SEXUAL HARASSMENT IN EDUCATION

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I. INTRODUCTION

Sexual harassment, including sexual violence, interferes with students' right to an educational environment free from discrimination.[1] Sexual harassment is

1. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

widespread on college campuses.[2] Among respondents to the 2019 Association of American University Campus Climate Survey, 59.2 percent of undergraduate women and 65.1 percent of transgender, nonbinary or genderqueer students indicated that they had experienced harassing behavior since enrolling in school.[3]

Sexual violence, like other forms of harassment, is pervasive on campuses. Roughly eleven percent of all students experience rape or sexual assault through physical force, violence, or incapacitation.[4] Among undergraduate students, twenty-three percent of females and five percent of males experience rape or sexual assault through physical force, violence, or incapacitation.[5] Among graduate and professional students, almost nine percent of females and two percent of males have similar experiences.[6] While pervasive, only twenty percent of female student victims report to law enforcement; this number is negligible among male student victims.[7]

Although media attention has largely focused on sexual harassment on college campuses, sexual harassment at all stages of youth education is prevalent. Forty-eight percent of middle and high school students reported at least one sexual harassment experience during the 2010-2011 school year.[8] Forty-four percent of students were harassed in person, while thirty percent of students said they were harassed either through Facebook, text messaging, or email.[9] Furthermore, the likelihood that a student with mental disabilities will be sexually assaulted is significantly higher.[10]

Title IX of the Education Amendments of 1972 (Title IX)[11] and its implementing regulations[12] prohibit discrimination on the basis of sex, including sexual harassment, in educational programs or activities operated by recipients of federal financial assistance.[13] Sexual harassment is unwelcome conduct of a sexual nature which includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.[14] Sexual violence is a form of sexual harassment prohibited by Title IX.[15] Sexual violence includes

2. *AAU Campus Climate Survey (2019)*, ASSOC. OF AMERICAN UNIVS., https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019 (last visited Feb. 23, 2020).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Jason Koehler, *Survey: Nearly Half of Students Sexually Harassed in School*, U.S. NEWS & WORLD REPORT (Nov. 9, 2011), https://www.usnews.com/education/blogs/high-school-notes/2011/11/09/survey-nearly-half-of-students-sexually-harassed-in-school (citing a 2011 report by the American Association of University Women).

9. *Id.*

10. *Id.*

11. 20 U.S.C.A. § 1681 (West, Westlaw through P.L. 114-61 approved Oct. 7, 2015).

12. 34 C.F.R. § 106 (2015).

13. Letter from Russlynn Ali, *supra* note 1, at 1.

14. *Id.* at 3.

15. *Id.*

rape, sexual assault, sexual battery, and sexual coercion.[16] The Supreme Court has also declared that unwanted sexual talk, teasing, or touching may also violate federal law.[17]

In the wake of the #MeToo movement, which began in October 2017, Harvard's Title IX Office saw fifty-six percent increase in disclosures in 2018.[18] #MeToo is proving to be a powerful social movement both within the United States and internationally that has brought much needed attention to the voices of survivors of sexual harassment and sexual violence.[19] However, it has yet to motivate significant change in higher education.

This Article provides an overview of the evolving federal law governing sexual harassment in education. It explains the most common legal recourse for students who experience sexual harassment in educational institutions, focusing primarily on Title IX. Section II discusses congressional action in response to sexual harassment in education. It illustrates how the implementation of legislation against sex discrimination in employment catalyzed legislation to address sexual harassment in education. Section III explains the legal remedies available under Title IX. Section IV describes the three factor test for determining whether a recipient of federal education funds is liable in a private damages action. Section V outlines which individuals may bring Title IX actions and who those claims can be brought against.

II. SEXUAL HARASSMENT AS A FORM OF SEX DISCRIMINATION

In 1971, Senator Birch Bayh (D-IN) introduced a bill prohibiting discrimination by academic institutions that receive federal funding.[20] This bill became Title IX of the Education Amendments of 1972,[21] and offered similar protections against sexual harassment discrimination in schools that had been offered by

16. *Id*. at 2.

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

18. Rhitu Chatterjee, *A New Survey Finds 81 Percent Of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018), https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment.

19. *Id*.

20. The original proposal stated that "No person. . .shall, on the ground of sex. . .be subject to discrimination under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity." 117 CONG. REC. 30, 155–56 (1971). This proposal, however, was rejected by the Senate.

21. Senator Bayh again introduced an amendment, which this time provided "No person. . .shall, on the basis of sex. . .be subjected to discrimination under any education program or activity receiving Federal financial assistance."118 CONG. REC. 5, 802–03 (1972). The Senate adopted Bayh's second amendment on February 28, 1972. 118 CONG. REC. 5, 815 (1972). The Senate and the House sent the bill to the committee of conference to reconcile differences. S. REP. No. 92–798 (1972) (Conf. Rep.). The bill passed both Houses and was signed into law on June 23, 1972. 118 CONG. REC. 22, 702 (1972).

Title VII in the workplace.[22] Title IX provides 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."[23] The Supreme Court initially construed Title IX to govern only those programs that received direct federal financial assistance, limiting Title IX's effectiveness as a remedy for educational sex discrimination.[24] Later, the Civil Rights Restoration Act of 1987 amended Title IX to protect those participating in programs or activities in educational institutions that receive federal financial assistance, including all public schools and some private schools.[25]

During the twenty years following the statute's enactment, there were virtually no cases brought under Title IX alleging sexual harassment.[26] While the language of Title IX does not expressly mention sexual harassment, the Supreme Court has expanded the scope of Title IX to apply to sexual harassment in educational settings.[27] In *Franklin v. Gwinnett County Public Schools*, the court considered whether sexual harassment against students in educational settings constituted "sex discrimination."[28] In *Franklin*, a male teacher and sports coach had sexually explicit conversations with a female student, forcibly kissed her on the mouth in the school parking lot, and, on three occasions, excused the student from class and took her to a private office where he had "coercive sexual intercourse" with her.[29] The principal and other teachers knew of the harassment but took no action to stop it; in fact, they tried to convince the student not to press charges against the teacher.[30] Following its own precedent in *Meritor*, where the Court held that sexual harassment is a form of sex discrimination in the employment context, the Supreme Court unanimously decided that sexual harassment is discrimination on the basis of sex under Title IX.[31]

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22. 42 U.S.C.A. § 2000e-2(a)(l) (West, Westlaw through P.L. 116–130). Title VII, in relevant part, reads, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's. . .sex."

23. 20 U.S.C.A § 1681(a) (West, Westlaw through P.L. 114-61 approved Oct. 7, 2015).

24. *See generally* Grove City v. Bell, 465 U.S. 555 (1984).

25. *Grove City*, 465 U.S. at 555 ("[T]he term 'program or activity' and 'program' mean all of the operations of. . .a college, university, or other postsecondary institution, or a public system of higher education.").

26. *See* Diane Heckman, *Tracing the History of Peer Sexual Harassment in Title IX Cases*, 183 WEST'S ED. L. REP. 1–2 (2004).

27. *See* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (finding that sexual harassment of a student is discrimination on the basis of sex that violates Title IX).

28. *Id*. at 65.

29. *Id*. at 63.

30. *Id*. at 64.

31. *Id*. at 75 (citing *Meritor*, 477 U.S. at 64).

