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Deliberately Indifferent: Institutional Liability for Further Harassment in Student-on-Student Title IX Cases

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NOTES

Deliberately Indifferent: Institutional Liability for Further Harassment in Student-on-Student Title IX Cases

Sexual harassment is an unfortunate problem far too many have experienced. Universities and other educational institutions owe a duty, both legal and moral, to protect students from sexual harassment, and in turn to allow students to receive the full benefits of their education. But a circuit split has limited students' ability to hold educational institutions liable. This circuit split results in the absurd scenario where an individual must experience sexual harassment more than one time to hold their educational institution liable. This Note attempts to fix that by proposing Title IX (the law governing sexual harassment at educational institutions) adopt the hostile work environment analysis from Title VII (an employment law statute) in further harassment claims. This solution balances the interests of students in receiving the full benefits of their education in a safe environment with the interests of educational institutions to not be held liable for issues these universities may not know exist.

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INTRODUCTION

In 2012, Emily Kollaritsch, a student at Michigan State University, reported to campus police that the previous year a male student attended to rape her and a week or two after the initial attack the same student sexually assaulted her.[1] Approximately ten months after her complaint, Michigan State finalized a report finding that the male student violated the university's policies on sexual harassment but had not raped Kollaritsch.[2] The university issued a no-contact

1. Brief for Appellees at 7, Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613 (6th Cir. 2019) (Nos. 17-2445, 18-1715), 2018 WL 5784369, at *7.

2. *Id.*

order,[3] which the male student violated, beginning to stalk Kollaritsch.[4] She suffered panic attacks, avoided public places, and fell behind in her studies.[5]

Two years later, Shayna Gross, another Michigan State student, reported that she was sexually assaulted by the same male student.[6] After an eight-month investigation, Michigan State expelled the student after finding him guilty of violating the school sexual-assault policy.[7] Following an appeal, the investigation results were rescinded, and an outside law firm investigated, finding there was no proof the sexual contact constituted sexual assault.[8] The expulsion was overturned on appeal, and the male student graduated from the university.[9] Gross's education was also disrupted as her assaulter freely roamed the campus.[10] The long process caused her ongoing emotional distress.[11]

Kollaritsch, Gross, and two other unnamed plaintiffs filed a lawsuit, alleging Michigan State's response to their sexual harassment claims violated Title IX.[12] Title IX is the federal law protecting individuals from discrimination based on sex at institutions that receive federal funding.[13] Subsequent Title IX caselaw created a private right of action allowing individuals to sue institutions for monetary damages when institutions fail to protect individuals from sex discrimination.[14] While the District Court for the Western District of Michigan ruled in favor of Kollaritsch and Gross, the Sixth Circuit Court of Appeals reversed the district court decision and dismissed the case.[15] In doing so, the Sixth Circuit held that to successfully plead a Title IX claim, a plaintiff must show a further incident of actionable sexual harassment that would not have occurred if not for the school's

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3. A no-contact order requires the abuser to be a certain distance away from the victim, as well as not to contact the victim in any way.

4. Brief for Appellees, *supra* note 1, at *8.

5. *Id.*; *see* Kollaritsch v. Mich. State Univ. Bd. Of Trs., 944 F.3d 616, 624 (6th Cir. 2019).

6. Brief for Appellees, *supra* note 1, at *9–10.

7. *Id.* at *10.

8. *Id.* at *10–11.

9. *Id.*; Megan Banta, *Michigan State University Alumnae Asking U.S. Supreme Court to Review, Reverse Title IX Ruling*, LANSING ST. J. (July 16, 2020, 10:00 PM), https://www.lansingstatejournal.com/story/news/local/2020/07/17/michigan-state-msu-title-ix-sixth-circuit-supreme-court-appeal/5449796002/ [https://perma.cc/953X-PALC].

10. Brief for Appellees, *supra* note 1, at *11.

11. *Id.*

12. Kollaritsch v. Mich. State Univ. Bd. of Trs., 298 F. Supp. 3d 1089, 1096 (W.D. Mich. 2017).

13. 20 U.S.C. § 1681(a).

14. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992).

15. Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 627 (6th Cir. 2019); *Kollaritsch*, 298 F. Supp. 3d at 1102–03.

deliberate indifference in its response to the plaintiff's first instance of sexual harassment.[16] Other circuits, including the First and Tenth Circuits, have applied a different pleading standard, requiring the plaintiff to show only that the school's response made future harassment more likely, not that their response actually led to further harassment.[17]

Sexual harassment on college campuses is far from a new problem. In a 2019 survey, 41.8 percent of students reported they experienced sexual harassment on their college campus.[18] Additionally, 18.9 percent of students said this sexual harassment "interfered with their academic or professional performance," "limited their ability to participate in an academic program," or "created an intimidating, hostile, or offensive social, academic or work environment."[19] Sexual assault—a form of sexual harassment including unwanted physical contact and rape—is a much too large problem. Although results vary across institutions, the rate of undergraduate women reporting nonconsensual sexual contact ranges between fourteen and thirty-two percent.[20] Universities owe a moral duty to provide a campus where students are safe from sexual assault and, if sexual assault occurs, an environment where victims are protected. Not only is this goal needed to keep students safe, but it is also crucial to a well-functioning academic environment. Currently, universities and the law are failing to achieve this safety and protection goal.

Under Title IX, an educational institution is liable when it acts with "deliberate indifference to known acts of harassment in its programs or activities" and this "deliberate indifference" bars a student's access to the benefits or opportunities provided by their

16. *Kollaritsch*, 944 F.3d at 623–24.

17. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 171 (1st Cir. 2007)(finding that, under the Title IX framework, an institution "subjected" a student to sexual harassment when its deliberate indifference made it more likely for a student to experience sexual harassment); Farmer v. Kan. State Univ., 918 F.3d 1094, 1103–04 (10th Cir. 2019) (relying on *Davis* to explain how a plaintiff can successfully establish a Title IX claim even if the institution's deliberate indifference only made the plaintiff vulnerable to harassment, as opposed it actually causing the harassment).

18. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 79, WESTAT (Jan. 17, 2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/8T8U-JE4Z].

19. *Id.*

20. *Id.* at xi (finding that 23.1 percent of undergraduate women experienced sexual contact by force and/or incapacitation).

education.[21] The law, however, is not settled with respect to the issue in the case of Kollaritsch and Gross: Can an educational institution be held liable when no further incident of sexual harassment occurs, even if the university's response makes future harassment more likely to occur?

This Note proposes holding universities liable for creating an environment that makes future harassment more likely. The solution modifies the existing judicial test to create a more workable standard that furthers the goals of Title IX. Part II offers a broad overview of how Title IX is used to hold universities liable for sexual harassment claims, as well as how other federal laws address discrimination on the basis of sex. Part III analyzes the two main chains of reasoning employed by courts to decide further harassment cases. It considers arguments for requiring a further actionable sexual harassment and those for requiring only the increased probability of future harassment. Part IV advocates for the adoption of a modified version of the more likely future harassment pleading standard—one which incorporates Title VII hostile work environment jurisprudence. To hold universities accountable, create a safe learning environment, and prevent harassment, the law needs to be adjusted.

I. AN EVOLVING PROTECTION: THE EXPANSION OF TITLE IX AND SEX DISCRIMINATION STATUTES

In 1972, Congress passed Title IX, stating that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[22] As most colleges, universities, and public schools receive federal funding, the law is wide reaching.[23] When initially passed, the law sought to withdraw federal funding from educational institutions that did not comply with its requirements.[24]

21. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (finding that a Title IX plaintiff must show that the sexual harassment is so "severe, pervasive, and objectively offensive" that it prevents the victim from accessing educational opportunities).

22. 20 U.S.C. § 1681(a).

23. *See* Ibby Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, ATLANTIC (July 7, 2016), https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/ [https://perma.cc/B5P8-GLR8] (explaining that only a handful of schools do not receive federal funds and those that do not receive federal funding are often small, religious schools).

24. *See* 20 U.S.C. § 1682.

This Part proceeds by discussing how Title IX became the prevailing mechanism for combating sexual harassment on college campuses.

A. Title IX's Creation and Expansion

Title IX has become the main weapon in combating sexual harassment and gender inequality on college campuses. While Title IX initially addressed clear acts of sex discrimination, such as denying applicants based on their sex or unequal treatment of athletic teams based on sex, Title IX has evolved to encompass other forms of sex discrimination, such as the way educational institutions respond to sexual harassment or to cultures which perpetuate a discriminatory environment.[25] The expansion of Title IX liability has raised questions about where the outer limits of institutional liability should be drawn.

