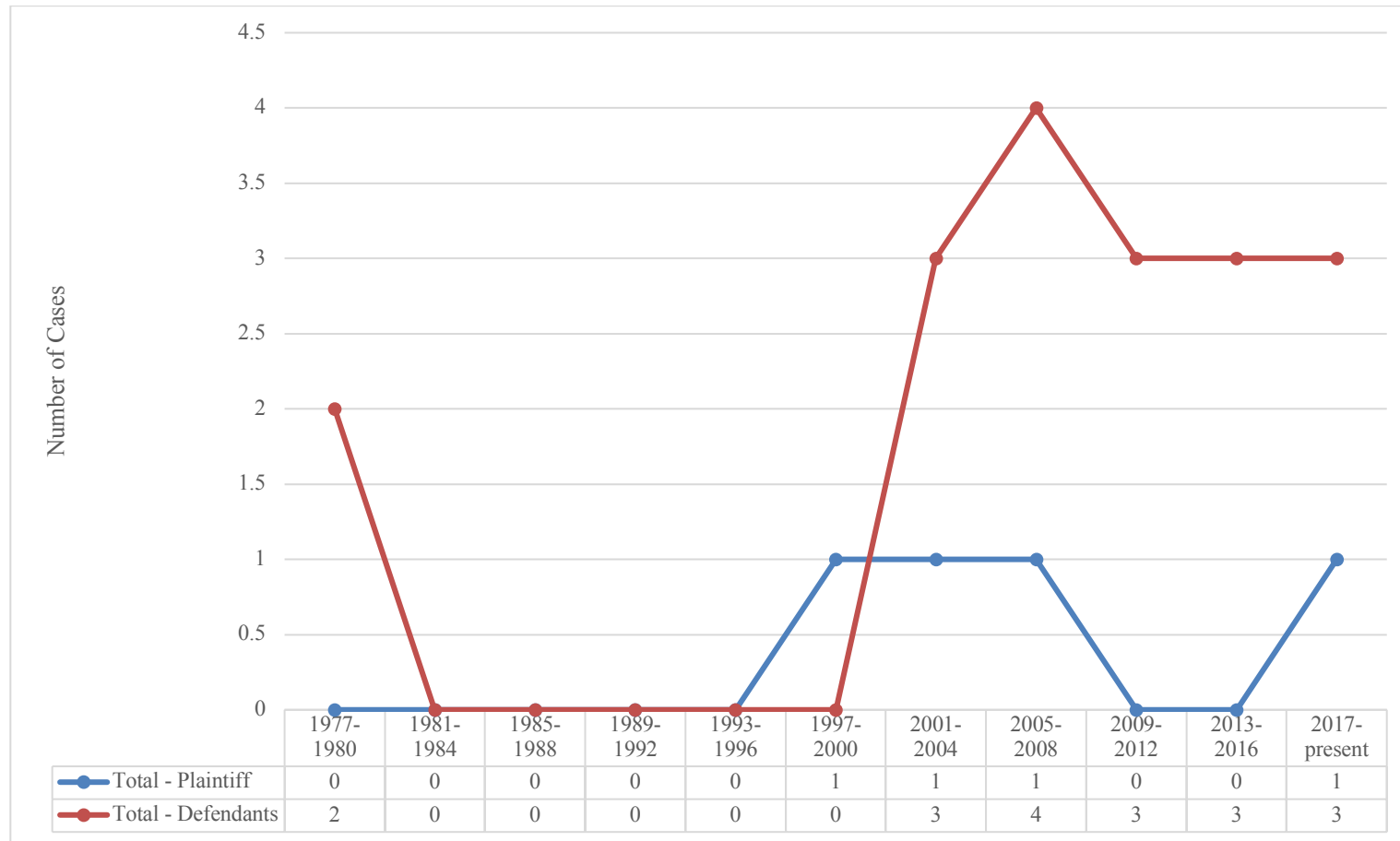


Table 4.3. Case outcomes disaggregated by four-year presidential terms between 1977-present.





full control, the defendants prevailed in 71% of the tried and appealed cases (n=12). Of the 33% of cases where the programming control was held by a host institution, the defendants prevailed in 100% of the tried cases (n=5). In all but one case (95%, n=21), the plaintiff accuser was a student of the university; the only exception is in *Drisin*, where the accuser was a faculty member. In more than 80% of the cases, the university administration was named as the accused in the federal violation (Table 4.4).

Many of the cases claimed violations of state law in addition to their federal claims. Of the 15 incidences, 80% (n=12) included a state claim. The two most common state claims were 1) breach of contract (60%, n=9), and 2) negligence (33%, n=5); thirty-three percent (n=5) of the incidences claimed both. Of the decided cases that made state claims, 47% (n=9) were dismissed upon being heard in court, another 42% (n=8) were split, and the remaining 11% (n=2) were granted or the court determined that it did not have jurisdiction to rule on the matter so the case was eligible to be tried in a state court. The most common defense in each of the 22 cases was either state, statutory, or sovereign immunity (27%, n=6). Of the universities that exercised that defense, 83% (n=5) were successful.

Geographic Distribution. While twelve states were involved in cases on federal violations during a study abroad experience (Table 4.5), the cases have been predominantly concentrated in New York and New Jersey (n=5). These states, too, were the most likely states to be involved in an appeal, resulting in eight of the 22 cases or 36%. Oregon was involved in three of the 22 cases, all of which resulted from a single incidence, *Bird v. Lewis & Clark*. The only two other states involved in an appeal were Florida and California with one each (Figure 4.1). Regardless of geographic frequency of

Table 4.4. Parties named as the violator of federal law.

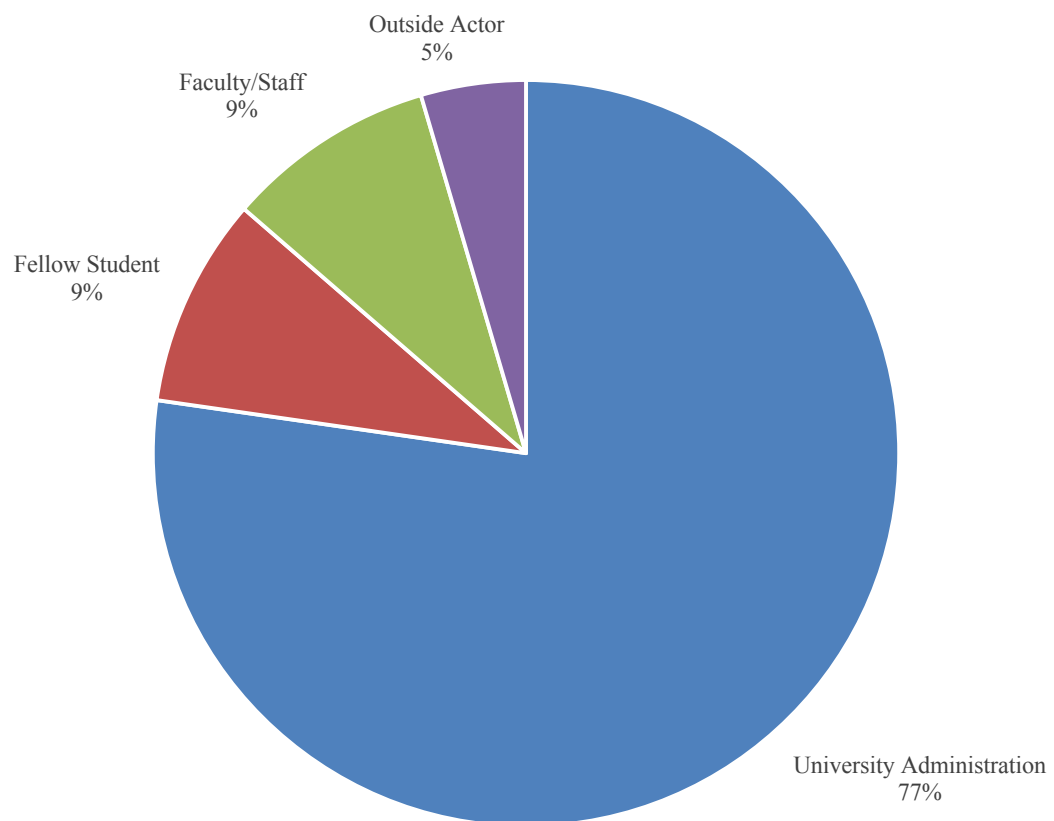
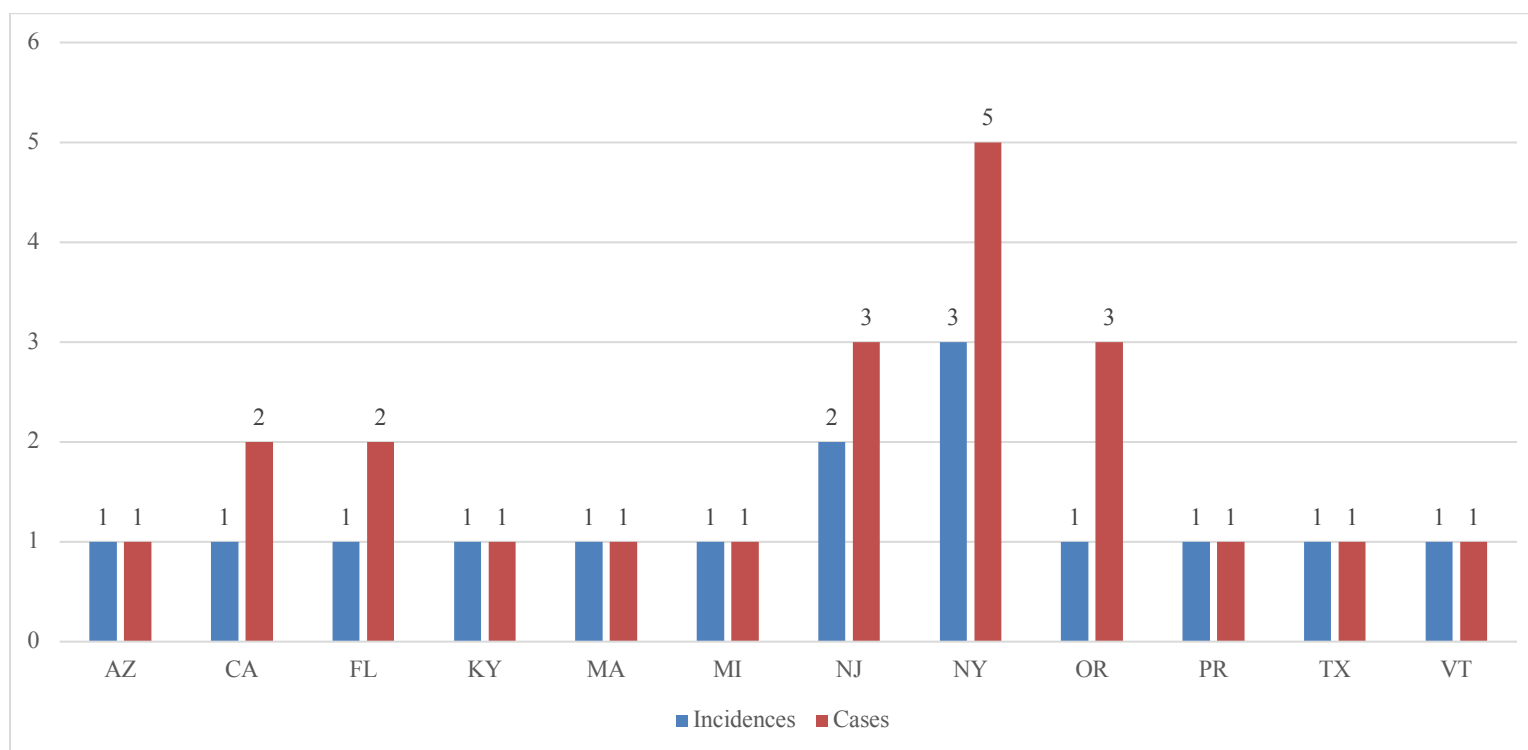


Table 4.5. Incidences and cases distributed by state.