III. AN IMPLIED PRIVATE RIGHT OF ACTION UNDER TITLE IX

Title IX does not expressly authorize a private right of action by which survivors of sex discrimination may obtain relief for a violation of the statute.[32] Nor does Title IX stipulate circumstances under which a school or education program would be liable for sex discrimination.[33] In the absence of clear statutory guidance, federal courts have sought to "shed light on Congress's intent"[34] for available remedies under Title IX by recognizing an implied private right of action, as well as an implied remedy in such actions.[35] In addition, federal courts have articulated a legal standard for establishing liability under Title IX for sexual harassment committed by a teacher,[36] and by peer students.[37] This judicially created standard–based on a "deliberate indifference" threshold–has frequently been characterized as a "high bar for plaintiffs to recover."[38]

A. JUDICIALLY CREATED PRIVATE RIGHT OF ACTION & AVAILABLE LEGAL REMEDIES

The Supreme Court first interpreted Title IX to create an implied right of action against an educational funding recipient in *Cannon v. University of Chicago*.[39] A woman alleged two medical schools had denied her admission on the basis of her sex in violation of Title IX.[40] *Cannon* applied a four-factor test to determine if a private right of action was appropriate under Title IX: (1) whether Congress named a particular class of individuals to benefit from the legislation; (2) whether the legislative history supports a private right of action; (3) whether a private right of action would frustrate the intent of legislation; and (4) whether the subject matter is important to the states.[41]

Applying the test, the Court read Title IX broadly to include an implied private right of action for individual students discriminated against on the basis of sex.[42] Writing for the majority, Justice Stevens reasoned that although Title IX did not expressly allow such relief, "the words and history of Title IX, [and] . . . its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."[43] Thus, *Cannon* created a judicially

32. *See* 20 U.S.C. §§ 1681–88 (West, Westlaw through P.L. 116-91).
33. *Id.*
34. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998).
35. Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979) (holding a cause of action for private individuals is implied by the history, purpose, and text of Title IX); *Franklin*, 503 U.S. at 76 (1992) (holding "a damages remedy is available for an action brought to enforce Title IX").
36. *Gebser*, 524 U.S. at 290–93.
37. Davis v. Munroe Cty. Bd. Of Educ., 526 U.S. 629 (1999).
38. *Id.* at 643.
39. *Cannon*, 441 U.S. at 709.
40. *Id.* at 680, n. l.
41. *See id.* at 689–708 (citing Cort v. Ash, 422 U.S. 66 (1975)).
42. *Id.* at 709.
43. *Id.*

implied private cause of action for Title IX violations.[44]

The Supreme Court next addressed what legal remedies were available for survivors of sex discrimination in a private right of action in *Franklin v. Gwinnett County Public Schools*.[45] After determining that sexual harassment against students in educational settings constituted "sex discrimination" and was thereby covered under Title IX, the Court next identified the specific remedies available under Title IX.[46] Due to the special nature of education, the Court found that limiting recovery to traditional employment remedies[47] would be unworkable.[48] Reversing lower court rulings, the Court established a permissive attitude toward remedies where a statutory private right of action had been found, and held that the plaintiff in *Franklin* should be awarded monetary damages.[49] The Court reasoned, "absent clear direction to the contrary by Congress, federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[50] Twenty years after the initial enactment of federal legislation designed to prohibit sex discrimination in education, damages remedies were available to plaintiffs in cases of sexual harassment in education.[51]

However, while plaintiffs may seek monetary damages as a remedy, the *Franklin* Court did not clarify a standard for plaintiffs seeking equitable relief under Title IX.[52] The Court still left open the possibility of equitable remedies, reasoning Congress did not limit available remedies, but noted a court "should determine the adequacy of a remedy in law before resorting to equitable relief."[53] In subsequent key decisions interpreting Title IX, the Court has seemingly narrowed the instances where equitable relief would be appropriate, while still keeping the door open for a court to fashion such relief.[54] In *Davis v. Munroe County Bd. Of Education*, the Court criticized the dissent for "erroneously imagin[ing]

44. *Id*. at 709, 717 (finding "Title IX presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present," and thus, concluding "that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute").

45. *See Franklin*, 503 U.S. at 65.

46. *See id*.

47. *See id*. at 67. A common legal remedy in employment cases where an employee is illegally terminated or discriminated against in pay involves the court determining how much money the employee would have earned absent the discriminatory pay or illegal termination and requiring the employer to pay that amount to the employee.

48. *Franklin*, 503 U.S. at 76 (finding that the only remedy that would supply plaintiff with relief was a monetary damages remedy because "[b]ackpay does nothing for petitioner, because she was a student when the alleged discrimination occurred. . .[P]rospective relief accords her no remedy at all."').

49. *Id*. at 66 ("We presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.").

50. *Id*. at 70–71.

51. *See id*. at 76.

52. *Id*. at 71.

53. *Id*. at 75–76.

54. *See Davis*, 526 U.S. at 648.

that victims of peer harassment now have a Title IX right to make *particular* remedial demands."[55] The Court appeared to take issue with awarding a remedy that would require "second guessing the disciplinary decisions made by school administrators."[56] Thus, it would likely be *inappropriate* for equitable remedies sought in a private right of action to preempt any corrective administrative actions a funding recipient could take to voluntarily comply with a Title IX public enforcement action.[57] Courts should respect school administrators' flexibility in their response to harassment without imposes certain remedial actions.[58]

Moreover, the Supreme Court has not yet ruled on whether punitive damages are available under Title IX. In 2002, the Court held in *Barns v. Gorma* that punitive damages are not available under a Title VI action.[59] The Court had frequently used Title VI to interpret Title IX, and so it is likely such an analysis would be extended to a Title IX claim.[60] Lower courts have applied this analytical framework to find punitive damages are not available.[61] However, plaintiffs may recover attorneys' fees.[62]

B. SCHOOL DISTRICT LIABILITY FOR TEACHER-ON-STUDENT HARASSMENT

The specific requirements for establishing Title IX liability against an educational funding recipient were articulated in two seminal Supreme Court cases: *Gebser v. Lago Vista Independent School District*, and *Davis v. Monroe County Board of Education*. In *Gebser*,[63] the Court outlined the circumstances under which a school district could be liable for sexual harassment against a student by a teacher.[64] A male teacher, Frank Waldrop, at Lago Vista Independent School District (Lago Vista) initiated sexual contact with an eighth-grade female student, Alida Star Gebser.[65] Their sexual relationship continued into the following school year, and they often had sexual intercourse during class time, although never on school property.[66] Gebser did not report the relationship to school officials,

55. *Id*. (emphasis added) (criticizing the dissent for contemplating that a victim could demand a new desk assignment).

56. *Id*.

57. *See id*. at 648; *See also* Frederick v. Simpson College, 160 F.Supp.2d 1033, 1035-38 (S.D. Iowa 2001).

58. *See Davis*, 526 U.S. at 648–49.

59. 536 U.S. 181, 189–90 (2002).

60. *Id*. at 185.

61. Mercer v. Duke University, 401 F.3d 199, 202 (4th Cir. 2005) (punitive damages are not available for private actions under Title VI or under Title IX).

62. *Id*. at 203.

63. *Gebser*, 524 U.S. at 277.

64. *Id*. ("[D]amages may not be recovered. . .unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.").

65. *Id*.

66. *Id*. at 278.

although she acknowledged his conduct was improper.[67] Eventually, police discovered the two engaging in sexual intercourse and arrested Waldrop.[68]

Gebser filed suit against the Lago Vista Independent School District, raising claims under Title IX.[69] The plaintiff argued the school was liable for Waldrop's conduct under a theory of *respondeat superior*, or constructive notice, and urged the Court to borrow from the employment context such agency principles in order to hold the defendant strictly liable for the actions of its employees.[70] As a result, the plaintiff would be able to recover damages from the school district, even if school officials were not aware of the harassment.[71]

The Court declined to extend strict liability under Title IX, rejecting plaintiffs' argument that Title VII's approach should be instructive.[72] The Court reasoned since a private right of action under Title IX is judicially implied and not explicitly directed by statute, as under Title VII, it has greater latitude "to shape a sensible remedial scheme that best comports with the statute." [73]

The Court, inferring by omission in the statute that Congress did not intend "unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination,"[74] held that in order for liability to attach, an "appropriate person" — defined as "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf"[75] — must have had "actual knowledge" of the sexual harassment.[76] In effect, the conduct itself is not the source of liability, but rather the subsequent remedial actions taken by the funding recipient.