While initially used in lawsuits regarding athletic programs, courts expanded Title IX to protect students from discrimination based on sex in a variety of contexts.[26] Title IX's original protections began to evolve when the Supreme Court held, in *Cannon v. University of Chicago*, that Title IX gave individuals the right to bring suit against an educational institution that denied the individual an educational opportunity based on sex, even though Title IX contains no provision for private-party enforcement.[27] Though the claim in *Cannon* relied upon the plaintiff not being admitted to medical school because of her sex,[28] as discussed below, future courts expanded the ability to bring an action against an educational institution for broader purposes not mentioned explicitly within Title IX.

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25. *Id.* § 1681; *see* Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (holding that plaintiff is able to bring a private cause of action under Title IX for being denied admission to an institution on the basis of sex despite the lack of clear authorization to do so under the statute's text); Paul M. Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS SPORT 127, 127 (2008) (explaining that though Title IX's text does not explicitly mention athletics, the statute has had a tremendous impact on high school and college athletics).

26. *See* Anderson & Osborne, *supra* note 25, at 127 (noting that while Title IX has been prevalent in athletics, the statute is focused generally on activities provided by educational institutions); Grove City Coll .v. Bell, 465 U.S. 555, 563, 574 (1984) (holding that Title IX prevents discrimination in educational programs receiving federal funds, even when those funds are accepted by students attending a private institution and the institution is not itself directly accepting the federal funds).

27. 441 U.S. at 717. In this opinion, the Court relied upon *Cort v. Ash*, 422 U.S. 66 (1975), to determine whether Congress had implicitly authorized a private right of action. *Id.* at 688. In *Cort*, the Court set forth a four-factor test that asked: (1) Does the statute create a federal right favoring the plaintiff's class? (2) Is there any legislative intent to create or deny a private remedy? (3) Is implying a private remedy consistent with the legislative purpose? And (4) Finally, is the cause of action and area of law a concern of the States, so that a federal cause of action would be inappropriate? *Id.* at 688 n.9 (citing *Cort*, 422 U.S. at 78, 95). The Court reasoned that all four factors supported an implied private cause of action. *Id.* at 709.

28. *Id.* at 680.

Although *Cannon* applied only to plaintiffs seeking injunctive relief,[29] the Court expanded Title IX remedies to include a cause of action for monetary damages nearly two decades later in *Franklin v. Gwinnett County Public Schools*.[30] In *Franklin*, the Supreme Court not only expanded an individual's remedies to include actions brought for prospective relief but also allowed individuals to receive retrospective monetary damages caused by an institution's violation of Title IX.[31] Although *Franklin* may not be the sole cause, following its decision, more victims filed Title IX claims at their universities, and that trend continues to this day.[32]

B. Title IX's Application to Sexual Harassment Cases

Although Title IX has since become synonymous with sexual harassment, for much of the law's existence, sexual harassment was not covered under denying an individual their educational opportunity.[33] Title IX does not itself mention sexual harassment, and until roughly twenty years after its passage, students could not bring a claim for sexual harassment against their educational institution.[34] In light of Title IX's silence on sexual harassment, legal scholars argued Title IX was inadequately designed to combat the problem of sexual harassment and hostile environments at universities, suggesting that Title IX should be amended to better address these problems.[35]

Title IX was eventually applied to sexual harassment in *Franklin*, in which the Supreme Court held that an individual can bring a private action against an educational institution in cases of teacher-on-student sexual harassment.[36] A later case, *Gebser v. Lago Vista Independent School District*, created a "deliberate indifference" standard where an individual can sue her educational institution only

29. *See id.* at 724 n.12 (White, J., dissenting) (noting that the Court focused on suits involving injunctive remedies because the individual bringing the suit challenged discriminatory practices preventing plaintiff's admission to an educational program funded by the federal government).

30. 503 U.S. 60, 75–76 (1992).

31. *See id.*

32. Allie Bidwell, *College Sexual Violence Complaints Up 1,000 Percent in 5 Years*, U.S. NEWS (May 5, 2015, 5:03PM), https://www.usnews.com/news/blogs/data-mine/2015/05/05/college-title-ix-sexual-violence-complaints-increase-more-than-1-000-percent-in-5-years [https://perma.cc/VQ5K-DS49] (reporting that universities received 3,384 claims by 1990, 4,981 by 1995, and 9,989 by 2014).

33. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

34. *See* 20 U.S.C. § 1681; *Franklin*, 503 U.S. at 76.

35. *See, e.g.*, Alexandra A. Bodnar, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 555–56 (1996).

36. *Franklin*, 503 U.S. at 76.

if the school acted with "deliberate indifference" towards the known harassment.[37] In *Davis v. Monroe County Board of Education*, the Supreme Court extended this reasoning to student-on-student harassment.[38] On top of the "deliberate indifference" standard, the Court added a second part to the *Gebser* test: that the sexual harassment, including but not limited to sexual assault, must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[39] *Davis*, however, does not provide a clear definition of what this new standard entails.[40]

Davis involved a fifth grader whose mother brought a claim against her daughter's school district.[41] Her daughter was sexually harassed while in school.[42] The mother complained to the school, which took no action, and the behavior continued.[43] In deciding the case, the Supreme Court resolved a circuit conflict over whether schools could be held liable in a private action for student-on-student sexual harassment.[44] In concluding the right to a private action existed, the Court found that student-on-student sexual harassment could systematically deny an individual access to an educational program—the majority acknowledged that in theory even one instance of sexual harassment can be sufficient to win a lawsuit under *Davis*.[45] Although *Davis* involved harassment at an elementary school, because of Title IX's federal funds requirement, all federally funded educational institutions, including nearly all universities, are liable if they fail to respond to a student's harassment claim.[46]

Upon establishing what must be shown to sustain a Title IX claim, *Davis* modified *Gebser*'s causation standard in cases of student-on-student harassment.[47] Unlike in *Gebser*, where a school must have been deliberately indifferent to known harassment committed by an employee to be held liable,[48] deliberate indifference to an individual's

37. 524 U.S. at 290.

38. 526 U.S. 629, 633 (1999).

39. *Id.*

40. *Id.* at 653–54 (discussing relevant factors in deciding this standard, such as type of harassment, amount of victims, and the concrete effect on victim's education).

41. *Id.* at 633.

42. *Id.*

43. *Id.* at 634.

44. *Id.* at 637.

45. *Id.* at 652–53.

46. *See id.* at 639 (determining that the institution is a recipient of federal funds for purposes of Title IX).

47. *See id.* at 644–45.

48. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

claim of sexual harassment is not enough in *Davis*: the deliberate indifference must also " 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[49] Under the *Davis* test, the harassment must also take place within the institution's control.[50] According to *Davis*, these elements limit an educational institution's liability to circumstances where the institution has "substantial control over both the harasser" and the venue where the harassment occurs.[51] This situation is most likely to occur when the harasser is an employee of the educational institution, because the educational institution has substantial control over the harasser in such a case, although the test is not one of agency.[52] In a student-on-student claim of sexual harassment, the school normally has less control over a student than they would have over an employee.[53] The *Davis* court expanded the causation test to address this problem—the Court assumed educational institutions have more control over employees than over students and therefore were less likely to be on notice of student-on-student harassment.[54]

In establishing institutional relief for both student-on-student and teacher-on-student claims, the Supreme Court has unmistakably held that the educational institution must not only be aware of the sexual harassment but must also be deliberately indifferent to the harassment.[55] This standard goes well beyond negligence and likely goes beyond recklessness; to hold an educational institution liable, an individual must demonstrate the institution's actual knowledge of the reported sexual harassment that prevents the individual from accessing an educational benefit—a high bar to achieve.[56] Along with this deliberate indifference element, an individual must also establish causation.[57] As *Davis* notes, the circumstances where Title IX can create liability are narrow.[58]

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49. *Davis*, 526 U.S. at 645 (alteration in original) (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)).

50. *Id.* In a student-on-student context, this plays out as being all students enrolled at the university but not non-students only visiting the university. *See, e.g.*, K.T. v. Culver-Stockton Coll., No. 4:16-CV-165 CAS, 2016 WL 4243965, at *4–5 (E.D. Mo. Aug. 11, 2016). This control over students extends to off-campus activities, as institutions still retain control over the students.

51. *Davis*, 526 U.S. at 645.

52. *See id.*

53. *See id.* at 653.

54. *See id.*

55. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277, 290 (1998).