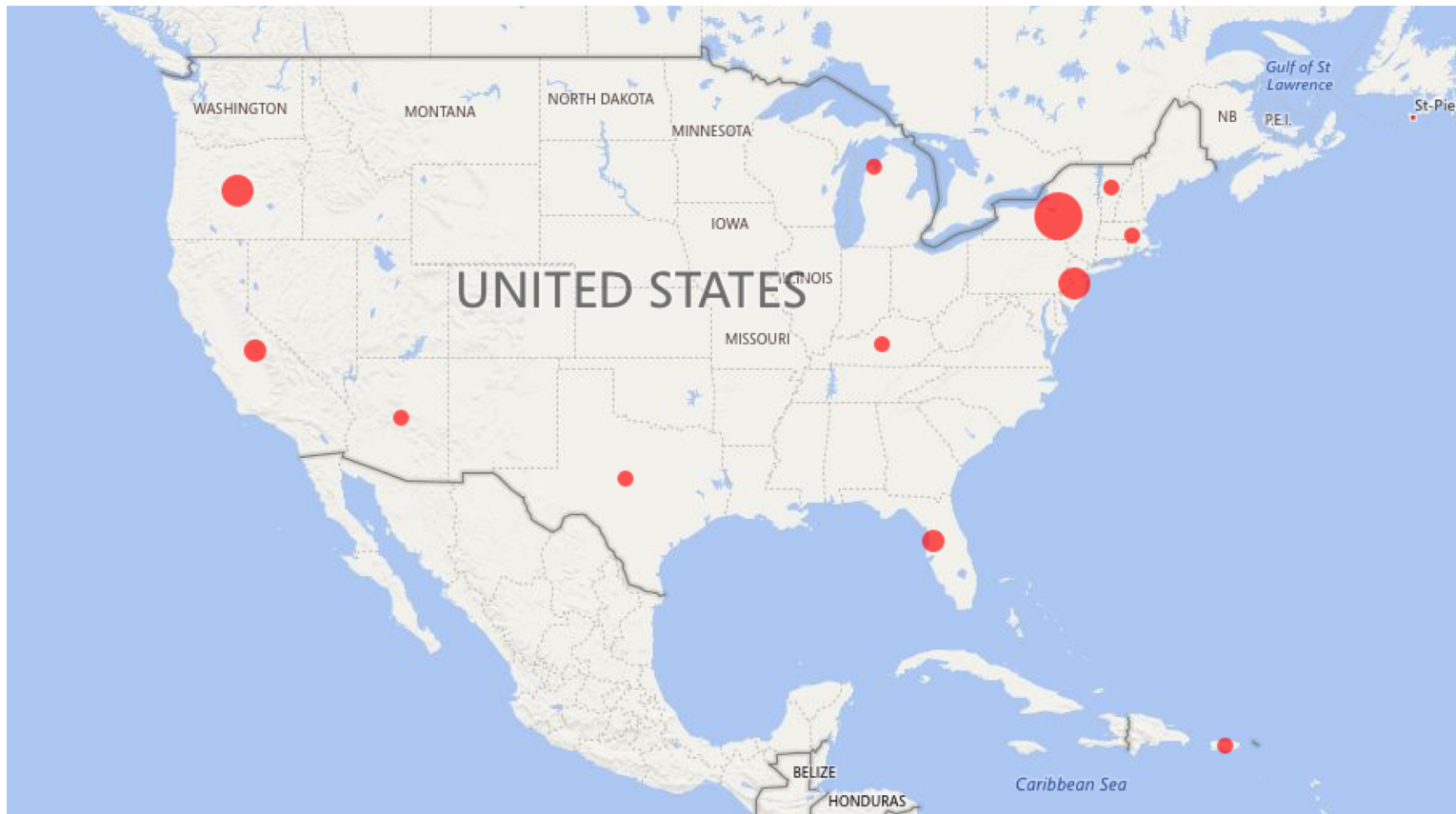


Figure 4.1. Heat map of states and U.S. territories where cases have been heard.

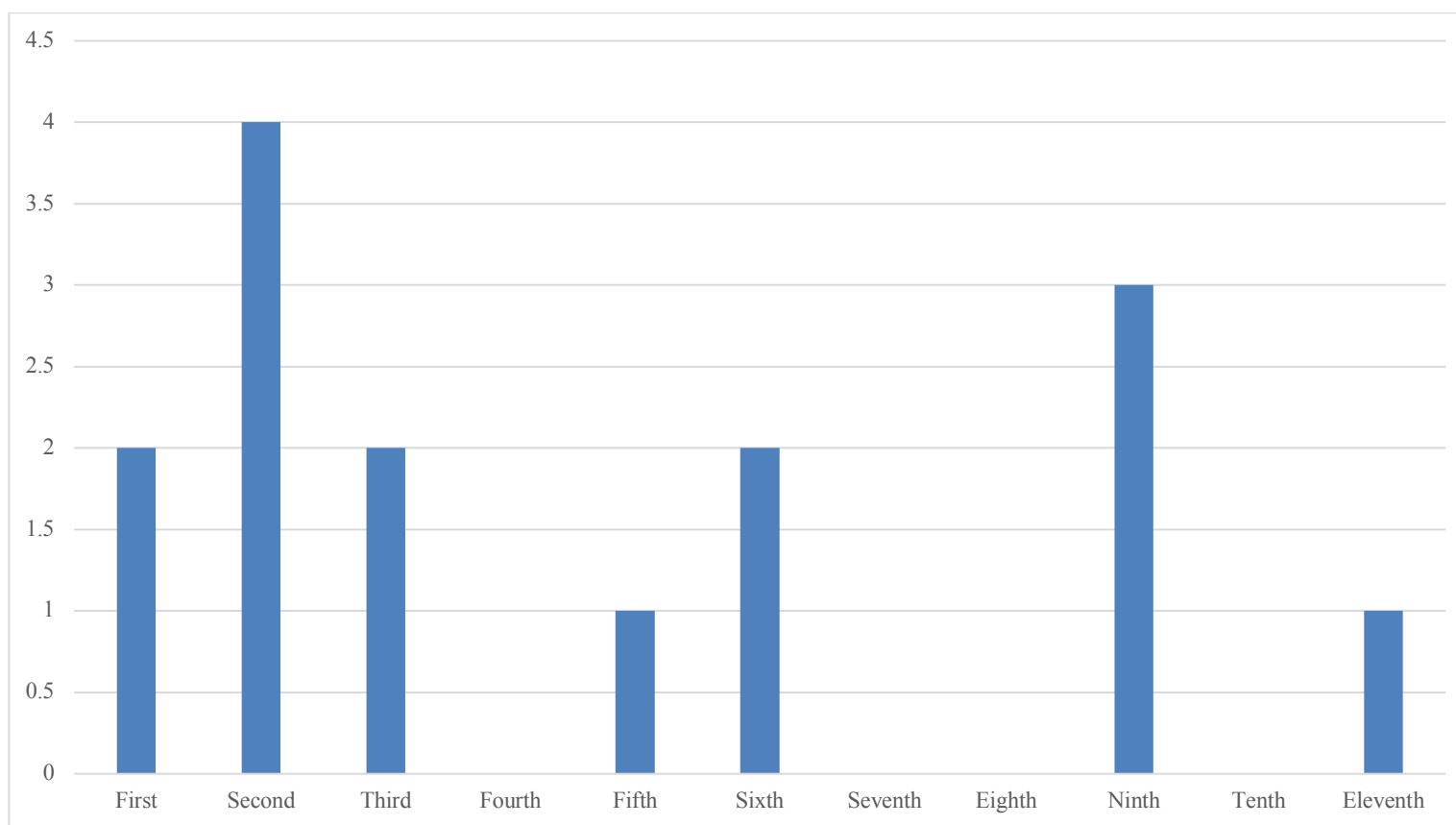
the cases, of those heard in New York, New Jersey, Oregon, Florida, and California, the likelihood of a successful suit was 13% (n=2); similarly as likely to be successful was a case heard in a state that only had one case each (14%, n=1).

When considered by the appellate circuit courts, all of the 22 cases fell into only seven of the eleven U.S. Court Circuits (Table 4.6) – the First, Second, Third, Fifth, Sixth, Ninth, and Eleventh. These circuits represent approximately two-thirds of the circuits, which geographically includes 30 of the 50 states. Interestingly, the involved states fell largely along the East and West Coasts. Very few of the Midwestern States, represented by Circuits Eight and Ten, have heard a case; only those Midwestern States in Circuit Seven which includes Michigan have representation by these decisions (Figure 4.2; Federal Bar Association, 2018).

Federal Claims by Type. Despite over thirty years of cases and the additions to federal law that have occurred over that time, several of the federal laws under which a claimant could make a case have remained unheard in the courts as it relates to study abroad. Clery, FERPA, and HIPAA appeared in none of the cases in which a decision or opinion were published. In only one case was a FERPA claim made, *Tecza v. University of San Francisco*, but the claim was removed when it was amended and eventually heard.

The most common cases heard were ADA/Section 504 at 45% (n=10) and Title IX at 27% (n=6) (Table 4.7). Together, these 16 cases accounted for 72% of all cases heard. While concentrated in the last 20 years, they were somewhat consistently distributed across the four-year terms as depicted in Table 4.8. However, of note is the most recent and incomplete four-year term – 2017-present – which has already included three Title IX cases. With two years remaining in this most recent term, it is likely that

Table 4.6. Cases heard by U.S. Circuit.



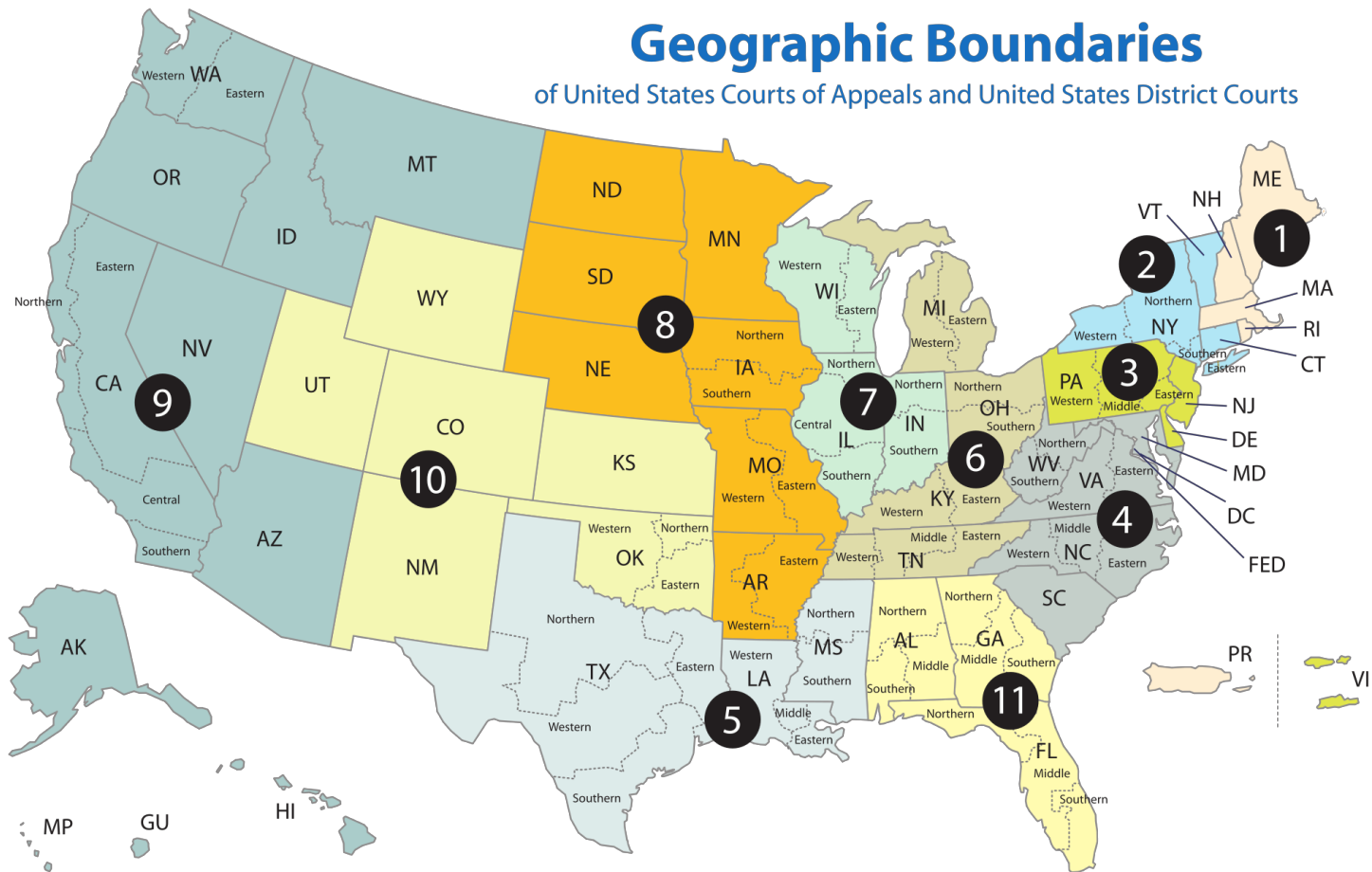


Figure 4.2. Geographic boundaries of the U.S. Courts of Appeals and U.S. District Courts (Federal Bar Association, 2018).

Table 4.7. Distribution of federal claims by violation type.