Relying significantly upon clues from the statute's public enforcement provisions, the Court reasoned this approach aligned with legislative intent of the statute.[77] Title IX's express means of public enforcement by a federal agency "operates on an assumption of actual notice to officials of the funding recipient,"[78] in which suspension of federal funds occurs *only if* a recipient is advised of the failure to comply with the statute and it is determined that compliance is not possible by voluntary means.[79] This "opportunity to rectify" rebuts any congressional intent for strict liability.

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67. *Id*.
68. *Gebser*, 524 U.S. at 278.
69. *Id*.
70. *Id*. at 282.
71. *Id*. ("Petitioners and the United States submit that, in light of *Franklin's* comparison of teacher-student harassment with supervisor-employee harassment, agency principles should likewise apply in Title IX actions.").
72. *Id*. at 281–83, 285, 287–88.
73. *Gebser*, 524 U.S. at 284.
74. *Id*. at 285.
75. *Id*. at 290.
76. *Id*.
77. *Id*. at 288–90.
78. *Gebser*, 524 U.S. at 288.
79. *Id*.

Additionally, the Court held a funding recipient would not be liable unless the school official responded to the "actual knowledge" so deficiently that it equates to "deliberate indifference" of the discrimination.[80] Thus, any claim asserting damages under Title IX for a teacher's harassment of a student requires (1) actual notice and (2) deliberate indifference.[81] Under this standard, the Court concluded that because Gebser did not notify the school about the harassment, the school could not be held liable.[82]

However, the Court in *Gebser* never defined what constitutes "actual notice," nor who exactly is "an appropriate person," causing a split among some circuit courts.[83] The interpretation of these requirements is paramount, as a failure to show either may result in dismissal of a Title IX claim.[84] For example, in *Doe No. 55 v. Madison Metropolitan School District*, the Seventh Circuit affirmed summary judgment in favor of the funding institution against a child who alleged she was sexually abused by a school security guard, Willie Collins.[85]

From 2011 to 2014, Jane Doe attended Whitehorse Middle School, and during that time, numerous teachers and staff, as well as principle Deborah Ptak, frequently observed Collins hugging students.[86] On a few occasions while Doe was in seventh grade, Ptak observed Collins rubbing Doe's shoulders.[87] In the spring

80. *Id.* at 290.

81. *Id.*

82. *Id.* at 290–91. Gebser testified that while she realized the teacher's conduct was improper, "she was uncertain how to react and she wanted to continue having him as a teacher." *Id.* at 278. In October 1992, the high school principal was informed about the teacher's inappropriate comments in class by two other parents. *Id.* The principal arranged a meeting at which the teacher denied making the comments and said it would not happen again. *Id.* The principal told the school guidance counselor about the meeting, but did not report the complaint to the school superintendent, who was the district's Title IX coordinator. *Id.* The court further reasoned that the student could not prevail because: "[T]he only official alleged to have had information about . . . [the teacher's] misconduct is the high school principal. That information, however, consisted of a complaint from parents of other students charging only that . . . [the teacher] had made inappropriate comments during class, which was plainly insufficient to alert the principal to the possibility that . . . [the teacher] was involved in a sexual relationship with a student." *Id.* at 291.

83. *Id.* at 285, 290; *see, e.g.*, K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1058 (8th Cir. 2017) (stating a plaintiff must show "actual knowledge" of a "substantial risk" of harassment); Doe v. St. Francis Sch. Dist., 694 F.3d 869, 871 (7th Cir. 2012) (stating a plaintiff must show the funding recipient had actual knowledge of "misconduct, not just actual knowledge of the risk of misconduct"). *But see* Kelly v. Allen Indep. Sch. Dist., 602 F. App'x 949, 953 (5th Cir. 2015) (concluding the funding recipient lacked "actual knowledge" because there was not knowledge of facts that "would permit inference. . . [of] a substantial risk of serious harassment").

84. *See e.g.*, P.H. v. Sch. Dist. Of Kansas City, Mo., 265 F.3d 653, 659–60 (8th Cir. 2001) (dismissing a claim under Title IX for failure to show the school district had "actual knowledge" of the abuse, despite a teacher's "persistent and ongoing" sexual abuse of a student for two years).

85. Doe No.55 v. Madison Metro. Sch. Dist., 897 F.3d 819, 825 (7th Cir. 2018). A petition for rehearing en banc of this case was granted, and the opinion and judgement were both vacated on October 11, 2018. A final holding and new opinion in this case are therefore pending. Order, Madison Metro., No. 17–1521 (7th Cir. Oct. 11, 2018).

86. *Madison Metro.*, 897 F.3d at 820. In her testimony, Ptak noted the hugs were initiated by students. *Id.*

87. *Id.* That spring, the school's behavioral support coach, Tracey Warnecke, informed Ptak she was concerned about interactions she had observed between Doe and Collins, and around that same time, the

of 2013, Ptak met with Collins to discuss these concerns and cautioned for stronger boundaries.[88] Collins explained Doe was simply "confiding in him."[89] No further action was taken that year, and by next fall, after Doe started eighth grade, Ptak "reported she was unaware of any new events."[90] A year later, in August 2014, Doe told her cousin that when she was in eighth grade, Collins had "made sexual comments to her, kissed her, fondled her breast, rubbed his penis against her clothed body, and digitally penetrated her.[91]

Doe filed a complaint against the school, alleging violation of Title IX.[92] On appeal, the Seventh Circuit affirmed the lower court's grant of summary judgment for the school.[93] The court applied a strict application of the "actual notice" standard from *Gebser*, reasoning an official must have actual knowledge of misconduct, "not just actual knowledge of the *risk*s . . . of misconduct."[94] Despite the numerous complaints made by multiple faculty members of inappropriate contact between Collins and Doe, the court reasoned such reports raised merely "cautionary flags," and they were "insufficient to bestow upon Ptak *actual knowledge* that Collins was engaging in sexual misconduct. . .or that there was an *almost certain risk* that he would do so in the future."[95]

The Seventh Circuit's opinion is currently pending before an en banc rehearing, and whether the rigid interpretation of the *Gebser* standard will be affirmed is of critical interest.[96] However, the opinion reveals the shortcomings of an "actual knowledge" approach to ensure schools *prevent* discrimination and harassment. This rigid interpretation of the standard would require either factual proof of past instances of abuse, or actual knowledge of a future risk of harm that is almost certain.[97]

Such requirements are at odds with current social knowledge about reporting. The #MeToo movement revealed the pervasiveness of underreporting, and has increased awareness of all the ways that survivors are disincentivized from speaking out about their harassment, abuse, or assault.[98] Restricting liability to such a

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school's counselor, Mary McAuliffe, and one of Doe's teachers, Brooke Gritt, expressed similar concerns to Ptak.*Id*. at 820–821. Moreover, the school's psychologist, Karen Wydenven, reported to Ptak about "a group of seventh grade girls who were hanging around Collins." *Id*.

88. *Id*. at 821.

89. *Id*.

90. *Id*. at 822.

91. *Id*.

92. *Id*. at 820.

93. *Id*.

94. *Id*. at 822 (emphasis added).

95. *Id*. (emphasis added).

96. Order, Madison Metro., No. 17–1521 (7th Cir. Oct. 11, 2018).

97. Case Comment, *Doe No. 55 v. Madison Metropolitan School District: Seventh Circuit Holds School Not Liable in Case of Child Sex Abuse*, 132 HARV. L. REV. 1550, 1555 (2019), https://harvardlawreview.org/2019/03/doe-no-55-v-madison-metropolitan-school-district/. [https://perma.cc/AKY5-WQSB].