56. *Davis*, 526 U.S. at 643; *Gebser*, 524 U.S. at 290.

57. *Davis*, 526 U.S. at 645.

58. *Id.* at 644 ("[B]oth the 'deliberate indifference' standard and the language of Title IX narrowly circumscribe the set of parties whose known acts of sexual harassment can trigger some duty to respond on the part of funding recipients.").

In sum, *Davis* created a two-part test to evaluate a Title IX claim in a student-on-student sexual assault case. First, there must be an "actionable harassment" by a student.[59] Actionable harassment means the harassment is "severe, pervasive, and objectively offensive."[60] Second, the educational institution must be "deliberately indifferent" to the harassment.[61] Deliberate indifference requires knowledge, an act, injury, and causation.[62] Knowledge requires the school to have actual knowledge of an actionable sexual harassment that resulted in a response from the school—or should have resulted in a response.[63] To satisfy the act requirement, the school's response (or lack of response) must be "clearly unreasonable in light of the known circumstances."[64] The injury means a student was denied "access to the educational opportunities or benefits provided by the school."[65] Causation requires that the school's aforementioned deliberate indifference caused the injury.[66] In future cases, courts are forced to wrestle with how further acts of harassment fit into this framework, a question that has yet to be answered definitively.

C. Institutional Liability in Responding to Title IX Claims

A problem not directly addressed in *Davis* is whether a plaintiff can show deliberate indifference by showing that an institution is indifferent toward future harassment. The framework used in *Davis* arose from a situation where an individual complained to an educational institution that then ignored the individual's complaints.[67] Issues in later cases center around whether an educational institution can be held liable for the school's deliberate indifference towards a *future* incident of sexual harassment.

The Sixth, Eighth, and Ninth Circuits have required plaintiffs to show that an educational institution's deliberate indifference to a reported sexual harassment claim resulted in a further actionable sexual harassment.[68] This standard creates a stringent requirement,

59. *See id.* at 651–52 (internal quotation marks omitted).
60. *Id.* at 651.
61. *Id.* at 643.
62. Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 621 (6th Cir. 2019).
63. *Davis*, 526 U.S. at 650.
64. *Id.* at 648.
65. *Id.* at 650.
66. *Id.* at 644.
67. *Id.* at 633–34.
68. Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 623–24 (6th Cir. 2019); K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1057–58 (8th Cir. 2017); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 739 (9th Cir. 2000).

where in addition to pleading deliberate indifference and deprivation of an educational environment, a plaintiff must show the deliberate indifference caused another sexual harassment incident to occur.

On the other hand, the First and Tenth Circuits have held that a plaintiff must show only that an educational institution's deliberate indifference to a sexual harassment claim made future harassment more likely: future harassment does not actually have to occur.[69] This standard takes the causation element described in *Davis* and holds that an injury can be caused by a deliberate indifference even if an additional actionable instance of sexual harassment does not occur. The split results in an important practical consequence: to hold a school liable for failing to respond to a sexual harassment claim under the standard applied in the Sixth, Eighth, and Ninth Circuits, a plaintiff would have to be sexually harassed for a second time.

D. Title VII: The Weapon Against Private Sector Sex Discrimination

While Title IX protects students from sex discrimination in federally funded institutions, Title VII protects employees from sex discrimination in the workplace.[70] Although separate jurisprudence developed, courts have acknowledged some overlap exists, and both can be used concurrently to address discrimination based on sex.[71] The extent of this concurrence is minimal, but courts have applied elements of Title VII case law, such as the hostile work environment test, to Title IX claims.[72]

The Supreme Court first recognized hostile work environment as a form of sexual harassment in the 1986 case *Meritor Savings Bank v. Vinson*.[73] Hostile work environment allows for sexual harassment claims in situations where the harm involved is not economic—but rather, for the first time, the Court acknowledged purely psychological harm as a valid basis for a discrimination claim.[74] *Meritor* lays out the standard for what can give rise to an actionable hostile work

69. Farmer v. Kan. State Univ., 918 F.3d 1094, 1103–04 (10th Cir. 2019); Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009).

70. 42 U.S.C. § 2000e-2.

71. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520–23 (1982) (holding Title IX may apply concurrently to employment at federal agencies even though Title VII also applies); Stanley v. Trs. of Cal. State Univ., 433 F.3d 1129, 1136 (9th Cir. 2006) (applying a Title VII hostile-environment analysis to a Title IX sexual harassment claim, although ultimately dismissing the claim).

72. *See Stanley*, 433 F.3d at 1136.

73. 477 U.S. 57 (1986).

74. *See id.* at 65–66 (suggesting that an employee may establish a Title VII violation by showing "discriminatory intimidation, ridicule, and insult").

environment claim: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' "[75] While a hostile work environment applies in an employment context, because it employs a test similar to that used Title IX law, this theory can be modified to address the problems with the current deliberate indifference circuit split.

II. ANALYSIS OF THE APPROACHES EMPLOYED BY VARIOUS COURTS

In deciding whether a future actionable sexual harassment must occur in order to hold a university liable, all circuits have relied on *Davis*. [76] The key language in the Supreme Court's ruling in *Davis*—and the language that provides the basis for disagreement among the courts of appeals—is that an educational institution's "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."[77]

Courts that require a further actionable sexual harassment—the Sixth, Eighth, and Ninth Circuits—reason that the language "cause students to undergo harassment or make them liable or vulnerable to it" cannot be read as two separately required elements.[78] Instead, when read with *Davis* as a whole, the language presents two possible ways a student can be subject to further harassment (i.e., undergoing harassment *or* making her vulnerable to harassment), rather than two requirements.[79] Additionally, these courts have reasoned that an educational institution cannot be "deliberately indifferent" to a single act of sexual harassment under *Davis*.[80] According to *Davis*, harassment must be "pervasive," and in requiring further actionable sexual harassment, courts contend that there must be another actionable sexual harassment because one instance of sexual harassment cannot reach the pervasive standard.[81] Thus these circuits require a further incident of harassment but that element can be fulfilled by either harassment or vulnerability to it. [82]

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75. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

76. *See, e.g.*, Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 623–24 (6th Cir. 2019).

77. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999) (internal quotation marks omitted).

78. *Id.* (internal quotation marks omitted)*; see, e.g.*, Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 623 (6th Cir. 2019); K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1057–58 (8th Cir. 2017); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 739 (9th Cir. 2000).

79. *Kollaritsch*, 944 F.3d at 623; *K.T.*, 865 F.3d at 1057–58; *Reese*, 208 F.3d at 739.

80. *Kollaritsch*, 944 F.3d at 623; *K.T.*, 865 F.3d at 1057–58; *Reese*, 208 F.3d at 740.

81. *See, e.g.*, *Kollaritsch*, 944 F.3d at 620.

82. *See, e.g.*, *id.*

On the other hand, courts that only require plaintiffs to show an educational institution's deliberate indifference made the plaintiffs more likely to experience sexual harassment—the First and Tenth Circuits—rely on the "or make them liable or vulnerable to [sexual harassment] language of *Davis*.[83] According to these courts, *Davis* "clearly indicat[ed] that Plaintiffs can state a viable Title IX claim by alleging alternatively *either* that [an educational institution's] deliberate indifference to their reports of rape caused Plaintiffs 'to undergo harassment *or* made them liable or vulnerable to it.' "[84] For the textual argument, these courts rely on the fact that because the quotation from *Davis* contains "cause [students] to undergo harassment," the phrase "or make them liable or vulnerable to it" would be redundant if further harassment were required.[85]

A. Sixth, Eighth, and Ninth Circuits' Approach: Requiring Further Actionable Sexual Harassment to Plead a Title IX Claim

The Sixth, Eighth, and Ninth Circuits require a plaintiff to plead a further actionable sexual harassment incident to successfully bring a Title IX claim.[86] These courts hold that the causal element required by *Davis* cannot be satisfied without a further incident of sexual harassment.[87] *Davis* requires that the institution's "deliberate indifference must, at a minimum, *cause* students to undergo harassment or make them liable or vulnerable to it."[88] Courts requiring further harassment reason that an educational institution cannot cause the student's harm unless the institution was aware of another, former, incident.[89] According to these courts, if the institution is unaware of further harassment or if further harassment did not occur, the school cannot respond in a way which amounts to deliberate indifference.[90]

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83. *Davis*, 526 U.S. at 645; Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019); Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 171 (1st Cir. 2007).

84. *Farmer*, 918 F.3d at 1103 (quoting *Davis*, 526 U.S. at 645); *see also Fitzgerald*, 504 F.3d at 172.