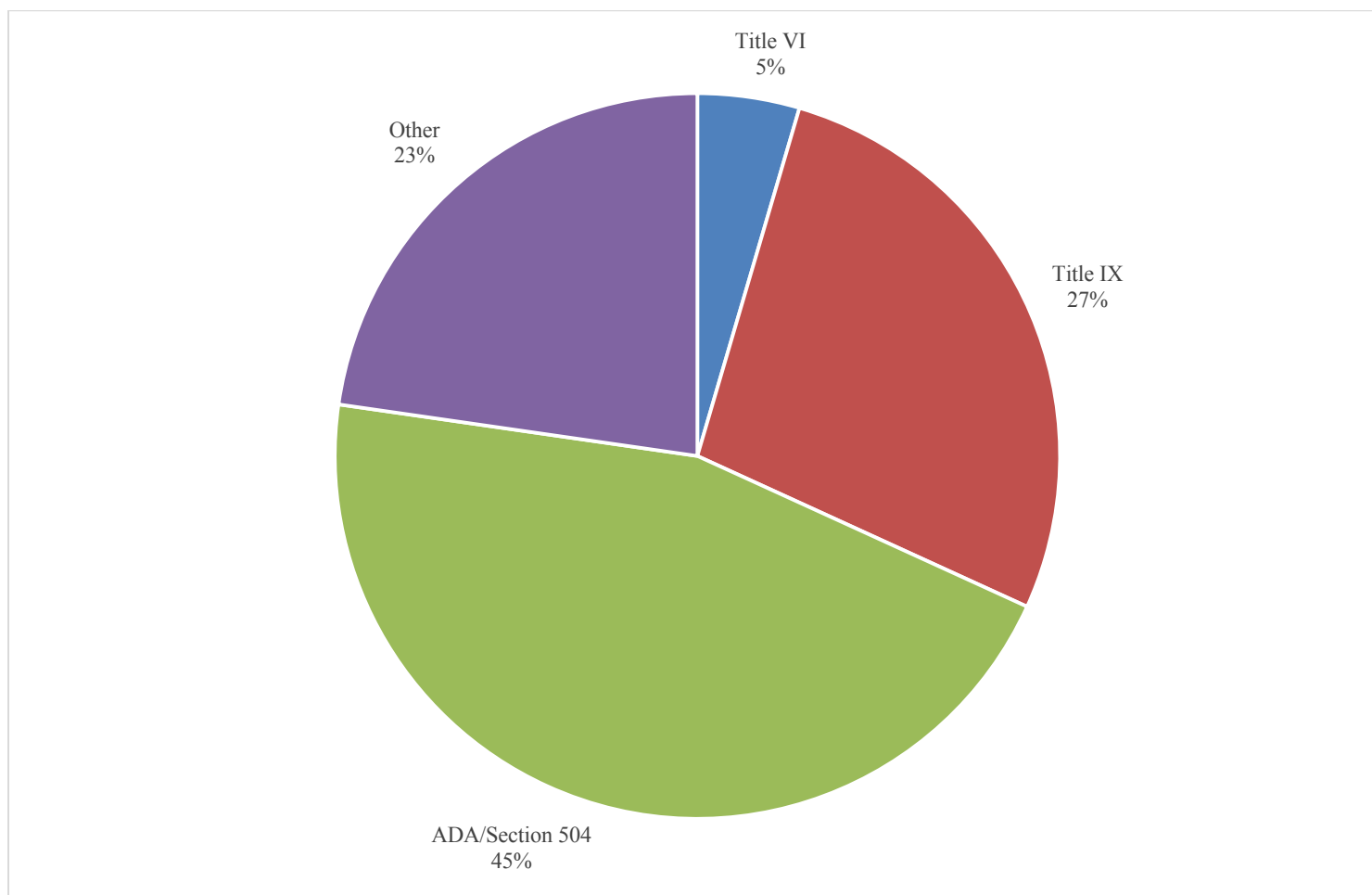
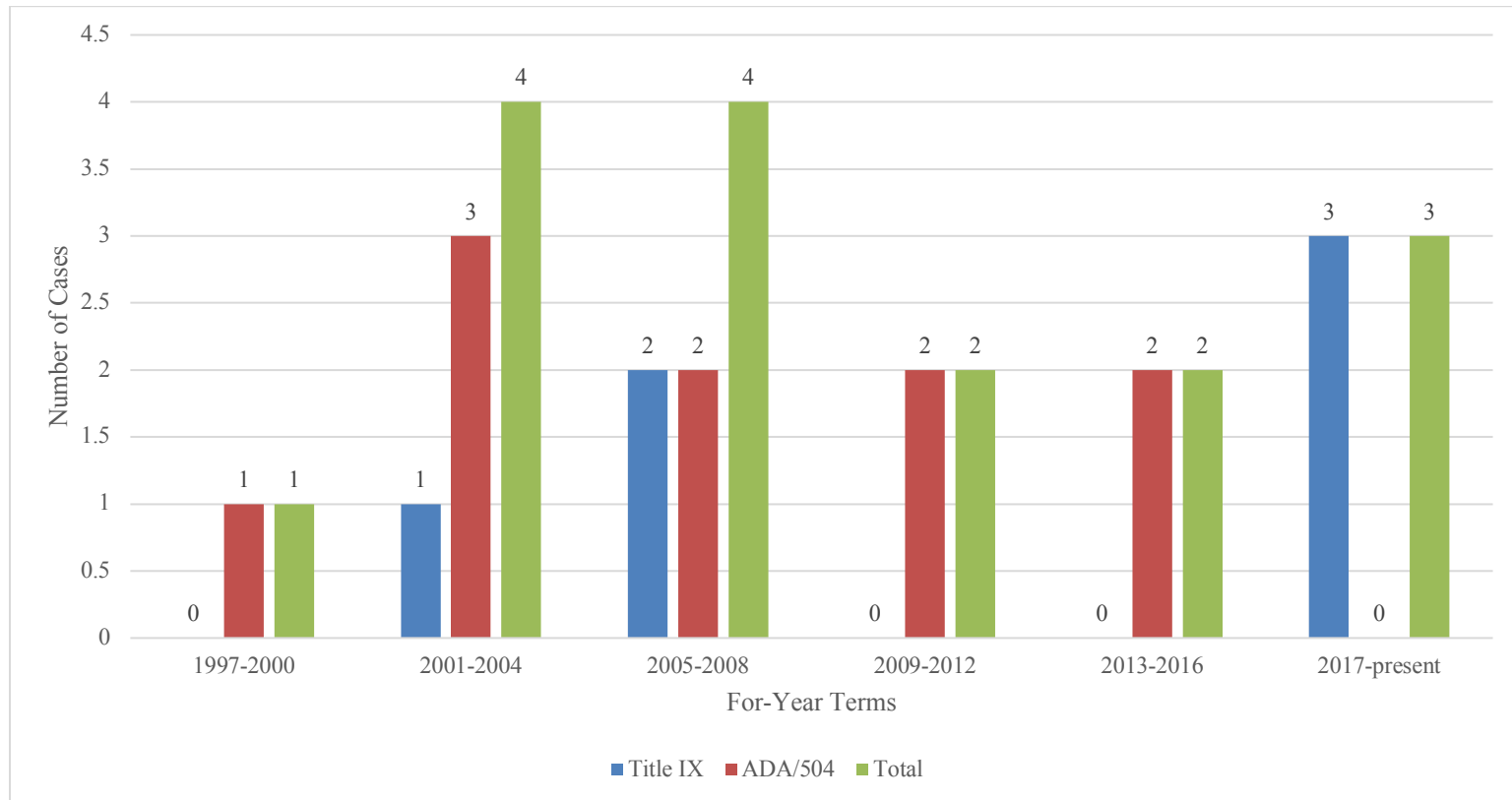




Table 4.8. Title IX and ADA cases heard by four-year term since 1997-2000.



additional cases may be heard, which could propel this term into the highest frequency of cases adjudicated in any one term.

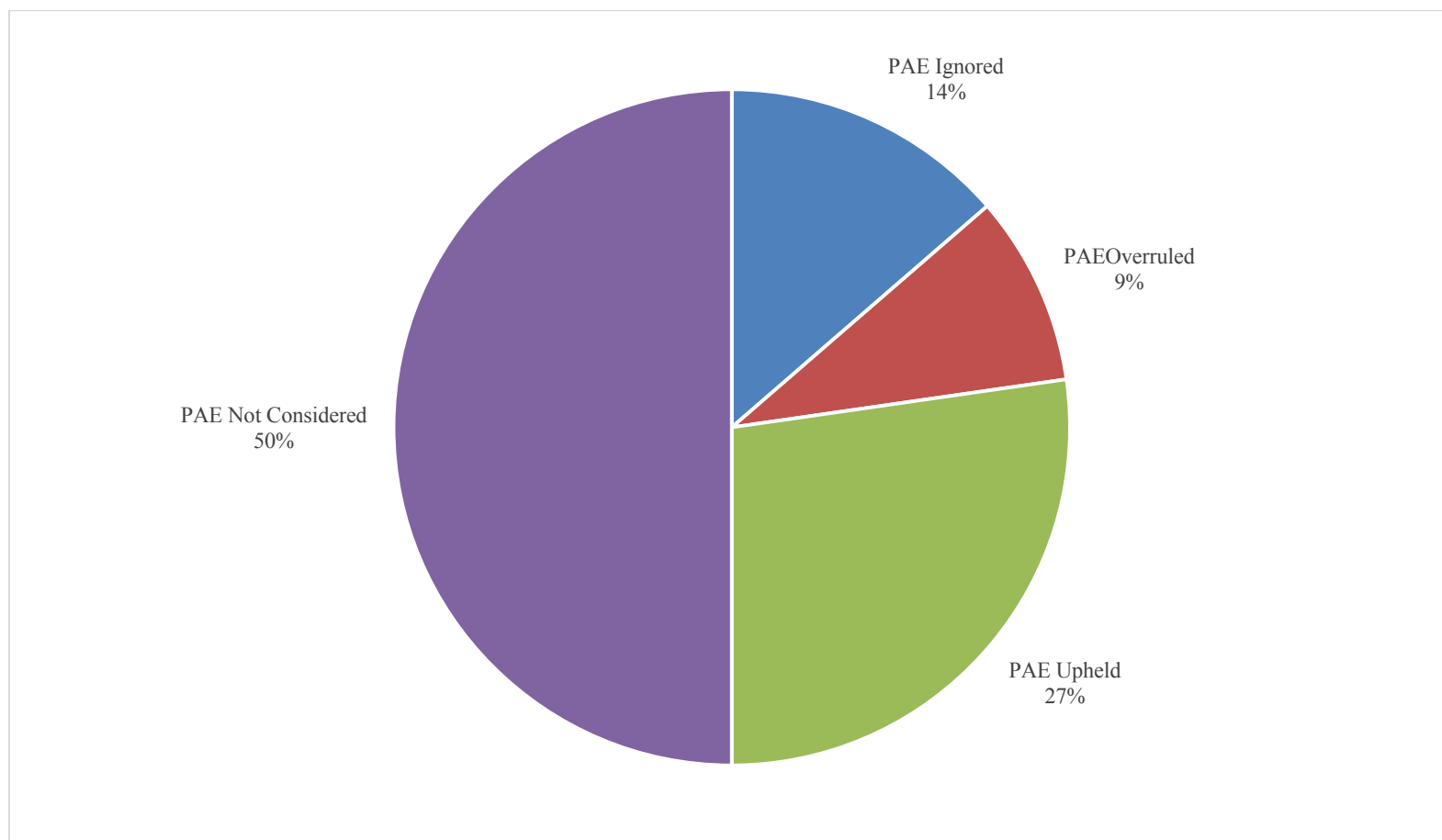
Several cases fell into “other” federal claims; these included alleged violations of the 14<sup>th</sup> amendment for due process, the Sherman Act, the Public Health Service Act, the Fair Housing Act, and Title VII for gender-based employment discrimination. These cases represented 23% (n=5) of all federal cases. The sole Title VI case, *Ortiz-Bou*, heard in 2005 in Puerto Rico was unsuccessful.

The ten ADA/Section 504 cases were the result of six specific incidences – *Bird*, *Sparkes*, *Dean-Hines*, *Tecza*, *Archut*, and the ASU ORC complaint. These six incidences and ten cases were heard between 2000 and 2014 in six different states. Of them, only two cases, *Bird* and *Dean-Hines*, resulted in wins for the plaintiffs on the federal disability discrimination charges. The *Bird* decision, however, was overturned on appeal. The *Dean-Hines* case remains as the only fully successfully litigated ADA/Section 504 case in the study abroad context.

The six Title IX cases were in and of themselves six separate incidences – *King*, *Mattingly*, *Phillips*, *Drisin*, *Harbi*, and *Doe*. These cases were heard between 2002 and 2018, and were heard across six different states. Only King was successful in her claims, and serves as the only successful Title IX case in the study abroad context. Of note, while three of the six Title IX cases, 50%, occurred in 2017 and 2018, only two – *Drisin* and *Harbi* – occurred during the expanded Obama-era definition of Title IX under the often-criticized 2011 and 2014 guidance, and neither case was successful in the courts.