98. *See* Rebecca Traister, *The Toll of Me Too*, THE CUT (Sept. 30, 2019), https://www.thecut.com/2019/09/the-toll-of-me-too.html. [https://perma.cc/WZH2-ATZ2].

stringent standard incentivizes school districts to "insulat[ed] themselves from knowledge,"[99] and permits them to benefit from survivors' silence, even where a should reasonably should have known about the misconduct.[100]

In contrast, other federal circuits have interpreted *Gebser* to permit greater flexibility interpreting "actual notice," so long as the standard was not strict liability. For example, in *Escue v. Northern OK College*, the Tenth Circuit reasoned the "actual notice" standard does not impose such a high bar that only a "clearly credible report of sexual abuse from the plaintiff-student" is sufficient to put a district "on notice."[101] Rather, the court reasoned, prior complaints are not required to be "clearly credible [because] . . . [a]t some point . . . a supervisory school official knows . . . that a school employee is a substantial risk to sexually abuse children."[102] Similarly, in *Doe v. School Board of Broward County*, the Eleventh Circuit emphasized "it is the risk of [sexually violent] conduct that the Title IX recipient has the duty to deter."[103]

C. SCHOOL DISTRICT LIABILITY FOR STUDENT-ON-STUDENT HARASSMENT

While teacher-on-student sexual harassment is a common form of sexual harassment in education, student-on-student harassment is even more pervasive.[104] *Gebser* established that students sexually harassed by a teacher could seek damages against the school employing the teacher if the school (1) had "actual knowledge" of the harassment and (2) was deliberately indifferent to it.[105] This decision, however, left open the question of whether students were able to seek damages against educational institutions under Title IX when harassed by their peers.[106]

A year after *Gebser*, the Supreme Court addressed the legal standard for applying liability to an education funding recipient for student-on-student harassment in *Davis v. Monroe County Board of Education*.[107] In *Davis*, a fifth-grade girl named LaShonda was harassed by a fellow fifth-grade male student.[108] Throughout the winter and early spring of LaShonda's fifth-grade year, the male student groped her breasts and genital area, put an object in his pants and rubbed it against her, and made sexually suggestive comments to her.[109] Although both LaShonda and her mother complained to the school principal and to several

99. *Gebser*, 524 U.S. at 300 (Stevens, J., dissenting).

100. *Cf. id.*; *Madison Metro*, 897 F.3d at 822.

101. Escue v. N. OK Coll., 450 F.3d 1146, 1154 (10th Cir. 2006).

102. *Id.* (quoting Gordon v. Ottumwa Cmty. Sch. Dist., 115 F.Supp.2d 1077, 1082 (S.D. Iowa 2000) (internal quotation marks omitted)).

103. Doe v. Sch. Bd. of Broward Cty., 604 F.3d 1248, 1258 (11th Cir. 2010); *see supra* Part III.B.

104. Helena K. Dolan, *The Fourth R—Respect: Combating Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 216 (1994).

105. *Gebser*, 524 U.S. at 277.

106. *See also id.* (discussing only teacher-on-student harassment).

107. Davis v. Monroe Cty. Bd. of Educ. 526 U.S. 629, 633 (1999).

108. *Id.*

109. *Id.* at 633–34.

different teachers who witnessed harassment, no action was taken by the school, and the harassment continued. [110] The trial court granted summary judgment for the defendant, holding Title IX did not provide a private right of action for student-on-student harassment.[111]

Reversing the lower court's decision, the Supreme Court found that the school's failure to take action may have constituted a potential violation of Title IX, and established a new liability standard specifically for student-to-student harassment.[112] Rejecting a narrow basis of liability only in the context of a teacher-harasser,[113] the Court found that a school could be found liable in cases in which a funding recipient's deliberate indifference to the harassment effectively caused students to undergo harassment or made them vulnerable to it.[114]

However, even where "deliberate indifference" has been established, a plaintiff alleging student-to-student harassment must satisfy three additional requirements: (1) the funding recipient had "substantial control" over not only the harasser, but also the context in which the harassment occurred;[115] (2) the harassment was severe, pervasive, and objectively offensive;[116] and (3) the harassment denied the victims equal access to education. [117]

In interpreting "substantive control," the Court emphasized whether the harasser was subject to a school's disciplinary authority,[118] a similar analysis presented in *Davis* regarding a funding recipient is able to take "remedial action" against the harassment.[119] In "context," the Court noted the harassment occurred during school hours and on school grounds, much of it in the classroom.[120]

In determining what amounts to sexual harassment, the Court explained the conduct alleged by the plaintiff must be "so severe, pervasive, and objectively offensive, and . . . so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[121] Any analysis of the conduct will consider the "constellation of surrounding circumstances, expectations, and relationships" involved, including such facts as "the ages of the harasser and the [survivor] and number of individuals involved."[122]

Finally, in establishing whether the harassment sufficiently denied equal access to education, the *Davis* court made two points. First, evidence of a decline in a

110. *See id*. at 635.
111. *Id*. at 636.
112. *Davis*, 526 U.S. at 636–38.
113. *Id*. at 645–46.
114. *Id*. at 644–45.
115. *Id*. at 645.
116. *Id*. at 650–51.
117. *Davis*, 526 U.S. at 652–53.
118. *Id*. at 646-47.
119. *Gebser*, 524 U.S. at 288–289.
120. *Davis*, 526 U.S. at 646.
121. *Id*. at 651.
122. *Id*.

student-survivor's grades could demonstrates a *potential link* between the harassment and access to education.[123] However, the Court also stated the harassment must be "serious enough to have the *systemic* effect of denying" equal access to education, and that a "single instance," even if "sufficiently severe," might not be "systemic."[124] The Court reasoned Congress was unlikely to have intended the statute cover single acts of harassment due to the "inevitability of student misconduct and the amount of litigation that would be invited."[125]

As was evidenced in the context of teacher-student harassment[126] legal issues as to what constitutes "actual notice" also arise in the context of student-on-student harassment, with some courts finding liability through a more flexible standard. Two federal courts have allowed cases to proceed absent the stringent "actual knowledge" requirement if a plaintiff shows evidence the harassment or assault stems from a known institutional policy.[127] For example, in *Simpson v. University of Colorado*, two female students were sexual assaulted at an off-campus football recruiting party.[128] The University had been issued guidance warning about the risks of sexual assault at recruiting events that were inadequately supervised.[129] Despite these known risks, the university did not take any preventative action to provide adequate training or issue warnings to protect students.[130] The Tenth Circuit held the "deliberate indifference to providing adequate training or guidance that is obviously necessary to implementation of a specific program or policy" established liability under Title IV, even though the University did not have notice of prior misconduct by the perpetrators.[131]

In addition, modern technologies, such as the proliferation of smart phones and rise of social media, raise interesting legal questions as to what liability, if any, schools bear in preventing online harassment and abuse. For example, might a school be acting with "deliberate indifference" by not effectively monitoring social media accounts of students? What defense might a school have if the cyber-harassment occurred outside of school hours, or using technology beyond the school's control? Moreover, if a school has a strong antiharassment policy that covers cyber activities, might "actual notice" liability be established by failure to provide training or issue warnings?

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123. *Id*. at 652.

124. *Id*. at 652–53 (emphasis added); s*ee, e.g*., K.T. v. Culver-Stockton College, 865 F.3d 1054, 1059 (8th Cir. 2017) (affirming dismissal of a Title IX complaint, including on the basis that because the plaintiff alleged "a single sexual assault," she did not sufficiently plead actionable peer harassment under Title IX).

125. *Davis*, 526 U.S. at 652–53.

126. *See supra* Part III.B.

127. *See* Williams v. Bd. Of Regents of the Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007); *Simpson v. University of Colorado*, 500 F.3d 1170 (10th Cir. 2007).

128. Simpson v. Univ. of Colo., 500 F.3d at 1173.

129. *Id*.

130. *Id*.

131. *Id*. at 1178.