85. *See* Karasek v. Regents of the Univ. of Cal., No. 15-cv-03717, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015) (citing Takla v. Regents of the Univ. of Cal., No. 15-cv-04418, 2015 WL 6755190 (C.D. Cal. Nov. 2, 2015); *see also Farmer*, 918 F.3d at 1103; *Fitzgerald*, 504 F.3d at 172..

86. *Kollaritsch*, 944 F.3d at 623–24; K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1057–58 (8th Cir. 2017); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000).

87. *See, e.g.*, *Kollaritsch*, 944 F.3d at 622–23.

88. *Davis*, 526 U.S. at 633 (emphasis added) (internal quotation marks omitted).

89. *See, e.g.*, *Kollaritsch*, 944 F.3d at 622.

90. *See, e.g.*, *id.* This awareness standard is one of actual awareness, so the incident must be reported to a school official. *Davis*, 526 U.S. at 642. Some courts have held that reporting the sexual harassment to only a resident advisor is not enough, and the student must actually initiate a Title IX proceeding. *See, e.g.*, M.R. v. Stockton Univ., No. CV 18-11431, 2019 WL 3451620, at *6 (D.N.J. July 31, 2019).

Further, without actual knowledge of a subsequent incident of sexual harassment, the institution cannot be held liable, as *Davis* is not a negligence standard.[91]

This approach is illustrated by the case *T.C. ex rel. S.C. v. Metropolitan Government of Nashville*.[92] In *T.C.*, two female students sued Nashville Public Schools, a federal funds recipient under Title IX, for their school's handling of harassment against the two girls.[93] The two girls were involved in a sexual encounter with four older male students in their high school.[94] While the girls did not tell the school of the event, the incident was recorded by another student and circulated around the school.[95] A few weeks after the incident, the girls became aware of the video and one girl's (Jane Doe's) mother reported the video to the school's vice principal and to the police officers stationed at the school.[96] While Jane Doe's mother told the school about her concerns that the video was being shared without her daughter's knowledge or consent, the vice principal and police officers ignored her concerns and focused on whether the recorded sexual conduct was consensual.[97] The vice principal never told the principal about the incident, referred the parents to the school's Title IX coordinator, or suggested that a Title IX investigation would or should occur.[98] Jane Doe left the school because she was "scared to remain" at the school and ultimately failed tenth grade at her new school.[99] The other girl (Mary Doe) remained at the school; she claimed she was taunted and bullied, and she told the dean of students she was having suicidal thoughts.[100]

The girls brought claims for both the initial incident and the effects of the incident that led to the girls feeling unsafe at school, suffering academically, and having suicidal thoughts.[101] With respect to the first claim regarding the initial incident, the claim would fail under *Kollaritsch*'s formulation of *Davis*: claims regarding the initial incident fail because the school did not have actual knowledge of the incident until after it occurred, and therefore the school cannot be deliberately

91. *See e.g.*, *Kollaritsch*, 944 F.3d at 621.
92. No. 3:17-cv-01098, 2020 WL 5797978 (M.D. Tenn. Sep. 25, 2020).
93. *Id.* at *2.
94. *Id.* at *3.
95. *Id.* at *4.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at *4–5.
101. *Id.* at *6.

indifferent to injury that occurred before this knowledge.[102] In *T.C.*, the district court dismissed Jane Doe's claims because she did not plead an incident of further harassment.[103] Although Jane Doe was bullied, transferred to another school, and lost academic opportunities, she did not experience another actionable harassment incident at her previous school and therefore could not sustain a Title IX claim.[104] In rejecting Jane Doe's claim, the court explored the possible outcomes under *Kollaritsch*, the binding Sixth Circuit precedent case involving the Michigan State student mentioned above, stating that "if a parent's child is, for example, raped by another student at school, . . . the parent's options are (1) withdrawing the child from school or (2) waiting for her to be sexually harassed again."[105]

Mary Doe, the other child involved in the videotaped incident, however, could sustain a Title IX claim because she remained at the school after the incident and experienced further harassment.[106] The court held that there was evidence that the school's inability to respond to Mary Doe's bullying complaints could allow for a reasonable finder of fact to find the school's response constituted deliberate indifference that contributed to the ongoing harassment she experienced.[107]

1. Sixth, Eighth, and Ninth Circuit Arguments for Requiring Further Actionable Sexual Harassment

If the language "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it" is ambiguous, leaning on the side of *Davis* requiring a further actionable sexual harassment reads more in line with the overall *Davis* opinion.[108] In deciding *Davis*, the Supreme Court intended to limit institutional liability.[109] Throughout its opinion, the *Davis* Court mentioned that the bar for institutional liability is high; the

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102. *Id.* at *16; *see* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 616, 621–22 (6th Cir. 2019) (noting the school must have "actual knowledge" of the incident and its inaction "post-actual-knowledge" resulted in further injury to the student because of its "clear unreasonableness").

103. *T.C.*, 2020 WL 5797978, at *17–18.

104. *See id.* at *17 ("Jane Doe transferred to KIPP Academy immediately, or nearly immediately, after Maplewood officials were informed of the incident in which she was involved.").

105. *Id.*

106. *Id.* at *20–21.

107. *Id.*

108. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999) (internal quotation marks omitted).

109. *See id.* at 642 ("We concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge.").

Court stated explicitly that the standard is not negligence but actual knowledge, and that *Davis* is not meant to impose sweeping liability.[110]

The narrowness of *Davis*, however, is not geared at whether deliberate indifference can exist when there is not a further act of sexual harassment but rather is geared at what kinds of acts constitute sexual harassment.[111] In the opinion, when addressing the dissent's concern about the overbreadth of institutional liability, Justice O'Connor writes, "Damages are not available for simple acts of teasing and name-calling . . . even where these comments target differences in gender."[112] This point goes to the question of what classifies as sexual harassment, rather than the question of if a further act of sexual harassment must occur to hold an institution liable. Justice O'Connor follows this argument by saying, "[I]n the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies victims the equal access to education that Title IX is designed to protect."[113]

2. Sixth, Eighth, and Ninth Circuit Arguments Against Requiring Further Actionable Sexual Harassment

From a practical matter, a clear problem with the standard used by the Sixth, Eighth, and Ninth Circuits is that for an educational institution to be liable, an individual must face sexual harassment not just once—but at least twice. Title IX says that an individual shall not "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" because of sex.[114] Based on solely the language of Title IX, it is clear that just one instance of sexual harassment has the potential to deny an individual educational benefits.[115] This idea fits with the *Davis* deliberate indifference standard and theory that one incident can bar a victim's educational opportunity.[116]

Looking solely at the language of *Davis*, it is counterintuitive to think that only upon a further incident of actionable sexual harassment can a victim be denied the benefit of an educational opportunity as

110. *See id.* at 642, 652 ("We trust that the dissent's characterization of our opinion will not mislead courts to impose more sweeping liability than we read Title IX to require.").

111. *See id.* at 652.

112. *Id.* at 652.

113. *Id.*

114. 20 U.S.C. § 1681(a).

115. *Id.*

116. *Davis*, 526 U.S. at 633.

stated in Title IX.[117] An individual's fear of running into her assaulter in the library, in class, or around campus surely deprives the individual of an educational benefit—even if no further sexual harassment occurs. Based on the language of Title IX, if an individual is too afraid to attend class and withdraws because of the educational institution's response to their claim of sexual harassment, the individual is not receiving the benefits of their educational program because of sex.[118] Even if a person is not subject to a further actionable sexual harassment, their educational opportunity can still be affected to the point where they are denied the benefits of that education.

An instance of sexual assault is one of the most traumatic events an individual can experience. Making the victim experience such a traumatic event more than once in order to hold an educational institution liable for its failure to respond borders on outrageous.

This standard is especially troubling when read in context with the 2020 Title IX rule promulgated by the Trump Department of Education.[119] Among other things, this rule states that the definition of sexual harassment under Title VII, which features a broader definition of sexual harassment, cannot be applied to Title IX.[120] The rule points to the fact that in *Davis*, the Supreme Court concluded that "schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults."[121] In making this comparison, the rule insinuates that, under Title IX, punishing verbal sexual harassment taking place on college campuses may violate the First Amendment and infringes on the free exchange of ideas that should take place at universities.[122]

If this administrative rule is applied in courts that require a further incident of actionable sexual harassment, a student would have to suffer a second incident of physical (and not verbal harassment), requiring them to suffer to harm, in order to get relief.[123] Universities using this administrative rule to inform the drafting of their sexual harassment policies may result in less victim-friendly policies that deter victims from reporting sexual harassment in the first place because of fear that their claim will not lead to any action.