Consideration of Extraterritoriality. For many of the cases, extraterritoriality was considered by either the defense or the court itself in the trials (Table 4.9). Sixty-percent

Table 4.9. Consideration of the presumption against extraterritoriality (PAE) in the case set.

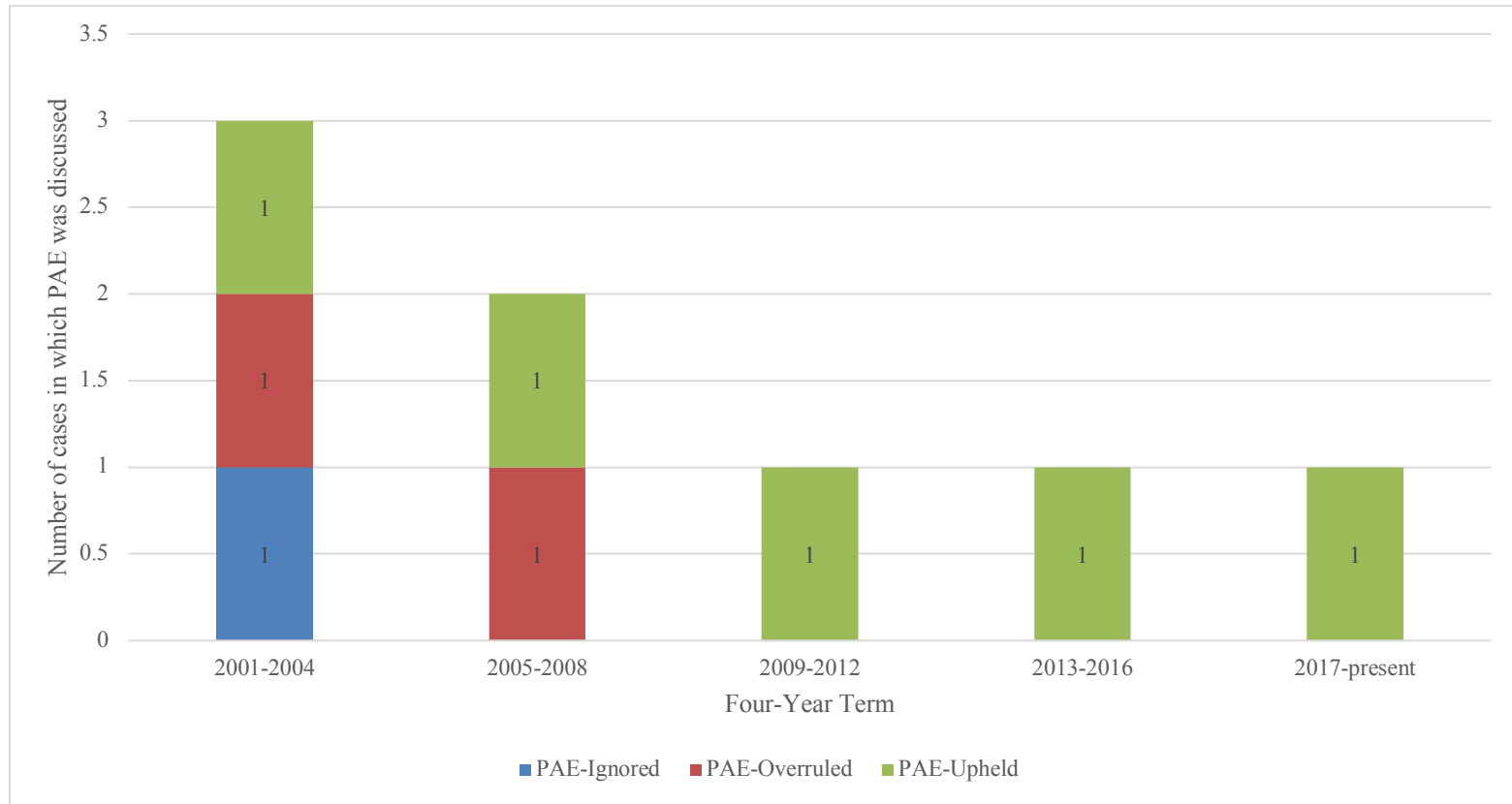


(n=9) of the incidences and 50% (n=11) of the cases mentioned extraterritoriality in some capacity. Of those eleven cases, 55% (n=6) were coded as having upheld the presumption against extraterritoriality, meaning that the court would not comment on the validity of the claims because it did not meet the language of the statute as defined by Congress. In 27% (n=3) of the cases, the presumption against extraterritoriality was mentioned but ignored, or it was discussed but not considered as part of the judgement.

In the remaining 18% (n=2), the presumption against extraterritoriality was both discussed and then overruled, meaning that the details of the case were sufficient to apply the statute extraterritorially. The only two cases in which this occurred were in the *King* 2002 Title IX case and *Dean-Hines* 2006 ADA case.

Over time, discussion of the presumption against extraterritoriality has decreased (Table 4.10). Since the turn of the century, extraterritoriality was mentioned in 40% (n=8) of cases, with the greatest amount of discussion occurring in the first two four-year terms. In the last decade, since 2009, it has been discussed only three times, and it has been upheld in each of those three cases, resulting in outcomes favorable for the defendant.

Table 4.10. Presumption against extraterritoriality (PAE) by term beginning with 2001-2004 term.



## CHAPTER 5

### DISCUSSION

This research is significant in that it bridges multiple areas of interest – legal, education, and internationalization. It sheds light on different ways in which we must consider our obligations to our students while abroad, but also highlights the many limitations that exist and how those are viewed by the courts. By collecting and analyzing these 15 incidences, multiple fields and disciplines can benefit from a better understanding of the law itself and how it may be applied proactively to an improved student experience and mitigate the risk and liability of institutions.

This chapter discusses the results of the systematic review of cases and the analysis of commonalities and trends. Specifically, discussion of three emergent trends in international education as gleaned from the study: 1) the prevalence of Title IX and ADA litigation, 2) the vulnerability of university administrators in the legal process, and 3) the extraterritorial application of federal law. Finally, this chapter will include a presentation of implications and recommendations for practice as well as opportunities for future continued research on the topic.

#### *Identification of Litigation Trends*

The findings summarized in Chapter 4 demonstrate the complexities of the issues facing the field of internationalization and the need for better clarity of the legal issues in an emergent field of education. The fact that these incidences exist reveals that

suboptimal outcomes have occurred in study abroad, and in learning about these incidences, we may be able to learn from faulty actions and assumptions in pursuit of higher participation and more diversity in education abroad. The following trends were identified and represent the greatest areas for needed attention.

Prevalence of Title IX and ADA litigation. Post-secondary OCR complaints are dominated by instances of alleged disability and sex-based discrimination accounting for nearly three-fourths (74%) of all complaints in 2015 (USDOE, 2015a). It is perhaps not surprising that these same types of complaints are also the mostly likely to be litigated in study abroad at nearly the same rate (72%), particularly when considering the level of attention that is given in the media to tracking such investigations. Title IX cases made up 28% of OCR investigations in 2015, or nearly 3,000 complaints. In higher education that year, the number of sexual violence complaints alone grew to 164, a figure that was five times higher than only three years prior (USDOE, 2015a). As of January 2017, there are nearly 300 open investigations into sexual violence in higher education (USDOE, 2018). The Chronicle of Higher Education has an entire projects page dedicated to the daily tracking and posting of sexual assault complaints and the subsequent outcomes of Title IX investigations on university campuses (Chronicle of Higher Education, 2018). These cases have proven challenging in the domestic context, and yet, even more so when occurring abroad.

The litigation of these cases in the international context offers little guidance to students, universities, and their general counsels. As noted in Chapter 4, only two cases – one ADA and one Title IX – were successfully litigated. Some have felt that the numerous outcomes in favor of the university defendants only serves to strengthen and

embolden their ability to engage in discriminatory practices (Hebel, 2001), particularly as it concerns disability discrimination where accommodations are typically sought proactively, rather than reported retroactively, as is often the case with Title IX. Media commentary following the ASU OCR complaint cited in Chapter 4 found the decision “damaging” to the progress that had been made toward a more fair campus environment (Hebel, 2001).

However, any complaint may prove newsworthy, and so universities have a vested interest in not only avoiding costly or lengthy trials, but to avoid unwanted attention in the court of public opinion. Particularly for schools that have found themselves in the news for previous OCR complaints, the desire to avoid additional complaints and/or negative press is legitimate. And yet, these are the two areas in which universities should continue to expect possible litigation in both domestic and abroad programming. Any planning, training, and process development done in advance of sending students abroad not only has the potential to prevent complaints but to safeguard the university in the event that a complaint is waged against them.

Vulnerability of university administrators in the legal process. As noted in Chapter 4, the vast majority of cases name a university administrator (77%) as the violator of their federally-protected rights. In ADA cases, claims were typically centered on the university administration’s inability or unwillingness to meet accommodation requests by the student; in Title IX, claims were most commonly focused on the lack of response to claims of sexual violence or harassment that occurred while abroad.

This vulnerability is perhaps the most preventable of possible threats to federal litigation. As noted previously, with appropriate planning and predefined processes for



managing discrimination cases, university administrators may better be able to avoid finding themselves named in a lawsuit. Only with an understanding of the significant role that they play in these complaints can administrators assume the appropriate level of responsibility for response. They are truly the front-line in protecting students from possible discrimination and in responding correctly and legally on their behalf and on behalf of the institution. Their reactions can and will be examined as part of any investigation that emerges, and the outcomes may very well depend on their level of training, professionalism, and their ability to make sound decisions.

Extraterritorial application of federal law. The legal theory of extraterritoriality in education in and of itself is challenged by this research. Many have asserted that the presumption is limited to those areas of American life that are specified in the statute, and in fact, this assumption has been tested time and again by the courts.

Most commonly discussed alongside the *Amaraco* case is the alteration of the statute by the legislation to amend any short-fallings in the original text that failed to extend the protections to employment abroad. Failure to amend the statute for any other purposes, namely education, has supported the argument that the statutes do not, in fact, apply extraterritorially, and that this is the explicit intent of Congress. However, this research uncovered two instances when the statute and its presumption against extraterritoriality was addressed by the courts and overcome, finding in favor of the plaintiff.

The presumption against extraterritoriality is not a blanket protection for institutions engaging in international education. It cannot be expected to be applied in all cases, and the circumstances of the incidence do matter. In *King*, where the university

had full programmatic control and sexual harassment was brazen and lacked appropriate university oversight and intervention, extraterritoriality was overruled because allowing such overt discrimination in an environment where the university could and should have better protected its female students would undoubtedly have led to future discrimination and impeded access to educational programs.

Other cases, such as the ASU OCR complaint, involved circumstances for which the universities had more of a hands-off approach to the programming. ASU's role in connecting the student to the opportunity, not administering it, was a consideration in their decision to not support the accommodation request while abroad (Hebel, 2001).

These two examples, as well as the data collected, lend to the nature of the legal theory and its hesitation to apply U.S. standards to foreign entities. Extraterritoriality at its core seeks to confine rulings to the American context and to not overstep the boundaries of U.S. control. This perceived boundary of control can be observed in these cases – the more control by a U.S. IHE, the greater the likelihood of application of the law despite the physical location of program delivery. *King* was indeed an extraordinary circumstance where the IHE failed its students. While it creates a bit of a legal abnormality, it was undeniably the suitable outcome based on the specific circumstances of that case. Few cases have been so positioned to challenge the longstanding legal theory.

Clarification by legislation or a higher court such as the Supreme Court, however, would be welcomed. Yet, there are no signs that such clarification is forthcoming. An opportunity for such a review of the law was denied in 2003. Following her unsuccessful appeal in 2002 for insufficient accommodations based on her disability, *Bird* filed a

petition for writ of certiorari, or a request for the Supreme Court to review a lower court's ruling. This writ was denied, leaving the matter unaddressed to date and continuing the ambiguity of the application of these statutes to abroad locations.

### *Sociopolitical and Cultural Considerations*

Presidential administrations and the make-up of Congress have the potential to design and influence legislation, while the courts interpret and apply the law to American life. Many presidents have specific causes that become known as the hallmark of their administrations. President George H.W. Bush is credited for shepherding the landmark disability discrimination legislation in 1990's ADA, and later the statutes amendment in the 2008 ADAA by President George W. Bush. President Barak Obama is more recently cited with the OCR's expansion of Title IX interpretation to include gender discrimination beyond sexual violence and harassment.

Expansion of such policy in education has opened up avenues for discrimination litigation and has contributed to the dramatic rise in complaints. In 1990, the OCR reported 3,384 complaints, but by 2015 that number had increased to well over 10,000, a more than 300% increase over the period that these statutes were in place (USDOE, 2015a). The steepest surge in complaints came during the Obama administration which saw a more than 50% increase in only five years between 2010 and 2015.