IV. THREE-FACTOR TEST FOR TITLE IX LIABILITY

Davis presented a three-factor standard to determine whether a recipient of federal education funds is liable in a private damages action arising from teacher-student or student-on-student sexual harassment.[132] First, the sexual harassment must be so severe, pervasive, and objectively offensive that it deprives the victims of access to the educational opportunities or benefits provided by the school.[133] Harassment must almost always occur on multiple occasions in order for the school to be found liable.[134] Second, the school must have actual knowledge of the harassment.[135] To have actual knowledge of an incident, school officials must have witnessed it or received a report of it."[136] Third, the school must be deliberately indifferent to the harassment.[137] To impose liability, school officials' response to known harassment also must have been "clearly unreasonable in light of the known circumstances."[138]

Some scholars consider the standard to be too stringent and argue that Title IX provides an "empty promise" for victims of sexual harassment in educational settings.[139] One criticism of the standard stems back to *Gebser*, where the Supreme Court rejected the use of agency principles and instead required "actual knowledge," despite previous OCR guidance stating that a school could be held liable "whether or not it knew, should have known, or approved of the harassment at issue."[140] As a result of this more stringent standard, the Court in *Gebser* found that the plaintiff could not recover damages under Title IX.[141]

A. SEVERE, PERVASIVE & OBJECTIVELY OFFENSIVE

Whether the sexual harassment is severe, pervasive, and objectively offensive is a fact-specific inquiry.[142] It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a

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132. *Davis*, 526 U.S. at 650.

133. *See id*. at 652–653 (implying that the "severe, pervasive, and objectively offensive"' factor was added in this student-on-student harassment case because peer harassment is much less likely to reach the level of denying the student equal access to an educational program or activity than teacher-on-student harassment, where this factor is met automatically due to the relationship between the harasser and the victim, as in *Gebser*).

134. *Id*.

135. *Id*. at 650.

136. Doe v. Galster, 768 F.3d 611, 614 (7th Cir. 2014).

137. *See Davis*, 526 U.S. at 650.

138. *Doe*, 768 F.3d at 614 (quoting *Davis*, 526 U.S. at 648).

139. Megan Chemer-Raft, Comment, *The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases*, 97 NW. U. L. REV. 1891, 1895 (2003) (arguing the courts' present interpretations of Title IX do not sufficiently address the needs of sexual harassment plaintiffs attempting to gain relief under the statute).

140. *See id*. at 1905–08.

141. *Id*. at 1907.

142. *See Davis*, 526 U.S. at 651 (using the expectations, circumstances and relationships of the parties as well as other factors to determine whether there was gender oriented conduct).

plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victim-student is effectively denied equal access to an institution's resources and opportunities.[143]

1. Severe

To determine whether the harassment is sufficiently severe, courts look to the context and frequency of the alleged conduct that occurred and whether it was reported.[144] In *Kollaritsch v. Michigan State University Board of Trustees*, four female students at Michigan State University (MSU) were sexually assaulted.[145] The victims reported the assaults to campus police and school administrators.[146] In one of the cases, the victim, Kollaritsch, had reported that a male student had sexually assaulted her; the student was placed on probation and forbidden to come into contact with Kollaritsch.[147] When the victim continued to encounter her attacker, she filed a formal retaliation complaint with the school, but after an investigation MSU determined no retaliation had occurred.[148] In another case another female student, "Jane Roe 1," reported to MSU that a male student had sexually assaulted her in February 2014. After completing an investigation, MSU declined to find sexual assault, due to a lack of sufficient evidence.[149]

The victims brought suit against Michigan State University Board of Trustees and other school administrators, alleging that the school's investigation and response to the assaults were inadequate.[150] The Sixth Circuit disagreed, finding that the sexual harassment for each student was not sufficiently severe.[151] In Kollaritsch's case, the court found that although she had encountered her attacker, her testimony suggested that they were merely both present in the same location, living in the same dormitory and frequenting public areas in the dorm where both were allowed to be.[152] In filing her retaliation claim, Kollaritsh did not allege that the attacker had further harassed her, or that she and her attacker had a conversation.[153] In the case of Jane Roe 1, the court found that after MSU initiated a response, the male student did not have any further contact with Roe 1,

143. *Id*.

144. *See* Gabrielle M. v. Park Forest-Chicago Heights, 315 F.3d 817, 822 (7th Cir. 2003) (looking at details of when, where, or how often the alleged conduct occurred and whether it was reported).

145. Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 618 (6th Cir. 2019).

146. *Id*. at 618.

147. *Id*. at 624.

148. *Id*.

149. *Id*. at 625.

150. *Id*. at 618.

151. *Id*. at 620 ("The *Davis* Court hypothesized that a single incident could be sufficiently severe that it would result in the articulated injury—and we do not doubt that a sexual assault would be such a severe incident —but the Court held that a single incident would nonetheless fall short of Title IX's requirement of 'systemic' harassment.").

152. *Id*. at 624.

153. *Id*. at 624.

and withdrew from the university.[154] Roe 1 had argued that MSU should be held liable because her male attacker could return to campus freely, making her vulnerable to further harassment. The court disagreed, noting that Roe 1 had not pled any facts showing that she had had a "post-response" encounter with her male attacker.[155] While the court did not dispute that some of the named victims had been subject to sexual harassment, the court emphasized that MSU had responded to the allegations and no further sexual harassment had taken place.[156] As such, the court held that the sexual harassment at issue was not sufficiently severe to hold MSU liable for Title IX damages.[157]

2. Pervasive

Sexual harassment over an extended period of time which interferes with a student's ability to learn at an educational institution satisfies the "severe, pervasive, and objectively offensive" test.[158] In *GP by and through JP v. Lee County School Board*, the Eleventh Circuit found that a female middle school student had failed to show that she suffered from severe and pervasive harassment that resulted in deprivation of educational opportunity.[159] The school student filed a Title IX action against the county school board, alleging sex discrimination arising out of an alleged bullying of the student by a male classmate.[160] The student alleged that the male classmate would push the plaintiff, pull her hair, pull books out of her hand, or shake a chair as she was standing on it to try to make her fall.[161] The female student reported the bullying to school administrators, who separated the two students from classes together, provided the female student with an escort, and suspended the male student for two days.[162] However, the female student would continue to see the male student in the hallways, where he would mouth to her that he was going to kill her.[163] The plaintiff's parents eventually withdrew

154. *Id*. at 625.
155. *Kollaritsch*, 944 F.3d at 625.
156. *Id*. at 618–30.
157. *Id*. 618–630.
158. *See* GP ex rel. JP v. Lee Cty. Sch. Bd., 737 F. App'x 910 (11th Cir. 2018); *e.g*., Doe v. Miami University, 882 F.3d 579, 591 (11th Cir. 2018)("one incident of allegedly non-consensual kissing—while unacceptable—does not rise to the level of sexual harassment [that is] so severe, pervasive, and objectively offensive. . .Rather, we have required a plaintiff alleging deliberate indifference to establish an extensive pattern of sexually offensive behavior, and this one incident of kissing is insufficient."); Pahssen v. Merrill Cty. Sch. Dist., 668 F.3d 356, 363 (6th Cir. 2012)(holding that three separate occasions of sexual harassment—a male student shoving a female student into a locker, demanding that she perform oral sex on him, and making obscene sexual gestures at her—did not constitute sexual harassment that rose to the level of severe, pervasive, and objectively offensive.); K.T. v. Culver-Stockton College, 865 F.3d 1054, 1059 (8th Cir. 2017) (plaintiff's complaint alleging a single sexual assault on its own does not plausibly allege pervasive discrimination as required to state a peer harassment claim.).
159. *GP ex rel. JP*, 737 F. App'x at 916.
160. *Id*. at 911.
161. *Id*. at 911.
162. *Id*. at 911–13.
163. *Id*. at 913.

her from the school.[164] In her Title IX claim, the plaintiff alleged that the Board discriminated against her based on sex by failing to respond adequately to her report that a male classmate was bullying her.[165]