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117. *See id.*; 20 U.S.C. § 1681(a).

118. *See* 20 U.S.C. § 1681(a).

119. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020).

120. *Id.* at 30037.

121. *Id.* at 30450 (quoting *Davis*, 526 U.S. at 651).

122. *Id.*

123. *Id.*

B. First and Tenth Circuits: A Further Incident of Sexual Harassment Is Not Necessary for a School to Be Deliberately Indifferent to a Prior Act

Unlike the approach adopted by the Sixth, Eighth, and Ninth Circuits, requiring a further actionable incident of sexual harassment, the First and Tenth Circuits have no such requirement to hold an educational institution liable.[124] These circuits read the language from *Davis* as disjointed—the deliberate indifference can either "cause students to undergo harassment" *or* "make them liable or vulnerable to it."[125] Additionally, in contrast to the courts requiring a further actionable harassment, the First and Tenth Circuit approach holds that "a single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution's response . . . unreasonable enough to have the combined systemic effect of denying access to a scholastic program or activity."[126] Examples of "mak[ing] them liable or vulnerable to [harassment]" can include altered study habits, lower grades, or the fear of being exposed to one's attacker.[127]

One case that illustrates the approach taken by these courts is *Hernandez v. Baylor University*, where a student sued her university under Title IX for its response to a reported sexual harassment.[128] The plaintiff's mother reported to Baylor's student health center that the plaintiff was sexually assaulted by a fellow student, who was also a football player at the university.[129] Baylor's student health center was "too busy" or "full," and the plaintiff was not treated.[130] Additionally, the university did not have a dedicated Title IX coordinator.[131] Both of the plaintiff's parents contacted the Baylor football coach and informed him of the sexual assault.[132] A member of his staff told the parents that the program was "looking into it" but never communicated any further information to the family.[133] The victim's attacker remained on

124. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 171 (1st Cir. 2007); Farmer v. Kan. State Univ., 918 F.3d 1094, 1103–04 (10th Cir. 2019).

125. *Davis*, 526 U.S. at 645 (internal quotation marks omitted); *see Fitzgerald*, 504 F.3d at 172 (reading *Davis* as holding that "funding recipients may run afoul of Title IX not merely by 'caus[ing]' students to undergo harassment but also by 'mak[ing] them liable or vulnerable' to it").

126. *See, e.g.*, *Fitzgerald*, 504 F.3d at 172–73.

127. *Farmer*, 918 F.3d at 1103; Hernandez v. Baylor Univ., 274 F. Supp. 3d 602, 613 (W.D. Tex. 2017).

128. *Hernandez*, 274 F. Supp. 3d at 608.

129. *Id.* at 610.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

campus.[134] Although the plaintiff reported no additional harassment by her attacker, she claimed that she was made more vulnerable to encountering him, and that, as a result, she was afraid of going to certain places on campus, her grades fell, and she eventually withdrew from the university.[135]

Hernandez was argued in the Western District of Texas, which is controlled by the Fifth Circuit. The Fifth Circuit has not spoken on this issue, but the Western District of Texas chose to adopt the First and Tenth Circuit view that a further act of harassment need not occur to support a Title IX claim.[136] The district court read *Davis* as stating that a school "need only make the student vulnerable to that harassment."[137] This harm can be either staying at the school where the student is vulnerable to harassment or leaving school to avoid the harassment.[138] The court reasoned that when an institution does not take steps to prevent an educational environment where a student is forced to change her behavior to avoid her attacker, the victim is denied educational opportunities.[139] As the plaintiff pled that she was made more vulnerable to sexual harassment through concrete educational harms, her claims were able to survive Baylor's motion to dismiss, and she later reached a settlement with the university.[140] This First and Tenth Circuit standard provides plaintiff-students with a more friendly standard and therefore a greater ability to succeed in their claim or ultimately settle, like in *Hernandez*.

1. First and Tenth Circuit Arguments Against Requiring Further Actionable Harassment

The strongest legal arguments supporting not requiring a further actionable sexual harassment stem from the language of the *Davis* opinion itself and the purpose of Title IX.[141] Looking again at the crucial language of *Davis*, deliberate indifference must "cause students

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134. *Id.*

135. *Id.*

136. *Id.* at 613.

137. *Id.*

138. *Id.*

139. *See id.* at 614; *see also* Kelly v. Yale Univ., No. 01-CV-1591, 2003 WL 1563424, at *3–4 (D. Conn. Mar. 26, 2003).

140. *Hernandez*, 274 F. Supp. at 614; Paula Lavigne, *Former Baylor Student Jasmin Hernandez Reaches Settlement on Title IX Lawsuit*, ABC NEWS (Aug. 15, 2017, 9:41 PM), https://abcnews.go.com/Sports/baylor-student-jasmin-hernandez-reaches-settlement-title-ix/story?id=49241127 [https://perma.cc/Y762-6QXT]. The ability to survive a motion to dismiss is critical for a victim's ability to be compensated for their injuries as even if the facts alleged may not be sufficient to hold the institution liable, many universities will settle the claims. *See id.*

141. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. at 629, 645 (1999).

to undergo harassment or make them liable or vulnerable to it."[142] According to the courts adopting this approach, this language should be read disjunctively or the language "or make them liable or vulnerable to it" would be redundant.[143] These courts also worry about practical applications of reading *Davis* the redundant way. Requiring a second incident "would penalize a sexual harassment victim who takes steps to avoid the offending environment in which she may again encounter the harasser."[144] Placing the burden to prevent a second incident on the victim rather than the university is an absurd practical outcome.

Further, when this language is combined with the purpose of Title IX, the argument that the phrase should be separated becomes even stronger.[145] Title IX was enacted to prevent students and other participants in institutions receiving federal funds from being denied educational benefits based on their sex.[146] Reading Title IX to require a subsequent sexual assault in order to hold an institution liable ignores an important aspect—that an educational benefit can be denied without a victim experiencing another incidence of sexual harassment. Being sexually harassed creates trauma that will result in deprivation of a victim's ability to obtain educational benefits without action from the university, and institutions should have to consider this trauma and its effects when responding to a reported claim.[147]

2. First and Tenth Circuit Arguments for Requiring a Further Actionable Harassment

Other than arguments involving the textual analysis of *Davis*, critics of courts which do not require a further actionable sexual harassment rely on the effect that not requiring a further actionable

142. *Id.*

143. *See, e.g.*, Karasek v. Regents of the Univ. of Cal., No. 15-CV-03717, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015) (citing Takla v. Regents of the Univ. of Cal., No. 15-cv-04418, 2015 WL 6755190 (C.D. Cal. Nov. 2, 2015) (stating that "the phrase, 'cause [students] to undergo' harassment already contains an element of causation [such that] the phrase, 'make liable and vulnerable' would be redundant if construed to require further harassment").

144. *Id.*

145. *See* 20 U.S.C. § 1681(a).

146. *Id.*

147. *See* Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. INTERPERSONAL VIOLENCE 223, 224 (1993) (Within three months, forty-seven percent of rape victims experience symptoms of PTSD and are clinically depressed.); *see also* Audrey Chu, *I dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sep. 26, 2017, 11:51 AM), https://www.vice.com/en/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus [https://perma.cc/RZ7M-2QRN] (a student discussing her choice to leave university due to being in classes with her rapist).

sexual harassment has on educational institutions and on the meaning of deliberate indifference in other contexts.[148]

Judges have expressed concern that the scope of liability may become too large for universities if further harassment is not required.[149] Judge Thapar expressed this concern in his concurring *Kollaritsch* opinion, stating that

> to hold schools liable for any act or omission that makes students 'vulnerable to' harassment is to hold schools liable for a wide range of decisions. Could a university be held liable for reducing its Title IX staff as a result of budget cuts? . . . All these decisions could make students vulnerable to harassment.[150]

If schools can be held liable for an act that makes students more vulnerable to the risk of harassment without a subsequent harassment occurring, educational institutions could be held liable for many actions, some only tangentially related to the harassment itself.[151] In *Kollaritsch*, Judge Thapar suggested examples in which this could occur, such as through expanding coed housing or allowing a bar to open on campus.[152] As a plaintiff would not need to show an actual incident of harassment, that plaintiff could show that a university opening coed housing or a bar increased the risk of her being sexually harassed.[153]

This argument has clear problems. First, to bring a Title IX claim, a plaintiff must show more than just an increased vulnerability to harassment—there are other elements to *Davis*.[154] Under *Davis*, pleading an actionable sexual harassment claim requires an action to be "severe, pervasive, and objectively offensive."[155] Opening a bar on campus, increasing coed housing, or cutting Title IX staff, could not as a matter of law reach this level of severity allowing a Title IX claim to survive, because the standard of "severe, pervasive, and objectively offensive" has often been interpreted by courts as a high bar, perhaps unreasonably high.[156] If a situation where sexual gestures and a request for oral sex are not severe, pervasive, and objectively offensive

148. *See infra* Part III.A.1 (noting the Sixth, Eighth, and Ninth Circuit arguments for requiring further actionable sexual harassment); Zachary Cormier, *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1, 27 (2017); Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 629–30 (6th Cir. 2019) (Thapar, J., concurring).