This complaint rate is consistent with the cases seen in study abroad as well. In the case of ADA claims, there is somewhat of a lag in the time that SWDs needed to matriculate into IHEs. By the turn of the century, however, both ADA and Title IX cases were being filed with far more frequency. Yet, by the time ADA cases in higher

education were being heard, a new Bush administration had taken effect with George W. Bush at the helm. While known later in his presidency for having enacted the ADAA, some early critics and disability activists commented that the ASU decision was evidence that the new administration had “completely forgotten what its mandate is or who it's supposed to serve” (Hebel, 2001).

Although these pieces of legislation appear to be accompanied by increased complaints and investigations, they did not result in greater success by plaintiffs who filed claims for violations while abroad. Defenses for university immunity and the presumption against extraterritoriality served as solid legal rationale in the vast majority of cases. As previously noted, only those most egregious cases were successful in spite of such defenses.

A new era of OCR leadership may result in fewer complaints under Secretary DeVos. In scaling back and even rescinding previous guidance on Title IX interpretation and enforcement, fewer claims may be filed and fewer still may be accepted for investigation. Only time will tell how lengthy of a term is served by DeVos or a similarly-affiliated successor, and how much change can be imparted in the DOE and OCR in that time. These changes, as previously noted, faced mixed results from a polarized American populous; many felt that the Obama-era interpretation was too far over-reaching and that the DOE and OCR were given too much power, while others fear that the recent changes are undoing much needed progress toward a more equitable educational environment.

However, these changes to Title IX interpretation and enforcement have occurred in conflict with popular gender movements such as #MeToo and Time's Up. These two

women's empowerment movements were highly publicized in 2017 and 2018, and brought to the forefront of U.S. popular culture the prevalence of sexual misconduct against women in daily life. Focusing on survivors of sexual assault and leveraging the power of global social media, #MeToo empowered women to come forward and discuss their experiences, many of which had been hidden for years (Langone, 2018). The Time's Up movement is often seen as the next step; with exposure of the extent of the problem through #MeToo, it was a declaration that tolerance for such behavior is unacceptable. This movement sought change in legislation, policy, and accountability for violators (Langone, 2018).

These two movements changed the conversation around sexual assault and encouraged victims to come forward in numbers not previously seen and with an empowerment not previously supported. This alteration in American culture is perhaps also a contributing factor in the understanding of what constitutes misconduct and subsequently the above-noted increase in reporting during and since the movements. Yet whether the impact of these movements is seen in policy, legislation, and the courtroom remains to be seen.

### *Implications for Study Abroad*

While the legal and education fields may find value in this line of research, the field of international education stands to gain the most insight from the exploration of these cases and their outcomes. Through this kind of research, the need for ongoing professionalization of the field becomes increasingly evident. IHEs must recognize the need for skill and training of professionals in international positions regardless of the size

of the institution or their scope of internationalization. By failing to recognize the important role that these professionals play in their organization and the added vulnerability of limited staffing, training, and funding of such professional departments, IHEs may be unknowingly exposing themselves to often preventable litigation.

Through the professional organizations dedicated to the advancement of international education such as the Forum and NAFSA, adequate materials and professional development resources exist to educate practitioners on the risks and resources related to federal legislation and discrimination abroad. By learning and considering such ADA language as “reasonable accommodation” and “undue burden”, for example, those same professionals can assess more critically the programs in which they are developing and/or involved. Access to these memberships and conferences may be viewed as costly from a budgetary perspective, but may help to insure an institution from even costlier legal expenses and media scrutiny.

These same organizations serve to also inform practitioners of changes in the statutes and their interpretations through their newsletters and updates. However, practitioners should also consider how domestic issues may influence interpretation while abroad. Staying abreast of higher education news through known and reputable outlets such as the Chronicle of Higher Education can help international education professionals stay attuned to important developments in leadership and in the current events that are shaping the broader landscape of American higher education.

Further, beyond the training needed for practitioners, is additional training and resources for students and faculty leadership. Depending on the length and type of the program, training needs may vary, but the development of institutional-level modules

helps students to understand their rights and responsibilities while abroad. Reiterating the expectations for acceptable conduct while abroad can also reinforce the role of the university in enforcing standards regardless of the student's whereabouts. It also reinforces the intent of the endeavor as educational at its core and can serve to remind students of the goals and reasons for their participation.

Similarly, faculty leading programs must engage in regular and robust training opportunities in an effort to help them become aware of the responsibility that they have undertaken, the process to follow should any issues arise during a program, and the university expectations for their behavior and response. IHEs should note that those programs with the greatest level of control of the study abroad programming, such as faculty-led programs, are those most susceptible to successful litigation. Therefore, these programs that are now the most popular and subscribed from study abroad program portfolios are those that are most vulnerable. The intentional selection and training of the faculty leaders of such programs cannot be understated. For many faculty leaders, their involvement in programs abroad is a small piece of their teaching and research responsibilities, and in many cases, is seen as a perk of their appointment; however, articulation of their important role in successful outcomes is absolutely necessary.

Finally, the need for coordination between study abroad offices, offices of disability services, and offices of general counsel is highly important in the facilitation of positive student outcomes. By working together, all institutional stakeholders can better understand the opportunities and limitations of international education. They can work together to identify appropriate locations for study abroad on a case-by-case basis that addresses a student's specific needs, they can coordinate with any host institution or

study abroad advisor in advance, and perhaps most importantly, they can work with the student to help manage expectations for what may or may not be possible. By identifying all possible solutions and narrowing the gap between accommodation expectation and delivery, students have an opportunity to be partners in the process of designing the experience that is best for them. In working with the office of general counsel, collaboration on risk management can occur both before, during, and after any incidences abroad. Not only is it important for international education professionals to understand the scope and limitations of their IHE's legal team, the general counsel can also better understand the programming that is in place and advise on any areas of vulnerability.

### *Limitations*

While this study examines all of the available cases and OCR complaints related to federal law in study abroad, limitations to the study exist, particularly in the area of data collection, data availability, and the narrow scope of the project. The lengthy history and sheer volume of American case law is so voluminous that even with the use of sophisticated databases and processes for triangulation, it is certainly possible that some cases may have been missed or overlooked. Too, as is true in qualitative research with the investigator as the instrument, it is possible that a case may have been erroneously and inadvertently eliminated from the final data set.

Case and complaint availability are also a limitation in that not all information for known incidences is accessible. State-level or jury trial information requires access to resources or the ability visit in-person courthouses where hard-copy filings are maintained. Older cases or investigations may not have been retained or may not be filed



in such a way that makes them available. Two complaints in particular appear in the secondary sources, St. Louis University (MO) Region VII; Complaint No. 07-90-2032, 1 NDLR P 259 (1990) and College of St. Scholastica (MN) Region V; Complaint No. 05-92-2095, 3 NDLR P 196 (1992). Each case centers around accommodations while studying abroad, yet one finds in favor of the university (St. Louis University) and the other with the complainant (College of St. Scholastica) (Whitlock & Charney, 2012). While other OCR complaints that meet the criteria exist, as discovered from the OCR FOIA request for these two complaints as well as any others of similar circumstances, retention of records may be limited by internal retention policy, and even those that may fall within that timeline require the cooperation of the OCR to make available the details. This may result in the discovery that records are no longer available, are incomplete or considered unofficial, or may not be returned in a timely enough fashion to be considered. Even with the availability of online resources, complaint discovery can be limited by filing structures and keyword searches, increasing the likelihood of missed or omitted complaints.

Another challenge to data collection is the limited number of cases that make it to trial. For a variety of reasons, many students chose to never file their complaints. Whether this is due to shame, embarrassment, or simply not wanting to draw attention to oneself, the decision to withhold a complaint limits the knowledge of the issues. Additionally, some students may choose to submit a complaint that is then settled by the university, never making it into official record. This small data set also limits, and even eliminates, the possible use of more advanced statistical analysis.

IHEs are increasingly motivated to reduce the fallout from the exposure of a federal violation. Particularly if they are considered a high-profile institution, have faced other recent indiscretions, or if they recognize their misstep, they may be inclined to bury the case, even at a high cost. Such cases have been reported in the media – an Earlham College student’s claim that she was raped by her host father in Japan in 1996 was settled out of court approximately a year after being filed in the U.S. District Court of Connecticut (Reisberg, 1998); the University of Connecticut settled a Title IX complaint for \$25,000 in 2013 (Thomas, 2013); and as recently as November 2018, the University of Minnesota settled a student’s rape claim from a study abroad program in Cuba for \$137,000 (U.S. News & World Report, 2018), to name a few.

Finally, while the scope of this study was intentionally specific, it also served to narrow the cases that meet the search criteria. By limiting the cases to only federal cases within the scope of higher education, it removes possible cases that were filed at the state level only or that may be considered tort litigation. Such cases may have resulted in more successful outcomes for plaintiffs, but because they did not result in federal cases, they do not contribute to this study’s assessment of institutional risk.

### *Recommendations for Future Research*

This emerging and rapidly growing area of education will continue to present new and interesting challenges for IHEs, and the possible areas of further research are extensive. Most relevant may be some of the topics previously mentioned in the consideration of limitations – expansion of criteria to include other study abroad claims such as state-level or tort cases, or expansion of criteria to include K-12 institutions to

compare the risk assumed by those programs that include minors. Implications for university branch campuses could also be explored in detail as well.

Additionally, this study was limited to complaints brought against IHEs, and does not address nor include the role of third-party providers, or private companies, facilitating education abroad experiences. These organizations have uniquely positioned themselves alongside IHEs, and have organized experiences for students that are often quite independent from the university operations. One might examine the sharing and layering of responsibility and how that may either impact the incidences of complaints through additional personnel or have an impact on the liability of the IHE as it shifts responsibility to the third-party provider. These relationships pose distinctive and interesting questions for future research.

### *Conclusions*

The purpose of this research was to shed light on and increase the understanding of the extraterritorial application of federal law in study abroad. This systematic review of cases and complaints, guided by the research questions, identified the applicable case law as well as trends and commonalities in litigation outcomes.

As universities become more practiced at federal lawsuits, both founded and unfounded, each of the cases contribute to the precedents and interpretations of the law. The likelihood that lawsuits will continue in the domestic and abroad context is high, but perhaps these can lead to closer examination of the policies themselves and whether their language has confined them into outdated application. Education that spans the territorial boundaries of our country is growing through increased participation in study abroad and

even through technology. What may have once been considered as the future of education – globalized and borderless – is now the reality for hundreds of thousands of U.S. students annually. Without clarity on the application of the law, confusion and inefficiencies in complaints and lawsuits will continue.

In the exploration of this topic, it is difficult to not wonder how many cases have gone unreported. The fact that 22 cases have been heard already demonstrates that there is room for improvement in how IHEs are serving their students and faculty abroad. If policy remains unaltered, perhaps practice can be. I am comforted by the growth that I have observed in the field of international education over my tenure as a practitioner, and I am confident that change will continue to be driven by the numerous true professionals that advocate at all levels, whether it be in their own offices or on the steps of Congress, for improvements in practice and to make meaningful and life-changing educational opportunities, such as study abroad, available for more, diverse student populations.

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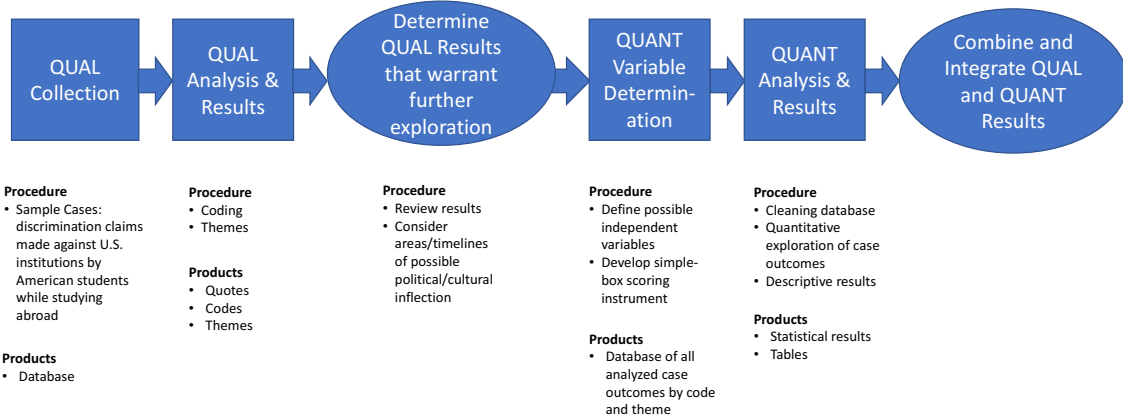
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# APPENDIX A