The Eleventh Circuit found that the male student's conduct was not sufficiently pervasive to survive a Title IX claim. The Court reiterated the factual findings of *Davis*, noting that students in school settings "regularly interact in a manner that would be unacceptable among adults," and "often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it."[166] The court held that Title IX allows private damages only when the harassing behavior is "serious enough to have the systemic effect of denying the victim equal access to an educational program or activity."[167] In this case, while the male student had subjected the female student to harassing and teasing remarks, the behavior had not deprived the female student of an educational benefit.[168] The plaintiff admitted that fear of the male student had not compelled her withdrawal from the school a few weeks later.[169] After the female student was removed from the class she shared with him, he no longer had the opportunity to harass, other than through a few brief sightings in the hallway that involved neither physical nor verbal contact.[170] The court also noted that the female student had not reported any of the teasing and bullying which had taken place for several months, mitigating the conclusion that it was pervasive and severe.[171]

3. Objectively Offensive

Sexual harassment may be "objectively offensive" when a reasonable individual would find the behavior demeaning, harmful, or threatening.[172] Examples of harmful conduct may include "objectionable epithets" and "demeaning depictions or treatment," as well as "threatened or actual abuse or harm."[173]

In *Davis*, the Supreme Court found that the petitioner had sufficiently alleged sexual harassment that was objectively offensive.[174] The petitioner's minor daughter was the victim of a prolonged pattern of sexual harassment by one of her fifth-grade classmates. The classmate attempted to touch the victim's breasts and genital area and made vulgar statements.[175] The daughter reported each of these incidents to her mother and to her classroom teacher, who allegedly

164. *GP ex rel. JP*, 737 F. App'x at 913.
165. *Id.* at 911.
166. *Id.* at 914–15 (quoting *Davis*, 526 U.S. at 651–52).
167. *Id.* at 914 (quoting *Davis*, 526 U.S. at 651–52).
168. *Id.* at 914–15.
169. *GP ex rel. JP*, 737 F. App'x at 915.
170. *Id.*
171. *Id.*
172. Abbott v. Pastides, 900 F.3d 160, 164 (4th Cir. 2018).
173. *Id.*
174. *Davis*, 526 U.S. at 652–53.
175. *Id.* at 632–633.

informed the school principal.[176] The classmate did not suffer any disciplinary action, and his conduct continued for months, despite the daughter repeatedly informing school administrators what was taking place.[177] The Court found that the classmate's behavior was objectively offensive–it included numerous acts of touching that were done without the daughter's consent, where she was touched in personal, intimate areas.[178] The Court also noted that multiple students had reported unease with the classmate's behavior and also reported incidents with the principal.[179]

4. Verbal Sexual Harassment

"Federal law does not protect students from commonplace schoolyard altercations, including name-calling, teasing, and minor physical scuffles."[180] Violent physical attacks generally satisfy the "severe, pervasive, and objectively offensive" standard of harassment that denies a student equal access to educational benefits or opportunities.[181] Verbal sexual harassment, in the absence of physical contact, may satisfy the severe, pervasive, and objectively offensive standard.[182] In *Jennings v. University of North Carolina*, a former student and soccer player at the University of North Carolina at Chapel Hill claimed that her coach persistently and openly pried into and discussed the sex lives of his players and made sexually charged comments.[183] The coach's sex-based verbal abuse permeated team settings; the sexually charged atmosphere left the players humiliated and uncomfortable.[184]

The Fourth Circuit concluded a jury could find the coach's degrading and humiliating conduct sufficiently severe to create a sexually hostile environment.[185] Thus, verbal sexual harassment alone may be sufficiently severe, pervasive, and objectively offensive to find a school liable.[186] Harassing conduct that is "merely tinged with offensive sexual connotations" is insufficient for Title IX protection.[187] For example, in *Eilenfeldt v. United* C.*U.S.D. #304 Board of Education*, the plaintiff claimed that his Title IX rights were violated as a result of the bullying he faced, including being called a rapist, pedophile, and child

176. *Id*.
177. *Id*. at 634.
178. *Id*. at 653–54.
179. *Davis*, 526 U.S. at 653–54.
180. Doe v. Galster, 768 F.3d 611, 618 (7th Cir. 2014).
181. *E.g., id*. ("In one, T.M. pushed Doe and punched her in the face in the hallway after class. In another, T.M. and M.C. repeatedly hit Doe with metal track spikes at a track meet, making her limp and bleed. In yet another, all three of the boys hit Doe with sticks on the playground on the last day of school-leaving a foot-long welt on her back and other injuries.").
182. *See* Jennings v. University of North Carolina, 482 F.3d 686, 696–99 (4th Cir. 2007).
183. *Id*. at 691–93.
184. *Id*. at 698.
185. *Id*.
186. *See id*. at 698–99.
187. Wolfe v. Fayetteville, 648 F.3d 860, 866 (2011) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998)).

molester.[188] While the court recognized that the abuse consisted of sexual language, it held that this was insufficient to state a Title IX claim because the plaintiff had not alleged that students harassed him "*because* of his male gender or his failure to conform to male gender norms."[189]

5. Gender Identity and Sexual Orientation

A developing area of the law is sexual harassment based on gender identity and/or sexual orientation.[190] It may be possible for a plaintiff to pursue a remedy for Title IX discrimination on the basis of sexual orientation or based on their gender identity. Plaintiffs in these situations have alleged torts such as intentional infliction of emotional distress[191] and invasion of privacy.[192]

Several circuits have also found protection against these types of harassment under the Equal Protection Clause of the Fourteenth Amendment and pursuant to 42 U.S.C. § 1983. In *Nabozny v. Podlesny*, the Seventh Circuit found that where administrators turn a deaf ear to the plaintiff's complaints of sexual harassment based on his sexual orientation, despite the fact that the school had a policy of investigating and punishing sexual harassment, school administrators may be liable for an equal protection claim involving peer sexual orientation harassment.[193] In *Flores v. Morgan Hill Unified School District*, the Ninth Circuit found that an equal protection violation existed when school administrators treated victims of sexual orientation harassment in a discriminatory manner or were deliberately indifferent to this type of harassment.[194] In this case, Flores found pornography and notes threatening "die, dyke bitch" inside her locker and written on her locker door. She alleged that when she showed these writings to the vice principal, the vice principal took no action to stop the harassment.[195] The court stated that while the guarantee of equal protection does not itself prescribe specific duties of a school administrator, "[i]t requires the defendants to enforce District policies in cases of peer harassment of homosexual and bisexual students in the same way that they enforce those policies in cases of peer harassment of

188. Eilenfeldt v. United C.U.S.D. #304 Bd. of Educ., 30 F. Supp. 3d 780, 788 (C.D. Ill. 2014).

189. *Id.*

190. Gender identity refers to a person's internal, deeply held sense of their gender. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. For some people, their gender identity does not fit neatly into the categories of man or woman. Sexual orientation, meanwhile, is totally distinct from a person's gender identity. A transgender person may be straight, lesbian, gay, bisexual, or queer. For example, a person who transitions from male to female and is attracted solely to men may identify as a straight woman.

191. Doe v. Board of Educ. of Prince George's Cty, 982 F. Supp. 2d 641 (D. Md. 2013), *aff'd*, 605 F. App'x 159, 318 (4th Cir. 2015); Cortese v. West Jefferson Hills Sch. Dist., 2008 WL 9404638 (Pa. Commw. Ct. Dec. 9, 2008).

192. Doe ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 536–37 (3rd Cir. 2018) (rejecting the appellants' tort claim).

193. Nabozny v. Podlesny, 92 F.3d 446, 449, 460 (7th Cir. 1996).

194. Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1132 (9th Cir. 2003).