149. *See Kollaritsch*, 944 F.3d at 629–30 (Thapar, J., concurring).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 630 (1999).

155. *Id.* at 651.

156. *See id.* at 652.

enough,[157] surely a mundane decision, such as opening a bar, cannot possibly rise to the level of severity required to create an actionable sexual harassment claim.[158]

Even if the plaintiff has successfully pled an actionable sexual harassment and is claiming the school's response was inadequate, the actions discussed by Judge Thapar still fail to satisfy deliberate indifference.[159] Even when using the "or make them liable or vulnerable to [harassment]" half of the *Davis* language, *Davis* still requires the educational institution's response to be "clearly unreasonable in light of the known circumstances" to be classified as deliberately indifferent.[160] Applying this standard, a court would have difficulty finding that a university deciding to open a campus bar or to create coed housing was "clearly unreasonable."[161]

Exactly where to draw the line of "clearly unreasonable" is ambiguous when attempting to hold educational institutions liable, even in the absence of a subsequent actionable sexual harassment. What is certain, however, is that this line falls short of the unlimited liability that critics of the theory argue would occur.[162] The purpose of Title IX must be considered. Title IX is not intended to hold educational institutions liable when a university expands coed housing; instead, Title IX is intended to hold universities liable when they fail to allow a victim to obtain her full educational benefit.[163] Holding institutions

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157. *See* Pahssen v. Merrill Cmty. Sch. Dist., 668 F.3d 356, 363 (6th Cir. 2012) (holding that a request for oral sex and sexual gestures were not severe, pervasive, and objectively offense); Thomaston *ex rel.* M.T. v. Baldwin Cnty. Bd. of Educ., 2019 WL 3069863, at *1–2 (S.D. Ala. June 25, 2019) (holding that male students who created rumors that a female student " 'fucked' five different boys" and sent nude photos to her classmates had not committed a severe, pervasive, and objectively offense); Jones v. Univ. of Detroit Mercy, 527 F.Supp.3d 945, 947, 950 (E.D. Mich. 2021) (holding that a basketball coach grabbing his genitals, thrusting his hips at the plaintiff, and yelling "suck my dick" was not severe, pervasive, and objectively offensive because this incident was "simply 'locker room talk' ").

158. *See Davis*, 526 U.S. at 651; *see also Kollaritsch*, 944 F.3d at 629–30 (Thapar, J., concurring).

159. *See Davis*, 526 U.S. at 644–45 (noting that the deliberate indifference standard "limit[s] a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs").

160. *Id.* at 644–45, 648.

161. *See Kollaritsch*, 944 F.3d at 629–30 (Thapar, J., concurring); *see e.g.,* Pahssen v. Merrill Cmty. Sch. Dist., 668 F.3d 356, 363.

162. *See* Johnson v. Ne. Sch. Corp., 972 F.3d 905, 915 (7th Cir. 2020) (holding that a school issuing a no-contact order between a female student and her accused harasser was not "clearly unreasonable").

163. *See Davis*, 526 U.S. at 650:

> We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

liable even in the absence of a second actionable sexual harassment is intended to protect students from situations where a victim must sit next to their attacker in a library, walk through campus in fear of a second attack, or withdraw from opportunities entirely because an educational institution failed to punish the student who sexually harassed the victim—not from mundane decisions. These situations must be separated from mundane decisions; evaluating decisions such as cutting Title IX staff could only result in liability under a negligence standard, and as *Davis* explicitly states, negligence cannot amount to deliberate indifference.[164]

III. SOLUTION: MODIFYING THE LEGAL TEST FOR FURTHER HARASSMENT TO BETTER REFLECT THE PURPOSE OF TITLE IX

The future of Title IX sexual harassment jurisprudence comes down to one question: Can an educational institution be held liable for its deliberate indifference to a single actionable claim of sexual harassment, or is a second actionable incident required? A simple solution is to adopt the views espoused by the First and Tenth Circuits, that deliberate indifference, which makes future harassment more likely is the appropriate interpretation when *Davis* and Title IX are read in conjunction.[165] Mostly, this solution is warranted because it seems absurd that, as laid out by the Middle District of Tennessee, a parent/student's choices are to leave the institution or wait until another actionable incident of sexual harassment occurs.[166] This solution, however, is too simple and throws out valid arguments discussed by the Sixth, Eighth, and Ninth Circuits.

As between the approach of the Sixth, Eighth, and Ninth Circuits on the one hand, and the First and Tenth Circuits on the other, the approach of the First and Tenth Circuits furthers the purpose of Title IX because it is clear that either choices under the Sixth, Eighth, and Ninth Circuits' approach—that a student/parent leave the institution or wait until another actionable incident of sexual harassment occurs—deprives the student of educational benefits. When a student leaves a school because of an incident of sexual harassment, sex-based discrimination directly led her to that decision and therefore deprived her of an educational benefit. When a student remains at an

164. *See id.* at 642 (noting that the Court "declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have* known").

165. *See, e.g.*, Farmer v. Kan. State Univ., 918 F.3d 1094, 1103–04 (10th Cir. 2019).

166. T.C.. *ex rel.* S.C. v. Metro. Gov't of Nashville, No. 3:17-cv-01098, 2020 WL 5797978, at *17 (M.D. Tenn. Sep. 25, 2020).

institution, susceptible to another incident, she is also deprived of educational opportunities.[167] The denial of educational benefits based on sex is the exact evil Congress enacted Title IX to remedy.[168] This Note proposes to apply Title VII hostile work environment case law to subsequent harassment claims brought under Title IX.

A. A Solution in a Similar Statute: Applying Title VII Caselaw to Title IX Claims

Rather than simply adopting the First and Tenth Circuit views, courts should create a modified legal test used to evaluate Title IX lawsuits involving future harassment. This new modified standard would be a superior method to protect the educational rights of students and to protect victims against future assault who currently cannot be protected after the first assault. Incorporating elements of the legal tests applied to show sex-based employment discrimination under Title VII of the Civil Rights Act will better allow Title IX to serve its purpose. Title VII, as discussed in Part II.D, applies to employer discrimination and includes sex, as well as race, color, religion, and national origin.[169] Title VII jurisprudence has created a test where sexual harassment can be pled through the showing of a "hostile work environment" or more blatant acts of discrimination.[170] Under the hostile work environment theory, an employee can show that even though they were not directly discriminated against because of their sex, sexual harassment within their organization created a hostile environment which constituted discrimination.[171]

Currently, hostile environment analysis is indirectly applied to Title IX claims, but the analysis has not been applied as widely there as it has in Title VII claims.[172] In almost every Title IX case brought against an educational institution, plaintiffs are looking to hold that educational institution liable under a modified hostile environment

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167. *See id.*; *see also* Karasek v. Regents of the Univ. of Cal., No. 15-cv-03717, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015) (reasoning that requiring an individual be harassed or assaulted for a second time before the educational institution may be held liable "runs counter to the goals of Title IX").

168. 20 U.S.C. § 1681(a) ("No person . . . shall, on the basis of sex . . . be denied the benefits of . . . any education program or activity receiving Federal financial assistance . . . .").

169. 42 U.S.C. § 2000e-2; *see infra* Part II.D.

170. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (holding "that a claim of 'hostile environment' sex discrimination is actionable under Title VII").

171. *Id.* at 66–67.

172. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 637 (1999); *see, e.g.*, Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1021–22 (7th Cir. 1997).

theory.[173] In nearly all Title IX claims, a plaintiff alleges that the school indirectly discriminated—i.e., acted with deliberate indifference—towards a known actionable sexual harassment incident.[174] Direct discrimination by the school would not require a deliberate indifference analysis; if the educational institution purposefully discriminated against a student based on sex, the student would succeed in bringing a Title IX claim. In bringing Title IX claims involving indirect discrimination, however, students are instead claiming the educational institution's response to someone else's action subjected the student to deprivation of Title IX rights.[175] This indirect claim already incorporates some level of hostile environment analysis—Title IX holds institutions liable for the conduct of others that creates a hostile environment and deprives students of their educational benefits.[176]

When expanding an individual's relief to include monetary damages, *Franklin*, which held individuals may receive monetary damages caused by an institution's violation of Title IX, relied on a hostile environment theory without explicitly stating that it was doing so.[177] The educational institution was held liable because it failed to supervise a teacher, thereby creating the hostile environment.[178] The school did not directly discriminate against the victim but rather failed to take adequate precautions to prevent this harassment.[179] The Fourth Circuit has more explicitly stated that hostile environment theories underlie most Title IX sexual harassment claims, modifying the *Davis* inquiry to "conduct [that] was sufficiently severe or pervasive to create a sexually hostile environment."[180]

This logic makes sense. If harassment reaches the level required by *Davis*, the harassment must have created a hostile environment—harassment cannot bar a victim's access to educational opportunity or benefit without creating a hostile environment.[181] The Fourth Circuit's mode of analysis turns all subsequent Title IX harassment claims into hostile environment questions. Putting Title IX analysis into Title VII

173. *See, e.g.*, Doe v. Weber State Univ., No. 20-CV-00054, 2021 WL 37646, at *2 (D. Utah Jan. 5, 2021); L.K.M. v. Bethel Sch. Dist., No. C18-5345, 2020 WL 7075209, at *9 (W.D. Wash. Dec. 3, 2020); Reed v. S. Ill. Univ., No. 18-CV-1968-GCS, 2020 WL 3077186, *5 (S.D. Ill. June 10, 2020).

174. *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Schs, 503 U.S. 60, 74–75 (1992).

175. *See Davis*, 526 U.S. at 648–49.

176. *See id.* at 642 ("[D]istrict[s] [can] be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of [ ] harassment of which it had actual knowledge.").

177. *See Franklin*, 503 U.S. at 74–75.

178. *Id.* at 63.

179. *Id.* at 63–64.

180. Jennings v. Univ. of N.C., 482 F.3d 686, 698 (4th Cir. 2007).

181. *See Davis*, 526 U.S. at 637.

terms, the school cannot be deliberately indifferent toward the known hostile environment.[182] While evaluating hostile environment claims, the Fourth Circuit, as well as the *Davis* and *Franklin* courts, incorporate Title VII hostile environment case law into their analyses.[183]

There is a strong argument that using Title VII case law in Title IX cases is an appropriate method of analysis. In the seminal sexual harassment Title VII case, *Meritor Savings Bank v. Vinson*, the Court created the standard under which sexual harassment claims are evaluated.[184] The Court held that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment.' "[185] If this language sounds familiar, it should. *Davis* created the "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" standard.[186] This "severe, pervasive, and objectively offense" standard nearly mirrors *Meritor*'s "severe or pervasive" standard.[187] The *Davis* Court specifically cited *Meritor* when creating the standard; therefore, relying on Title VII caselaw in Title IX cases is reasonable.[188]

The differences between the current Title IX and Title VII hostile environment analyses are both the scope of the hostile work environment and a consideration of the effects harassment has on employees or students.[189] In Title IX jurisprudence, for purposes of establishing a claim of actionable harassment, hostile environment claims are used to show that an actionable incident of sexual harassment occurred that created a hostile environment and deprived a student of educational benefits.[190] The causal chain is that an actionable sexual harassment, which is severe, pervasive, and offensive enough, creates a hostile environment, and this hostile environment in

182. *See* Feminist Majority Found. v. Hurley, 911 F.3d 674, 690–91 (4th Cir. 2018).

183. *See Davis*, 526 U.S. at 651 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, (1986)); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (same); *Jennings*, 482 F.3d at 695 ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

184. 477 U.S. 57, 66–67 (1986).

185. *Id.* at 67 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

186. *Davis*, 526 U.S. at 633.

187. *Id.*; *Meritor*, 477 U.S. at 67.

188. *Davis*, 526 U.S. at 651 (citing *Meritor*, 477 U.S. at 67).

189. *See id.* at 653–54; *Meritor*, 477 U.S. at 65.

190. *See Davis*, 526 U.S. at 633 (holding that "a private damages action may lie against the school board in cases of student-on-student harassment . . . that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

turn denies a student educational benefits.[191] This chain means that a hostile environment must deny students educational benefits to sustain a Title IX claim.[192]

Contrasted with Title IX jurisprudence, the Title VII causal chain is different.[193] In Title VII cases, such as *Meritor*, while an incident or incidents of sexual harassment create a hostile work environment, there is not a requirement of any deprivation of tangible benefits.[194] Put another way, in Title VII hostile environment cases, psychological harm alone is enough to sustain a claim.[195] While debated in the Title IX circuit split, Title VII case law says that "purely psychological aspects of the workplace environment" are protected from discrimination.[196]

Title VII prescribes many of the same requirements as Title IX to plead a claim of actionable sexual harassment, including the slightly rephrased version of severity, stating that harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' "[197] So, although largely similar, the main difference between a Title VII and Title IX hostile environment claim is that Title VII allows claims to survive on purely psychological harm, while Title IX claims, using the approach followed by the Sixth, Eighth, and Ninth Circuits, do not allow for purely psychological harm to sustain a claim of subsequent harassment without another incident of sexual harassment occurring.[198] Adopting a test that allows students to successfully plead

191. *See id.* at 653.

192. *See id.*

193. *See Meritor*, 477 U.S. at 65 (noting that "harassment leading to noneconomic injury can violate Title VII").

194. *Id.* at 64.

195. *See id.* (holding that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination").

196. *Id.*

197. *Id.* at 67 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

198. *See id.* at 66 (noting that "an employee's protections under Title VII extend beyond the economic aspects of employment"); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (stating that hostile environment claims under Title IX must involve "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"); Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 616, 623–24 (6th Cir. 2019) ("A Title IX private cause of action against a school for deliberate indifference to student-on-student sexual harassment comprises the two components of actionable sexual harassment by a student and a deliberate-indifference intentional tort by the school, along with the underlying elements for each."); K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1057–58 (8th Cir. 2017) (affirming dismissal of a Title IX claim because "[a]t most, [plaintiff's] allegations link the College's inaction with emotional trauma [plaintiff] claims she experienced following the assault"); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000) (rejecting a Title IX claim where there was "no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations").

a Title IX claim when an educational institution is deliberately indifferent towards purely psychological harm after a known incident of sexual harassment is the best outcome to resolve the current circuit split.

B. Concerns with Applying Title VII Caselaw in Title IX Cases

While there is a precedent for comingling Title VII and Title IX, there is also a large concern: Title IX and Title VII are different laws, created under different circumstances and affecting different groups of stakeholders. In his *Davis* dissent, Justice Kennedy realized this and was critical of the majority's use of Title VII caselaw applied to a Title IX issue.[199] First, Kennedy stated that Title VII is meant to compensate victims, while Title IX is made to protect individuals from facing discrimination from institutions who receive federal funds.[200] Kennedy argued that this difference meant that a plaintiff could not establish a Title IX claim by showing only that he or she was subjected to discrimination but rather would have to show that the recipient of federal funds discriminated against the plaintiff.[201] In fact, Kennedy believed that an educational institution should not be held liable for student-on-student harassment at all.[202]

While agreement with Kennedy's belief that student-on-student harassment is not a Title IX problem has faded as post-*Davis* law has developed, the differences he pointed out regarding the various actors involved in Title IX and Title VII claims underlie the circuit split, as do the differences between Title IX and Title VII caselaw.[203] The 2020 Title IX regulations promulgated by the Trump administration share Justice Kennedy's concerns about the different stakeholders.[204]

One of the differences is the location: one is a workplace, containing only adults, contrasted with the other being a college campus—or other academic institution—that contains students, some of whom are minors.[205] Kennedy argued that the norms of an adult

199. *See Davis*, 526 U.S. at 675 (Kennedy, J., dissenting) ("Analogies to Title VII hostile environment harassment are inapposite, because schools are not workplaces and children are not adults.").

200. *Id.* at 659 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998)).

201. *Id.* at 659.

202. *See id.* at 661 ("I am aware of no basis in law or fact, however, for attributing the acts of a student to a school and, indeed, the majority does not argue that the school acts through its students.").