## RESEARCH DESIGN MAP



## APPENDIX B

### BOX SCORING METHOD

Title VI	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Plaintiff												0
Defendant								1				1
Title IX	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Plaintiff							1	0	0	0	0	1
Defendant							0	2	0	0	3	5
ADA/504	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Plaintiff						1		1				2
Defendant							3	1	2	2		8
Clery	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Plaintiff												0
Defendant												0
FERPA	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Plaintiff												0
Defendant												0
HIPAA	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Plaintiff												0
Defendant												0
Other*	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Plaintiff											1	1
Defendant	2								1	1		4
	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Total - Plaintiff	0	0	0	0	0	1	1	1	0	0	1	4
Total - Defendants	2	0	0	0	0	0	3	4	3	3	3	18
	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Total	2	0	0	0	0	1	4	5	3	3	4	22
*title VII, 14th Amendment, Fair Housing Act, title VI												
	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
StudyAbroad-I	2					1	3	4	1	1	3	15
StudyAbroad-II							1	1	2	2		6
Total	2	0	0	0	0	1	4	5	3	3	3	21
	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
Immunity Defense	2							3			1	6
	1977-1980	1981-1984	1985-1988	1989-1992	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016	2017-present	Total
PAE-Ignore	2						1					3
PAE-Overruled							1	1				2
PAE-Upheld							1	1	1	1	1	5
Total	2	0	0	0	0	0	3	2	1	1	1	10



## APPENDIX C

### CASE SEARCH RESULTS

Case Name	Date Decided	Reason for Exclusion
King v. Bd. of Control, 221 F. Supp. 2d 783	July 17, 2002	n/a
Harbi v. Mass. Inst. of Tech., 2017 U.S. Dist. LEXIS 141890	September 1, 2017	n/a
Phillips v. St. George's Univ., 2007 U.S. Dist. LEXIS 84674	November 15, 2007	n/a
Archut v. Ross Univ. Sch. of Veterinary Med., 2012 U.S. Dist. LEXIS 164960	October 31, 2014	n/a
Crider v. Univ. of Tenn., 784 F. Supp. 2d 882	July 23, 2012	employment and religious accommodation discrimination; alleged discrimination did not occur abroad
Brunarski v. Miami Univ., 2018 U.S. Dist. LEXIS 13054	March 28, 2018	employment discrimination case; alleged discrimination did not occur abroad
Drisin v. Fla. Int'l Univ. Bd. of Trs., 2017 U.S. Dist. LEXIS 100247	January 10, 2018	n/a
Heatherly v. Univ. of Ala. Bd. of Trs., 2018 U.S. Dist. LEXIS 118869	July 17, 2018	employment discrimination case; alleged discrimination did not occur abroad
Selman v. Harvard Medical School, 494 F. Supp. 603	October 7, 1980	n/a
Hahn v. Vermont Law School, 698 F.2d 48	January 21, 1983	domestic admissions; alleged discrimination did not occur abroad
Tobin v. Univ. of Me. Sys., 59 F. Supp. 2d 87	August 13, 1999	domestic admissions case; alleged discrimination did not occur abroad
Thackurdeen v. Duke Univ., 130 F. Supp. 3d 792	March 23, 2018	due process case; alleged discrimination did not occur abroad
Hamilton Chapter of Alpha Delta Phi v. Hamilton College, 1996 U.S. Dist. LEXIS 4695	June 29, 2000	domestic campus housing claim; alleged discrimination did not occur abroad

United States v. Brown Univ., 5 F.3d 658	September 17, 1993	domestic financial aid case; alleged discrimination did not occur abroad
Wake Forest Univ. Health Sciences v. Regents of the Univ. of Cal., 2013 U.S. Dist. LEXIS 101196	August 22, 2013	case is between two universities and involves domestic contract law
United Carolina Bank v. Board of Regents, 665 F.2d 553	January 11, 1982	domestic faculty compensation case; alleged discrimination did not occur abroad
Washington v. Jackson State Univ., 2008 U.S. Dist. LEXIS 53400	July 14, 2008	domestic admissions case; alleged discrimination did not occur abroad
Mihan v. Regents of the Univ. of Cal., 2016 U.S. Dist. LEXIS 165624	November 18, 2016	domestic disability claim regarding proper accommodation at medical procedure
Vaughn v. Regents of University of Cal., 504 F. Supp. 1349	January 16, 1981	domestic employment discrimination case; alleged discrimination did not occur abroad
Lemon v. Labette Cmty. College, 6 F. Supp. 3d 1246	March 11, 2014	domestic property and admissions case; does not occur abroad
Phelps v. Washburn University of Topeka, 632 F. Supp. 455	February 10, 1986	domestic admissions case; alleged discrimination did not occur abroad
Atchison v. Bd. of Regents of the Univ. Sys. of Ga., 2014 U.S. Dist. LEXIS 189249	June 23, 2016	domestic admissions claim; alleged discrimination did not occur abroad
Mason v. State ex rel. Bd. of Regents, 2001 OK CIV APP 33	October 1, 2001	domestic admissions case; alleged discrimination did not occur abroad
Roebuck v. Drexel University, 852 F.2d 715	July 26, 1988	higher ed employment discrimination case; alleged discrimination did not occur abroad
Nungesser v. Columbia Univ., 244 F. Supp. 3d 345	March 24, 2017	Title IX and due process case; alleged discrimination did not occur abroad
Bailey v. New York Law Sch., 2017 U.S. Dist. LEXIS 212102	December 27, 2017	domestic Title IX case; alleged discrimination did not occur abroad
Russell v. New York Univ., 2017 U.S. Dist. LEXIS 111209	June 25, 2018	domestic employment claim; alleged discrimination did not occur abroad
Painter v. Doe, 2016 U.S. Dist. LEXIS 119959	September 6, 2016	while involving college-aged persons, not against an institution of higher ed
Purcell v. Tulane Univ. of La., 2016 U.S. Dist. LEXIS 155967	May 25, 2017	ADA case (among other claims); alleged discrimination did not occur abroad
Kossow v. St. Thomas Univ., Inc., 42 F. Supp. 2d 1312	March 1, 2001	age discrimination case; alleged discrimination did not occur abroad
Portz v. St. Cloud State Univ., 196 F. Supp. 3d 963	July 25, 2018	Title IX case; alleged discrimination did not occur abroad

Godfrey v. Princeton Theological Seminary, 196 N.J. 178	August 4, 2008	sexual harassment case with a brief interaction abroad; as a whole, alleged discrimination did not occur abroad
Whitaker v. N.Y. Univ., 2012 U.S. Dist. LEXIS 87619	October 6, 2014	n/a
Doe v. Ohio State Univ., 239 F. Supp. 3d 1048	March 19, 2018	Title IX case; alleged discrimination did not occur abroad
Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799	September 13, 2017	Title IX case; alleged discrimination did not occur abroad
Somoza v. Univ. of Denver, 2006 U.S. Dist. LEXIS 62394	January 18, 2008	employment case; alleged discrimination did not occur abroad
Mattingly v. Univ. of Louisville, 2006 U.S. Dist. LEXIS 53259	July 28, 2006	n/a
Peavey v. Univ. of Louisville, 834 F. Supp. 2d 620	July 13, 2011	academic progression claim; alleged discrimination did not occur abroad
Doe v. Blackburn College, 2012 U.S. Dist. LEXIS 24797	February 24, 2012	title IX claim; alleged discrimination did not occur abroad
Levi v. Regents of University of California, 15 Cal. App. 5th 892	September 26, 2017	employment case; alleged discrimination did not occur abroad
Doe v. Washington & Lee Univ., 2015 U.S. Dist. LEXIS 102426	August 5, 2015	Title IX case; alleged discrimination did not occur abroad
Breyer v. Pac. Univ., 2017 U.S. Dist. LEXIS 126081	August 9, 2017	ADA case; alleged discrimination did not occur abroad
Slippery Rock Univ. of Pa. v. Ass'n of Pa. State College & Univ. Faculty, 71 A.3d 353	December 23, 2013	n/a
East Stroudsburg Univ. of Pa. v. Ass'n of Pa. State College & Univ. Faculties, 125 A.3d 870	October 19, 2015	employment and tenure case; alleged discrimination did not occur abroad
Pa. State Sys. of Higher Educ. v. Ass'n of Pa. State College & Univ. Faculties, 2015 Pa. Commw. Unpub. LEXIS 545	September 18, 2015	collective bargaining case; alleged discrimination did not occur abroad
Filson v. Tulane Univ., 2009 U.S. Dist. LEXIS 130489	October 4, 2010	age and employment case; alleged discrimination did not occur abroad
Joritz v. Edinboro Univ. of Pennsylvania, 2008 U.S. Dist. LEXIS 48365	June 23, 2008	Title IX case; alleged discrimination did not occur abroad

Elmore v. Bellarmine Univ., 2018 U.S. Dist. LEXIS 52564	March 28, 2018	harassment and retaliation case; alleged discrimination did not occur abroad
Hunt v. El Camino Cmty. College, 2013 Cal. App. Unpub. LEXIS 2060	March 21, 2013	employment case; alleged discrimination did not occur abroad
Morris v. Yale Univ. Sch. of Med., 2006 U.S. Dist. LEXIS 15692	February 14, 2007	expulsion case; alleged discrimination did not occur abroad
Phelps v. President & Trustees of Colby College, 1990 Me. Super. LEXIS 176	August 23, 1990	fraternity discipline case; alleged discrimination did not occur abroad
Doe v. George Washington Univ., 305 F. Supp. 3d 126	April 25, 2018	Title IX and due process case; alleged discrimination did not occur abroad
Doherty v. Emerson College, 2017 U.S. Dist. LEXIS 161602	September 29, 2017	Title IX case; alleged discrimination did not occur abroad
Tecza v. Univ. of San Francisco, 2010 U.S. Dist. LEXIS 43057	June 25, 2013	n/a
Sparkes v. Norwich Univ., 2005 Vt. Super. LEXIS 124	June 7, 2005	n/a
Regents of the Univ. of Cal. v. United States, Dept. of Homeland Sec., 279 F. Supp. 3d 1011	January 9, 2018	DACA case; alleged discrimination did not occur abroad
Faculty Senate of Fla. Int'l Univ. v. Roberts, 574 F. Supp. 2d 1331	October 28, 2010	state funds usage on travel case; alleged discrimination did not occur abroad
Ortiz-Bou v. Universidad Autonoma de Guadalajara, 382 F. Supp. 2d 293	July 12, 2005	n/a
Fisher v. Univ. of Tex., 631 F.3d 213	June 17, 2011	domestic admissions case; alleged discrimination did not occur abroad
Chang v. University of Rhode Island, 606 F. Supp. 1161	September 3, 1985	domestic employment discrimination case; alleged discrimination did not occur abroad
Guckenberger v. Boston Univ., 974 F. Supp. 106	May 29, 1998	learning disabled and foreign language course case; alleged discrimination did not occur abroad
Broomer v. Loch Haven Univ., 2012 U.S. Dist. LEXIS 42545	March 28, 2012	Title III case; alleged discrimination did not occur abroad
Gay & Lesbian Law Students Ass'n v. Board of Trustees, 236 Conn. 453	March 26, 1996	sexual orientation discrimination case; alleged discrimination did not occur abroad
Johnson v. Bd. of Regents, 263 F.3d 1234	August 27, 2001	admissions discrimination case; alleged discrimination did not occur abroad

Klouta v. Southwestern Baptist Theol. Seminary, 543 F. Supp. 2d 594	March 19, 2008	employment discrimination; alleged discrimination did not occur abroad
Spencer v. Va. State Univ., 2018 U.S. Dist. LEXIS 15773	January 30, 2018	employment and compensation case; alleged discrimination did not occur abroad
Regents of University of California v. Superior Court, 225 Cal. App. 3d 972	March 28, 1991	admissions case; alleged discrimination did not occur abroad
Allan v. University of Washington, 140 Wn.2d 323	April 20, 2000	employment case; alleged discrimination did not occur abroad
Pouyeh v. UAB Dep't of Ophthalmology, 625 Fed. Appx. 495	February 29, 2016	admissions case; alleged discrimination did not occur abroad
Papish v. Board of Curators, etc., 331 F. Supp. 1321	March 19, 1973	expulsion case; alleged discrimination did not occur abroad
Smith v. Bd. of Supervisors for the Univ. of La. Sys., 2015 U.S. Dist. LEXIS 166829	December 11, 2015	employment dispute where faculty was dismissed for taking an abroad assignment, not for conduct while abroad
Roth v. Board of Regents, 310 F. Supp. 972	June 29, 1972	employment case; alleged discrimination did not occur abroad
Janati v. Univ. of Nev., 2017 U.S. Dist. LEXIS 46497	March 28, 2017	admissions and expulsion case; alleged discrimination did not occur abroad
Thomas v. Salem State Univ., 2013 U.S. Dist. LEXIS 98448	July 2, 2013	expulsion case; alleged discrimination did not occur abroad
Catlin v. Trs. of Trinity College, 22 Abb. N. Cas. 28	June 1888	taxation case; alleged discrimination did not occur abroad
Ha v. Northwestern Univ., 2014 U.S. Dist. LEXIS 160046	November 13, 2014	Title IX retaliation case; alleged discrimination did not occur abroad
Doe v. Middlebury Coll., 2015 U.S. Dist. LEXIS 124540	September 16, 2015	injunction against expulsion for post-assault accusation/investigation that occurs on a US campus
Doe v. Pa. State Univ., 276 F. Supp. 3d 300, 2017 U.S. Dist. LEXIS 132186	January 8, 2018	Title IX case; alleged discrimination did not occur abroad
Doe v. Univ. of Mich., 2018 U.S. Dist. LEXIS 112438	July 6, 2018	Title IX and expulsion case; alleged discrimination did not occur abroad
Nokes v. Miami Univ., 2017 U.S. Dist. LEXIS 136880	August 25, 2017	disciplinary case; alleged discrimination did not occur abroad
Doe v. Univ. of Notre Dame, 2017 U.S. Dist. LEXIS 69645	December 27, 2017	Title IX and expulsion case; alleged discrimination did not occur abroad
Matter of Hall v Hofstra Univ., 59 Misc. 3d 1214(A)	April 3, 2018	expulsion case; alleged discrimination did not occur abroad