195. *Id.* at 1133.

heterosexual students."[196] The court found that a jury could conclude that the defendants intentionally discriminated against the plaintiff in violation of the Equal Protection Clause.[197]

Students' have also argued school districts that require high school students to use only facilities matching their biological sex or to use gender-neutral alternative facilities would violate Title IX.[198] However, these cases relied on Title IX interpretations from the Obama Administration, which had protected transgender students in public schools, allowing them use bathrooms and facilities corresponding with their gender identity.[199] In February 2017, the Trump Administration reversed this interpretation of Title IX.[200]

6. Cyber-Bullying

Advancements in technology have paved the way for online bullying and have presented new challenges to schools addressing bullying and harassment concerns.[201] Cyber bullying can be done at any time of day from any location and affects a child even when he or she is alone.[202] Because cyber bullies often post anonymously, their harassment tends to be even more "psychologically savage" than that of bullies acting in person.[203] On the internet, adolescents lose their inhibitions and often go farther with slights than they would if they were face-to-face with their victim.[204] Bullying can also go viral online, allowing many children to attack the same target at once and facilitate widespread distribution of harmful materials.[205]

School officials face many difficulties in addressing cyber bullying. Many adults are not as technologically adept as the adolescents using electronics to bully others, which hinders their ability to confront and resolve the issue.[206] Some school officials view cyber bullying as an "off-campus matter" and believe they

196. *Id*. at 1137–38 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)).

197. *Id*. at 1138.

198. Parents for Privacy v. Dallas Sch. Dist. No. 2, 326 F. Supp. 3d 1075 (D. Or. 2018); Harrington v. City of Attleboro, 172 F. Supp. 3d 337, 352–54 (D. Mass. 2016); Reed v. Kerens Indep. Sch. Dist., 2017 WL 2463275 at *9–10 (N.D. Tex. 2017).

199. Ariane de Vogue, *Trump administration withdraws federal protections for transgender students*, CNN (Feb. 23, 2017), https://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/index.html. [https://cnn.it/37M5Vj8].

200. *Id*.

201. *See* T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 299–300 (E.D.N.Y. 2011).

202. *What is Cyberbullying*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://stopbullying.gov/cyberbullying/what-is-it/index.html (last visited Feb. 19, 2020). [http://2SNCsB7].

203. Jan Hoffman, *As Bullies Go Digital, Parents Play Catch-Up*, N.Y. TIMES (Dec. 4, 2010), https://www.nytimes.com/2010/12/05/us/05bully.html. [https://nyti.ms/2ulyCWy].

204. *Id*.

205. SAMEER HINDUJA AND JUSTIN W. PATCHIN, WHITE HOUSE CONFERENCE ON BULLYING PREVENTION: OVERVIEW OF CYBERBULLYING 22 (January 2014), https://www.myovm.com/media/1049/hinduja-patchin-whitehouse.pdf. [http://37IC9eX].

206. *Id*. at 23.

lack the authority to discipline student perpetrators.[207] As such, many school officials have taken the position that bullying over social media is not something school administrators can be held liable for under Title IX.

In *I.F. v. Lewisville Independent School District*, a high school student who had reported that she was sexually assaulted at a party also reported that she was subject to cyberbullying from her fellow classmates about the assault on Twitter.[208] Investigators reviewed tweets and retweets by the victim's fellow high school students, as well as Instagram posts.[209] The school concluded that those social media posts did not amount to "bullying" because there was no indication that they occurred while the students were on school property or at a school-sponsored activity, they did not threaten harm to the victim's person or property, and they were not sufficiently pervasive to create a harassing environment.[210]

The Court found that the online and in-person actions were allegedly so severe, pervasive, and objectively offensive that they could have effectively barred the student's access to an educational opportunity or benefit, and as such should not be dismissed on summary judgment.[211] The plaintiff had alleged that in person her classmates had called her a "whore" and a "slut."[212] Others had asked whether she had sex with multiple people and "how did it feel to be fucked in every single hole of your body?"[213] Similar comments continued online, where fellow students had commented on her alleged assault on both Twitter and Instagram.[214] As a result of the harassment, the student stated that she felt suicidal and depressed, began cutting herself, had nightmares, and experienced panic attacks. Based on this evidence the Court found that she had demonstrated a genuine dispute regarding whether the harassment was severe, pervasive, and objectively offensive.[215]

B. ACTUAL KNOWLEDGE

Funded schools may only be held liable for a Title IX sexual harassment claim when the school has actual notice or knowledge of the harassment.[216] As such, only funded schools who have actual knowledge of sexual harassment *and* are "deliberately indifferent" to an incident "that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the

207. *See* Hoffman, *supra* note 204 (discussing issues parents face when their children are bullied online).

208. I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360 (5th Cir. 2019); s*ee also* Burke v. Brentwood Union Sch. Dist., No. 3:15-cv-00286 (N.D. Cal. 2015) (settled); Ketchum v. Newport-Mesa Unified Sch. Dist., No. 30-2009-00120182-CU-CR-CJC (Orange Cnty. Super. Ct. 2009) (settled).

209. *Lewisville*, 915 F.3d at 373.

210. *Id*. at 367.

211. *Id*. at 373.

212. *Id*.

213. *Id*.

214. *Lewisville*, 915 F.3d at 373.

215. *Id*.

216. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650 (1999).

educational opportunities" can be penalized.[217] The language of Title IX suggests "that Congress did not intend to allow recovery of damages where liability rests solely on principles of vicarious liability or constructive notice."[218] The purpose of requiring notice of the violation to an appropriate person and giving schools an opportunity to voluntarily rectify the violation before Title IX proceedings commence is to avoid punishing schools who were "unaware of discrimination in its programs and is willing to institute prompt corrective measures."[219] As a result, courts have consistently held that funded schools cannot be held responsible for Title IX violations if they do not know about the incident in the first place.[220]

Title IX's "actual knowledge" requirement demands the official who is informed of the alleged sexual harassment be a person with the authority to institute corrective measures.[221] In *Ross v. University of Tulsa*, a university policy designating campus security officers as persons to whom students should report campus sexual assault did not render officers "appropriate persons" within the meaning of Title IX, so as to place the university on actual notice.[222] The court held that, although student-on-student harassment was reported to campus security officers, the officers could not take corrective action themselves, and therefore could not be considered "appropriate persons" for a Title IX claim.[223] The court refused to extend principles of agency, stating if an employee or mandatory reporter fails to convey a report to a sexual harassment claim to a superior, that failure cannot be attributed to the school as a whole.[224] As such, the act of receiving and forwarding a report may lead a school to take corrective action, but until the information is received by an individual who has the authority to institute remedial procedures, the school will not be held to have "actual knowledge" of sexual harassment.[225] Appropriate officials to act on behalf of a school to address sexual harassment may include a principal or assistant principal.[226] In contrast, a campus security officer or a teacher's aide cannot act on behalf of a school to address sexual harassment.[227] As result, a school has "actual knowledge" when an official who has the authority to address the alleged discrimination *and* to institute corrective measures knows of the harassment.

The most direct way for a victim to demonstrate "actual notice" is to make a direct report to appropriate school officials at the time of the harassment because actual knowledge cannot be established by an ambiguous inference. In *P.H. v.*

217. *Id.*
218. *Gebser*, 524 U.S. 274, 288 (1998).
219. *Id.* at 289.
220. Some circuits have interpreted the flexibility of the actual notice standard differently. *See infra* Part III.B.
221. Ross v. Univ. of Tulsa, 859 F.3d 1280, 1288 (10th Cir. 2017).
222. *Id.*
223. *Id.* at 1289–90.
224. *Id.* at 1290.
225. *Id.*
226. *See* Donovan v. Poway Unified Sch. Dist., 167 Cal. App. 4th 567, 612 (2008).
227. Hill v. Cundiff, 797 F.3d 948, 971 (11th Cir. 2015). *See also Ross*, 859 F.3d at 1288–90.