203. *See id.* at 662–63, 674–77 (discussing the differences between Title VII and Title IX).

204. *See id.* at 675; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30037 (May 19, 2020).

205. *See Davis*, 526 U.S. at 675 (cautioning against "eras[ing], in one stroke, all differences between children and adults, peers and teachers, schools and workplaces").

workplace cannot be translated to schools, and therefore applying Title VII caselaw to Title IX problems is flawed.[206] Underlying this argument is the idea that students and adults should not be held to the same standards.[207] Kennedy reasoned that "[t]he norms of the adult workplace that have defined hostile environment sexual harassment . . . are not easily translated to peer relationships in schools, where teenage romantic relationships and dating are a part of everyday life."[208] Kennedy also argued that while educational institutions can be held liable for actions of teachers, they should not be held liable for the acts of students.[209] Once again, Kennedy relied on the maturity difference between adults and students, stating that "[a] teacher's sexual overtures toward a student are always inappropriate; a teenager's romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence."[210]

Keeping in mind that Title IX and Title VII are aimed at different actors, this Note proposes to apply a Title VII hostile environment analysis only to Title IX claims of subsequent harassment brought against higher educational institutions. Justice Kennedy's concerns were geared at teenagers.[211] While Justice Kennedy's opinion did not realize the difference between sexual harassment, which is unacceptable at any age, and normal teenage dating behavior, justifying this lack of difference by sugarcoating sexual harassment as "romantic relationships and dating" and "romantic overtures," this logic fails when students reach college.[212] Calling incidents of sexual harassment in middle and high schools "romantic relationships and dating" or "romantic overtures" may be ineloquent, but Justice Kennedy at least makes a colorable argument that teenagers may not know what is appropriate;[213] although in today's social climate, students from a young age know sexual harassment is wrong. Justice Kennedy's reasoning has less weight on college campuses.

First, while college-aged individuals are students, and some are even minors, college students are treated as adults and have a knowledge of appropriate behavior. While some might still argue "boys will be boys" in instances of sexual harassment, few, if any, would argue that sexual harassment on college campuses is "a part of everyday life"

206. *Id.*
207. *See id.* (stating that "schools are not workplaces and children are not adults").
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *See id.*
213. *See id.*

and "an inescapable part of adolescence."[214] As college students are aware of acceptable behavior, applying Title VII caselaw to Title IX claims against colleges does not raise the same concerns as those that arise when applying Title VII caselaw to Title IX claims against middle or high schools. Applying a hostile environment analysis to subsequent claims of harassment against universities will have the effect of holding institutions liable in situations where students' educational benefits were deprived despite no further actionable harassment occurring.

This legal test can be adopted to combat the problem of further harassment within Title IX claims. Without a further actionable harassment, the educational institution should be held liable if they are deliberately indifferent toward preventing a "culture of discrimination" following a known act of sexual harassment. This test would hold institutions liable in situations such as in *Kollaritsch* and *T.C.*, where the victims had to continue encountering their attackers and living in fear.[215] Protecting victims after they have been harassed is crucial to allowing them to achieve their full educational benefits—any solution must recognize purely psychological harm.[216] Situations where the attacker is let off with a warning deny victims educational opportunities by expecting normal educational attainment while still encountering their attacker. The fear created by this situation deprives victims of their educational benefits under Title IX.

C. Effects of This New Standard on Educational Institutions

While critics of expansive Title IX protections argue that expanding the statute's scope will lead educational institutions to be liable both for acts the institutions are unaware of and for more mundane acts, Title VII case law has additional safeguards that protect employers—or in Title IX's case, universities—from these situations.[217] In 1998, the Supreme Court released two decisions on the same day that articulated an affirmative defense for employers in hostile environment

214. *Id.*

215. Kollaritsch v. Mich. State Univ. Bd. of Trs., 298 F. Supp. 3d 1089, 1096 (W.D. Mich. 2017); T.C. *ex rel.* S.C. v. Metro. Gov't of Nashville, No. 3:17-cv-01098, 2020 WL 5797978, at *2 (M.D. Tenn. Sep. 25, 2020).

216. *See* 20 U.S.C. § 1681(a).

217. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) ("When no tangible employment action is taken, a defending employer may raise an affirmative defense to [vicarious] liability or damages . . . ."); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (outlining the affirmative defense for employers). For more discussion on the mundane acts issue, *see infra* Part III.B.2.

cases.[218] The affirmative defense consists of two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[219] If applied to Title IX, these defenses would give institutions the ability to show that once the institution was aware of sexual harassment, they took action to correct the behavior.[220]

In fact, in a Title VII context, scholars argue that this defense is too employer friendly, and the hostile environment theory does not go far enough.[221] Title VII shares the same goals as Title IX: to prevent sexual harassment in the workplace/in educational institutions, to encourage victims to report sexual harassment, and to ensure victims receive the benefits of their workplace/education.[222] This defense may be too employer friendly because it allows recidivist harassers to sexually harass *different* victims at the workplace, and the employer can avoid liability on the basis that they corrected the first behavior as applied to a different victim.[223] Fortunately, this problem will not exist in Title IX cases for subsequent harassment, as these claims require a first incident of sexual harassment, rather than just a hostile environment alone, something Title VII does not require.[224]

Additionally, this standard continues to protect institutions that did not know these acts had occurred. Unlike a business, the large amounts of students with higher degrees of freedom are not under the tight supervision of the institution, especially at the university level.

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218. *See Burlington*, 524 U.S. at 765 (describing the affirmative defense for employers in such cases); *Faragher*, 524 U.S. at 807 (same).

219. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

220. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

221. *See* Kerri Lynn Stone, *License to Harass: Holding Defendants Accountable for Retaining Recidivist Harassers*, 41 AKRON L. REV. 1059, 1059–60 (2008) (arguing that "in constructing the framework within which sexual harassment claims are adjudicated, the Supreme Court might have actually incentivized employers to deal with each isolated harassment complaint in a vacuum, ensuring nothing more than that the specific reporting victim at issue is not harassed again by the same harasser"). For a discussion of how courts have limited Title IX's ability to police employment discrimination, see SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017).

222. *See* Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 326 (2012) (explaining that Title IX was patterned on the Civil Rights Act of 1964, which contains Title VII).

223. *See* Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-up Call for Women*, 68 BROOK. L. REV. 457, 505 (2002).

224. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999) (holding educational institution must be deliberately indifferent to known actionable instance of harassment); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (a hostile environment alone is enough to sustain a Tile VII claim).

Continuing the deliberate indifference standard toward a known incident of actionable sexual harassment protects educational institutions from liability for incidents about which they have no knowledge.

While institutions are largely unaware of student conduct, once a student or parent reports an incident of actionable sexual harassment, the school is on notice of future events. The school is aware that this victim could be subject to future harassment if remedial actions are not taken. Because of this context, requiring the school to take preventative action against a future incident of harassment is justified. Far more than just a further actionable incident of sexual harassment can deprive a victim of their educational benefits. Fear of going to class, depression, and suicidal thoughts all cause a victim to fail to realize the full benefits of their educational experience. After the institution has been put on notice of an actionable sexual harassment, the institution should have a duty to ensure a reasonably safe learning environment for the victim. Failing to take preventative action and ignoring the consequences of sexual harassment is acting with deliberate indifference.

CONCLUSION

Congress enacted Title IX with the purpose of protecting individuals, specifically students, from sex-based discrimination at institutions receiving federal funds.[225] The Supreme Court has furthered this purpose to include new remedies at multiple points, even if those remedies were not expressly included in the original statute.[226] Adopting a new test to better protect the educational rights of individuals at federally funded institutions is the next step in Title IX jurisprudence. While the approach taken by the First and Tenth Circuits furthers Title IX, a modification of the test will lead to more predictable results and benefit both students and universities.

This Note proposes that courts adopt a new legal test to further the purpose of Title IX. Specifically, this test will analyze Title IX claims of subsequent sexual harassment against universities under hostile

225. See 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

226. See Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (recognizing a private right of action); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992) (recognizing a damages remedy); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (allowing a student to sue for damages because they were sexually harassed by a teacher); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (allowing a student to sue for damages because they were sexually harassed by another student).

environment case law created under Title VII. By modifying discrimination to include a hostile environment, students will be free from interference with their educational opportunities. Additionally, universities will benefit from increased predictability; once a university is aware of an instance of sexual harassment, they will be required to address the issue and make sure the victim is able to obtain his or her educational benefit. This new test would protect vulnerable students, further the purpose of Title IX, and benefit all parties involved in Title IX compliance.

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