Doe v. Coll. of Wooster, 2018 U.S. Dist. LEXIS 23411	February 13, 2018	Title IX case; alleged discrimination did not occur abroad
Ansari v. New York Univ., 179 F.R.D. 112	April 20, 1998	admissions case; alleged discrimination did not occur abroad
Palmer College of Chiropractic v. Davenport Civ. Rights Comm'n, 850 N.W.2d 326	June 27, 2014	disability case; alleged discrimination did not occur abroad
Dean-Hines v. Ross Univ. Sch. of Veterinary Med., 2006 U.S. Dist. LEXIS 101375	August 9, 2006	n/a
Bird v. Lewis & Clark College, 303 F.3d 1015	March 24, 2003	n/a
Redding v. Lane Cmty. College, 2012 U.S. Dist. LEXIS 165397	November 19, 2012	disability case; alleged discrimination did not occur abroad
Yount v. Regent Univ., 2008 U.S. Dist. LEXIS 66926	April 13, 2009	disability case; alleged discrimination did not occur abroad
Cherry v. City College of San Francisco, 2005 U.S. Dist. LEXIS 47978	January 4, 2011	disability and facilities case; alleged discrimination did not occur abroad
Kingsepp v. Wesleyan University, 763 F. Supp. 22	September 3, 1992	antitrust and tuition fixing case; alleged discrimination did not occur abroad
Eze v. City Univ. of N.Y., 2014 U.S. Dist. LEXIS 45802	March 31, 2014	unlawful imprisonment case; alleged discrimination did not occur abroad
Fosco v. City Univ. of New York, 2012 U.S. Dist. LEXIS 3246	February 22, 2013	employment discrimination case; alleged discrimination did not occur abroad
Siddiqi v. Regents of the Univ. of Cal., 2001 U.S. Dist. LEXIS 26611	May 14, 2002	student accommodations claim; alleged discrimination did not occur abroad
Tuason v. Regents of the Univ. of California, 2007 Cal. App. Unpub. LEXIS 3135	April 19, 2007	employment discrimination claims; alleged discrimination did not occur abroad
Bloss v. University of Minn. Bd. of Regents, 590 N.W.2d 661	April 6, 1999	Student raped while abroad sued the university for the assault and negligence; however, since original case cannot be found, exact claims are unknown, although they do align
Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49 (1st Cir. 2000)	February 14, 2002	sexual harassment and employment discrimination case; alleged discrimination occurred in a US Commonwealth
Oden v. N. Marianas Coll., 440 F.3d 1085 (9th Cir. 2006)	October 2, 2006	Title IX case; alleged discrimination occurred in a US Commonwealth

Alva v. Tex. A&M Int'l Univ., 2018 U.S. Dist. LEXIS 186609	October 31, 2018	Title IX retaliation case; alleged discrimination did not occur abroad
Doe v. Baylor Univ., 2018 U.S. Dist. LEXIS 169710	September 29, 2018	n/a
<b>OCR Complaints</b>	<b>Date Decided</b>	<b>Reason for Exclusion</b>
Arizona State University (AZ), Complaint No. 08-01-2047, 22 NDLR P 239 (Dep't of Educ. Dec. 3, 2001)	Dec. 3, 2001	n/a
St. Louis University (MO), Complaint No. 07-90-2032, 1 NDLR P 259 (Dep't of Educ. Dec. 12, 1990)	Dec. 12, 1990	complaint materials requested as part of a FOIA not yet received
College of St. Scholastica (MN), Complaint No. 05-92-2095, 3 NDLR P 196 (Dep't of Educ. Sep. 15, 1992)	Sep. 15, 1992	complaint materials requested as part of a FOIA not yet received
Vatterott College, OCR Complaint No. 07-10-2034 (Aug. 26, 2010)	Aug. 26, 2010	complaint materials requested as part of a FOIA not yet received
Univ. of Conn., OCR Complaint No. 01-14-2005		complaint materials requested as part of a FOIA not yet received
Occidental College, OCR Complaint No. 09-13-2264 (Jun. 9, 2016)	Jun. 9, 2016	Title IX complaint that included many incidences, one of which was abroad, but not detailed specifically
Husson College (OCR, January 5, 2005)	Jan. 5, 2005	alleged admissions discrimination did not occur abroad; student withdrew her application based on stated concerns of the administration
Goshen College, OCR Complaint No. #05-17-2066 (Dec. 21, 2017)	Dec. 21, 2017	alleged discrimination did not occur abroad
Princeton Univ. OCR Complaint # 02-08-6002		alleged discrimination did not occur abroad
Alliant International University #09-14-2380 (February 11, 2015)		alleged discrimination did not occur abroad
California State University-Fresno #09-16-2066		alleged discrimination did not occur abroad
Langston University #07142042		alleged discrimination did not occur abroad
University of Virginia #11-03-2072		alleged discrimination did not occur abroad
Santa Clara University #09-17-2584		alleged discrimination did not occur abroad

North Carolina State University #11-04-2009		alleged discrimination did not occur abroad
University of Wisconsin – La Crosse #05-15-2091		alleged discrimination did not occur abroad
Southern University at Shreveport Louisiana #06-16-2065		alleged discrimination did not occur abroad
Hampton University #11-16-2247		alleged discrimination did not occur abroad
Tennessee State University #04-13-2449		alleged discrimination did not occur abroad
State University of New York at Buffalo #02-17-2422		alleged discrimination did not occur abroad
West Virginia State University #03172475		alleged discrimination did not occur abroad
University of Louisiana at Lafayette #06142345		alleged discrimination did not occur abroad
Michigan State University #15-11-2098		alleged discrimination did not occur abroad
University of Phoenix #08-15-2040		alleged discrimination did not occur abroad
University of North Carolina at Greensboro #11-14-2299		alleged discrimination did not occur abroad
Montclair State University #02-13-2429		alleged discrimination did not occur abroad
Southeast Missouri State University #07162079		alleged discrimination did not occur abroad
Tuskegee University #04-16-2082		alleged discrimination did not occur abroad
University of Central Missouri #07162005		alleged discrimination did not occur abroad
Tarleton State University #06142083		alleged discrimination did not occur abroad
University of North Carolina, Chapel Hill, NC #11-07-2016		alleged discrimination did not occur abroad
Montana Missoula Resolution Agreement #10126001		alleged discrimination did not occur abroad
Niagara University #02-16-2332		alleged discrimination did not occur abroad
University of Tampa #04-14-2499		alleged discrimination did not occur abroad
University of Virginia #11-11-6001		alleged discrimination did not occur abroad
Youngstown State University #15-13-6002		alleged discrimination did not occur abroad
Westminster College #07102031		alleged discrimination did not occur abroad



Southeastern Louisiana University #06-10-6001		alleged discrimination did not occur abroad
Montana Tech of the University of Montana #10086001		alleged discrimination did not occur abroad
Pittsburg State University #07-10-6001		alleged discrimination did not occur abroad
Lake Superior State University #15-11-2018		alleged discrimination did not occur abroad
Merrimack College #01-10-6001		alleged discrimination did not occur abroad
Elmira College #02-14-2316		alleged discrimination did not occur abroad

Cases included in the data set are listed in green. Those excluded are listed in red.

APPENDIX D

FINAL DATA SET OF CASES

Incidence #	Case #	Case Name	Citation	Date Decided	State
1	1	Selman v. Harvard Medical School	494 F. Supp. 603	May 20, 1980	NY
	2	Appeal: Selman v. Harvard Medical School	636 F.2d 1204	October 7, 1980	NY
2	3	Bird v. Lewis & Clark College	104 F. Supp. 2d 1271	May 24, 2000	OR
	4	Bird v. Lewis & Clark College	jury trial, described at length in appeal		OR
	5	Appeal: Bird v. Lewis & Clark College	303 F.3d 1015	September 3, 2002	OR
		Petition for writ of certiorari: Bird v. Lewis & Clark College	2003 U.S. LEXIS 2217	March 24, 2003	SCU S
3	6	King v. Bd. of Control	221 F. Supp. 2d 783	July 17, 2002	MI
4	7	Sparkes v. Norwich Univ.	2005 Vt. Super. LEXIS 124	June 7, 2005	VT
5	8	Ortiz-Bou v. Universidad Autonoma de Guadalajara	382 F. Supp. 2d 293	July 12, 2005	PR
6	9	Mattingly v. Univ. of Louisville	2006 U.S. Dist. LEXIS 53259	July 28, 2006	KY
7	10	Dean-Hines v. Ross Univ. Sch. of Veterinary Med.	2006 U.S. Dist. LEXIS 101375	August 9, 2006	NJ

8	11	Phillips v. St. George's Univ.	2007 U.S. Dist. LEXIS 84674	November 15, 2007	NY
9		Tecza v. Univ. of San Francisco	Superior Court of California: CGC094886 62	May 26, 2009	CA
		First Amended Complaint: Tecza v. Univ. of San Francisco	Superior Court of California: CGC094886 62	July 21, 2009	CA
	12	Second Amended Complaint: Tecza v. Univ. of San Francisco (original order December 30, 2009)	2010 U.S. Dist. LEXIS 43057	May 3, 2010	CA
	13	Appeal: Tecza v. Univ. of San Francisco	532 Fed. Appx. 667	June 25, 2013	CA
		Tecza v. Univ. of San Francisco	United States District Court, N.D. California, San Francisco; Case No. 3:09-cv-03808-RS.	January 28, 2014	CA
10	14	Amended Complaint: Whitaker v. N.Y. Univ.	New York Southern District Court; Case Number: 1:2011cv04394	July 19, 2011	NY
		Motion for Relief: Whitaker v. N.Y. Univ.	2012 U.S. Dist. LEXIS 87619	June 20, 2012	NY
	15	Appeal: Whitaker v. N.Y. Univ.	531 Fed. Appx. 89, 2013 U.S. App. LEXIS 17686	August 22, 2013	NY

		Appeal: Whitaker v. N.Y. Univ.	543 Fed. Appx. 113, 2013 U.S. App. LEXIS 23835	November 23, 2013	NY
		Writ for certiorari: Whitaker v. N.Y. Univ.	2014 U.S. LEXIS 4978	October 6, 2014	NY
11	16	Archut v. Ross Univ. Sch. of Veterinary Med.	2012 U.S. Dist. LEXIS 164960	November 19, 2012	NJ
		Archut v. Ross Univ. Sch. of Veterinary Med.	2013 U.S. Dist. LEXIS 156024	October 31, 2013	NJ
	17	Appeal: Archut v. Ross Univ. Sch. of Veterinary Med.	580 Fed. Appx. 90	October 31, 2014	NJ
12	18	Drisin v. Fla. Int'l Univ. Bd. of Trs.	2017 U.S. Dist. LEXIS 100247	June 27, 2017	FL
	19	Drisin v. Fla. Int'l Univ. Bd. of Trs.	2018 U.S. Dist. LEXIS 5286	January 10, 2018	FL
13	20	Harbi v. Mass. Inst. of Tech.	2017 U.S. Dist. LEXIS 141890	September 1, 2017	MA
		Harbi v. Mass. Inst. of Tech.	U.S. District Court of Massachusetts; Case: 1:16-cv-12394-FDS	October 8, 2018	MA
14	21	Doe v. Baylor Univ.	2018 U.S. Dist. LEXIS 169710	September 29, 2018	TX

#		OCR Complaints	Citation	Date Decided	State
1	22	Arizona State University (AZ)	Region VII; Complaint No. 08-01-2047, 22 NDLR P 239	Dec. 3, 2001	AZ

Full case and all known related cases are listed above. Those in green met the criteria for inclusion in the dataset, resulting in the 15 incidences and 22 specific cases.

# APPENDIX E

## QUALITATIVE CODING KEY

A PRIORI CODING Initial Coding from the Research Questions		Codes from the Literature		Final Coding Set	
Code	Description	Codes	Description	Code	Description
Outcomes → Rulings	How was the trial decided	RIFA	"ruling in favor of the accuser"	RIFA	"ruling in favor of the accuser"
		RIFIHE	"ruling in favor of the IHE"	RIFIHE	"ruling in favor of the IHE"
		Appeal - Upheld	the case is an appeal of a previous ruling in which the outcome is upheld	Appeal-U	the case is an appeal of a previous ruling in which the outcome is upheld
		Appeal - Partial	the case is an appeal of a previous ruling that was only partially upheld	Appeal-P	the case is an appeal of a previous ruling that was only partially upheld
		Appeal - Over- turned	the case is an appeal of a previous ruling in which the outcome is overturned	Appeal-O	the case is an appeal of a previous ruling in which the outcome is overturned

Discrimination → Violation	What kind of violation is alleged	Title VI	race, color, national origin discrimination	Title VI	race, color, national origin discriminat ion
		Title XI	sex discrimination	Title IX	sex discriminat ion
		ADA/ Section 504	disability discrimination	ADA/Sect 504	disability discriminat ion
		Clery	safety disclosure	Clery	safety disclosure
		FERPA	educational privacy	FERPA	educational privacy
		HIPAA	health privacy	HIPAA	health privacy
Participation	What were the roles of those involved	Student - Accuser	enrollee in a program is the one filing the claim	Student-A	enrollee in a program is the one filing the claim
		Faculty/ staff - Accuser	instructor or program leadership is the one filing the claim	Faculty/staff- A	instructor or program leadership is the one filing the claim
		Student - Violator	enrollee in a program is the one being accused of the violation	Student-V	enrollee in a program is the one being accused of the violation
		Faculty/ staff - Violator	instructor or on- site program leadership is the one being accused of the violation	Faculty/staff- V	instructor or program leadership is the one being accused of the violation
		Univer- sity admin- istrator - Violator	university administrator is the one being accused of the violation	UnivAdmin- V	university administrat or is the one being accused of the violation

		OAV	outside actor is being accused of the violation	OAV	outside actor is being accused of the violation
International Experience	What kind of experience was it	Study Abroad I	coursework is delivered by home institution; IHE had control of all program aspects	Study Abroad I	coursework is delivered by home institution; IHE had control of all program aspects
		Study Abroad II	coursework is delivered by a host institution, but sanctioned by home institution; home institution had limited control	Study Abroad II	coursework is delivered by a host institution, but sanctioned by home institution; home institution had limited control
		Distance Education	coursework is delivered by host institution, but physical location of student is open	Distance Ed	coursework is delivered by host institution, but physical location of student is open
Extraterritoriality	Was extraterritoriality addressed	PAE - Upheld	the "presumption against extraterritoriality" was upheld, court would not comment because of jurisdiction	PAE-U	the "presumption against extraterritoriality" was upheld; court would not comment because of jurisdiction

		PAE – Over-ruled	the "presumption against extra-territoriality" was considered, but judgement was issued in spite of jurisdiction	PAE-O	the "presumpt-ion against extra-territorial-ity" was considered, but judgement was issued in spite of jurisdiction
		PAE - Ignored	the "presumption against extra-territoriality" was not considered or discussed, and judgement was issued in spite of jurisdiction	PAE - I	the "presumpt-ion against extra-territorial-ity" was not considered or discussed, and judgement was issued in spite of jurisdiction
		Extra-territorial-ity Not Addressed	because federal law was not violated, extraterritoriality was not addressed	ENA	because federal law was not violated, extraterritoriality was not addressed
		AOC	"alteration of charges", discrimination not determined, but other non-federal charge identified	AOC	"alteration of charges", discrimination not determined , but other non-federal charge identified



<b>Axial Coding</b>	<b>Description</b>
Emergent in the reading of cases	
AA	student dissatisfied with accommodation(s), but court finds it adequate under the law
FedLaw-O	other federal law identified in claims
StateLaw-O	state law violation identified in claims
StateLaw-B	state claim of breach of contract
StateLaw-N	state claim of negligence
Univ-Immunity	University claims either sovereign or statutory immunity from charges
State-Juris	University claims state filed does not meet jurisdiction
RSP	ruling is split or partially in favor of both parties
Family-A	family member of enrolled student is filing the claim

APPENDIX F

CODING OF SELECTED CASES

Incidence #	Case #	Case Name	Citation	Date Decided	State	Coding
1	1	Selman v. Harvard Medical School	494 F. Supp. 603	May 20, 1980	NY	RIFIHE; Student-A; UnivAdmin-V; FedLaw-O; StudyAbroad I; PAE-I (domestic university; foreign student); FedLaw-O; StateLaw-O; StateLaw-B; Univ-Immunity
	2	Appeal: Selman v. Harvard Medical School	636 F.2d 1204	October 7, 1980	NY	RIFIHE; Appeal-U; Student-A; UnivAdmin-V; FedLaw-O; StudyAbroad I; PAE-I (domestic university; foreign student); FedLaw-O; StateLaw-O; StateLaw-B

2	3	Bird v. Lewis & Clark College	104 F. Supp. 2d 1271	May 24, 2000	OR	RSP; RIFA (Rehab Act, Title III, breach of contract, breach of fiduciary, negligence, fraud, and misrepresentation ; RIFIHE (defamation, emotional distress); AA; ADA/Section 504; Student-A; UnivAdmin-V; StudyAbroad I; ENA; StateLaw-B; StateLaw-O; StateLaw-N
	4	Bird v. Lewis & Clark College	jury trial, described at length in appeal		OR	RSP; RIFA (breach of fiduciary duty); RIFIHE (all other claims); AA; ADA/Section 504; Student-A; UnivAdmin-V; StudyAbroad I; ENA; StateLaw-B; StateLaw-O; StateLaw-N
	5	Appeal: Bird v. Lewis & Clark College	303 F.3d 1015	September 3, 2002	OR	RSP: Appeal-U; AA; ADA/Section 504; Student-A; UnivAdmin-V; StudyAbroad I; PAE-I; StateLaw-B
		Petition for writ of certiorari: Bird v. Lewis & Clark College	2003 U.S. LEXIS 2217	March 24, 2003	SCU S	
3	6	King v. Bd. of Control	221 F. Supp. 2d 783	July 17, 2002	MI	RIFA; Title IX; Student-A; Student-V; StudyAbroad I; PAE-O

4	7	Sparkes v. Norwich Univ.	2005 Vt. Super. LEXIS 124	June 7, 2005	VT	RIFIHE; ADA/Sect 504; Student-A; UnivAdmin-V; StudyAbroad II; PAE-U; AA; StateLaw-B
5	8	Ortiz-Bou v. Universidad Autonoma de Guadalajara	382 F. Supp. 2d 293	July 12, 2005	PR	RIFIHE; Title VI; Student-A; UnivAdmin-V; StudyAbroad I; PAE-U; FedLaw-O; StateLaw-O; Univ-Immunity
6	9	Mattingly v. Univ. of Louisville	2006 U.S. Dist. LEXIS 53259	July 28, 2006	KY	RIFIHE; Title IX; Student-A; OAV; StudyAbroad I; ENA; StateLaw-B; StateLaw-N; Univ-Immunity
7	10	Dean-Hines v. Ross Univ. Sch. of Veterinary Med.	2006 U.S. Dist. LEXIS 101375	August 9, 2006	NJ	RIFA; ADA/Section 504; Student-A; UnivAdmin-V; StudyAbroad I; PAE-O; StateLaw-B
8	11	Phillips v. St. George's Univ.	2007 U.S. Dist. LEXIS 84674	November 15, 2007	NY	RIFIHE; Title IX; Student-A; FacultyStaff-V; StudyAbroad I; PAE-U; Univ-Immunity
9		Tecza v. Univ. of San Francisco	Superior Court of California: CGC0948866 2	May 26, 2009	CA	ADA/Sect504; FERPA; Student-A; UnivAdmin-V; StudyAbroad II; StateLaw-O; StateLaw-B; StateLaw-N;
		First Amended Complaint: Tecza v. Univ. of San Francisco	Superior Court of California: CGC0948866 2	July 21, 2009	CA	ADA/Sect504; FERPA; Student-A; UnivAdmin-V; StudyAbroad II; StateLaw-O; StateLaw-B; StateLaw-N;

	12	Second Amended Complaint: Tecza v. Univ. of San Francisco (original order December 30, 2009)	2010 U.S. Dist. LEXIS 43057	May 3, 2010	CA	RIFIHE; ADA/Sect504; Student-A; UnivAdmin-V; StudyAbroad II; ENA; StateLaw-O; StateLaw-B; StateLaw-N;
	13	Appeal: Tecza v. Univ. of San Francisco	532 Fed. Appx. 667	June 25, 2013	CA	Appeal-P; ADA/Sect504; Student-A; UnivAdmin-V; StudyAbroad II; ENA; StateLaw-O; StateLaw-B; StateLaw-N;
		Tecza v. Univ. of San Francisco	United States District Court, N.D. California, San Francisco; Case No. 3:09-cv-03808-RS.	January 28, 2014	CA	
10	14	Amended Complaint: Whitaker v. N.Y. Univ.	New York Southern District Court; Case Number: 1:2011cv04394	July 19, 2011	NY	RIFIHE; Student-A; UnivAdmin-V; StudyAbroad I; ENA; FedLaw-O; StateLaw-O; StateJuris
		Motion for Relief: Whitaker v. N.Y. Univ.	2012 U.S. Dist. LEXIS 87619	June 20, 2012	NY	RIFIHE; Appeal-U; Student-A; UnivAdmin-V; StudyAbroad I; ENA; FedLaw-O; StateLaw-O; StateJuris
	15	Appeal: Whitaker v. N.Y. Univ.	531 Fed. Appx. 89, 2013 U.S. App. LEXIS 17686	August 22, 2013	NY	RIFIHE; Appeal-U; Student-A; UnivAdmin-V; StudyAbroad I; ENA; FedLaw-O; StateLaw-O

		Appeal: Whitaker v. N.Y. Univ.	543 Fed. Appx. 113, 2013 U.S. App. LEXIS 23835	November 23, 2013	NY	RIFIHE; Appeal- U; Student-A; UnivAdmin-V; StudyAbroad I; ENA; FedLaw-O; StateLaw-O
		Writ for certiorari: Whitaker v. N.Y. Univ.	2014 U.S. LEXIS 4978	October 6, 2014	NY	
11	16	Archut v. Ross Univ. Sch. of Veterinary Med.	2012 U.S. Dist. LEXIS 164960	November 19, 2012	NJ	RIFIHE; ADA/Sect 504; Student-A; UnivAdmin-V; StudyAbroad II; PAE-U; StateLaw-O; StateLaw-B; State-Juris
		Archut v. Ross Univ. Sch. of Veterinary Med.	2013 U.S. Dist. LEXIS 156024	October 31, 2013	NJ	RIFIHE; ADA/Sect 504; Student-A; UnivAdmin-V; StudyAbroadII; StateLaw-B; State-Juris
	17	Appeal: Archut v. Ross Univ. Sch. of Veterinary Med.	580 Fed. Appx. 90	October 31, 2014	NJ	RIFIHE; Appeal- U; ADA/Sect 504; Student-A; UnivAdmin-V; StudyAbroad II; PAE-U; StateLaw-O; StateLaw-B; State-Juris
12	18	Drisin v. Fla. Int'l Univ. Bd. of Trs.	2017 U.S. Dist. LEXIS 100247	June 27, 2017	FL	RSP; RIFA (due process: property; equal protection; title VII); RIFHE (title IX; due process: liberty; defamation); Title IX; Fac/Staff-A; UnivAdmin-V; Fac/Staff-V; StudyAbroad I;

						FedLaw-O; StateLaw-O; Univ-Immunity
	19	Drisin v. Fla. Int'l Univ. Bd. of Trs.	2018 U.S. Dist. LEXIS 5286	January 10, 2018	FL	RSP; RIFA (due process: property; RIFHE (hostile work environment); Fac/Staff-A; UnivAdmin-V; StudyAbroad I; FedLaw-O; StateLaw-O
13	20	Harbi v. Mass. Inst. of Tech.	2017 U.S. Dist. LEXIS 141890	September 1, 2017	MA	RIFIHE (fed claim); RSP (state claims); Title IX; Student- A; FacultyStaff- V (fed); UnivAdmin-V (state); Distance Ed; PAE-U; StateLaw-B; StateLaw-N; StateLaw-O
		Harbi v. Mass. Inst. of Tech.	U.S. District Court of Massachusetts; Case: 1:16- cv-12394- FDS	October 8, 2018	MA	
14	21	Doe v. Baylor Univ.	2018 U.S. Dist. LEXIS 169710	September 29, 2018	TX	RIFHIE; Title IX; Student-A; Student-V; StudyAbroad I; ENA; StateLaw- N; StateLaw-B

#		OCR Complaints	Citation	Date Decided	State	Coding
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1	22	Arizona State University (AZ)	Region VII; Complaint No. 08-01-2047, 22 NDLR P 239	Dec. 3, 2001	AZ	RIFIHE; ADA/Sect504; Student-A; UnivAdmin-V; StudyAbroad II; PAE-U
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