School District of Kansas City, a male student victim alleged a teacher walked in on a sexual act between himself and another male teacher.[228] Since the teacher and the student victim quickly hid the sexual nature of the incident, it was unlikely the innocent teacher realized what occurred.[229] Other teachers had complained the particular teacher was spending too much time with the victim, who was frequently absent, tardy and whose grades were suffering.[230] However, the third-party teacher complaints did not voice concern about sexual abuse.[231] Ultimately, the court found the reporting teachers were not aware of the extent of the harassment. The reporting teachers did not have sufficient control to take remedial action which did not amount to actual notice to the school of sexual harassment.[232] As a result, alleged observation or an inference of inappropriate behavior does not put a school on actual notice of sexual harassment for a Title IX claim.

"Actual knowledge" can be satisfied when other student victims have provided notice of specific sexual harassment to an appropriate school official. In *Doe v. School Board of Broward County, Florida*, a student was sexually assaulted by her teacher.[233] The Eleventh Circuit found "actual knowledge" was satisfied because the school district had been put on notice as a result of complaints filed by two other female students of sexual assault and misconduct by the same teacher.[234]

A harasser's prior behavior can put a school on "actual notice" that sexual harassment is more likely to occur.[235] In *Williams v. Board of Regents of University System of Georgia*, a student-athlete had been dismissed from a former school after sexually assaulting two employees on the prior college's athletic department. The University of Georgia's knowledge of the prior behavior, specifically the coach's knowledge of athlete's misconduct when recruiting him, put the university on actual notice.[236] Similarly, in *Morrison v. Northern Essex Community College*, a collegiate coach had been reported for numerous sexual harassment complaints.[237] Even though the coach had been banned from coaching women's teams at the school, he was reinstated as a women's coach before the plaintiff brought a Title IX claim.[238] The court held the coach's prior behavior had put the school on notice sexual harassment was highly likely to occur. As such, if an employee or student has a history of sexual harassment, a school may be on actual notice of harassment if they know of the harasser's prior behavior.

228. P.H. v. Sch. Dist. of Kansas City, 265 F.3d. 653, 662 (8th Cir. 2001).
229. *Id*.
230. *Id*.
231. *Id*. at 663.
232. *Id*.
233. Doe v. Sch. Bd. of Broward Cty., 604 F.3d 1248, 1259 (11th Cir. 2010)
234. *Id*.
235. *Williams*, 477 F.3d at 1288–90, 1294.
236. *Id*.
237. Morrison v. N. Essex Cmty. Coll., 780 N.E.2d 132 (2002).
238. *Id*. at 137.

Title IX protects students from sexual harassment, regardless of disability status, so when a plaintiff cannot communicate effectively to school officials, "actual knowledge" seriously disadvantages a plaintiff.[239] In *Rost v. Steamboat Springs RE-2 School District*, a student with a disability was sexually harassed for several years by male students. The plaintiff did not know the word assault and told the school counselor that "these boys were bothering me."[240] The Tenth Circuit held the student's statement that boys were bothering her and statements by her parents to school officials before the sexual abuse was known did not provide the school with actual notice. As such, unless a student expressly complains known sexual harassment has occurred, a school will not be on "actual notice" for a Title IX claim.

C. DELIBERATE INDIFFERENCE

To establish deliberate indifference, a plaintiff must show the school district's response to sexual harassment was "clearly unreasonable in light of the known circumstances,"[241] and "at a minimum [has] caused the student to undergo harassment" or "made them more vulnerable to it."[242] Courts have given wide deference to schools in matters of responding to sexual harassment before finding a school to be deliberately indifferent. As noted by the Supreme Court in *Davis*, when discussing deliberate indifference under Title IX, "courts should refrain from second-guessing the disciplinary decisions made by school administrators."[243] If the school district did investigate and performed some response to the sexual harassment, this act is usually sufficient to overcome the "deliberate indifference" standard.

In *I.F. v. Lewisville Independent School District*, the court found Title IX does not require flawless investigations or perfect solutions to sexual harassment; instead, schools must merely respond to known sexual harassment "in a manner that is not clearly unreasonable."[244] In *Lewisville*, a student's parents contacted a school counselor to report that the student had been sexually assaulted and was subsequently bullied.[245] Several years later, the student brought action against the school district for violating Title IX, claiming the district was deliberately indifferent to her alleged sexual harassment.[246] The student stated the school engaged in a twenty eight day "lengthy and unjustified delay" before it began its

239. Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1127 (10th Cir. 2008).

240. *Id.* at 1119.

241. *Davis*, 526 U.S. at 630 ("Funding recipients are deemed 'deliberately indifferent' to acts of student-on student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."); *See also* Sauls v. Pierce Cnty. Sch. Dist., 399 F.3d 1279, 1285 (11th Cir. 2005) (adopting *Davis* deliberate indifference standard).

242. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 171 (1st Cir. 2007).

243. *See id.*

244. I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d at 370–73.

245. *Id.* at 364.

246. *Id.*

investigation.[247] However, the court found the school was actively taking steps to provide relief to the student, worked with the student's teachers to get her the work she was missing, requested the teachers be flexible the student's workload, and provided the student with information about educational opportunities outside of the school.[248] When considering the facts at hand, the court held the delay was not clearly unreasonable and thus was not sufficiently deliberately indifferent to justify bringing a Title IX claim.[249]

However, when a school district takes limited action in response to known sexual harassment, a jury may find a school's response clearly unreasonable if the harassment continues.[250] In *Patterson v. Hudson Area Schools*, a male student was repeatedly sexually harassed by other students for several years.[251] The school district primarily responded by verbally reprimanding the harasser, which did not stop other students from continuing the harassment.[252] During the student's eighth grade year, the school allowed him to utilize a special education resource room, which isolated him from the harassment. However, upon entering ninth grade, the district no longer allowed the student to use the resource room and returned to the unsuccessful verbal reprimand approach.[253] The Sixth Circuit held that even though the school took some response to known harassment, because further harassment continued and responses were ineffective, a jury could find the school was deliberately indifferent.[254] As with the other elements of a Title IX action, a finding of "deliberate indifference" remains a fact-intensive determination.

V. BRINGING TITLE IX CLAIMS

A. INDIVIDUALS WHO CAN BRING TITLE IX CLAIMS

An action to recover under Title IX for sexual harassment will generally be brought by the sexually harassed victim. Generally, third parties, such as parents and family members do not have a personal claim under Title IX.[255] This is true even when the third-party parent or family member suffers individual harm or damages as a result of the sexual harassment.[256] Although parents do not have standing to assert personal claims under Title IX, parents can bring claims on a

247. *Id*. at 374.
248. *Id*. at 375–77.
249. *Id*. at 377.
250. Patterson v. Hudson Area Schs., 551 F.3d 438, 448 (6th Cir. 2009).
251. *Id*. at 440.
252. *Id*. at 448.
253. *Id*. at 449.
254. *Id*. at 449–50.
255. *See* Franks v. Ky. Sch. for the Deaf, 142 F.3d 360 (6th Cir. 1998); see also Seiwert v. Spencer–Owen Cmnty. Sch. Corp., 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007).
256. *See* Haines v. Metro. Gov't of Davidson Cty., Tenn., 32 F Supp. 2d 991, 1000 (M.D. Tenn. 1998) (where parents of a child suing under Title IX could not recoup medical expenses).

student's behalf.[257] The one context in which parents can bring a Title IX claim is when a student is not personally able to bring the action. When parents bring a Title IX on behalf of a student, the student in question is often a minor, making it difficult for the student to personally assert their own claim.[258] In addition, parents can bring a Title IX on behalf of a deceased child, whether an adult or a minor.[259]

B. INDIVIDUALS WHO TITLE IX CLAIMS CAN BE BROUGHT AGAINST

In both *Gebser* and *Davis*, the Supreme Court made clear that a school district will not be held liable for the actions of individual teachers or students.[260] Instead, courts will only hold a school district responsible for *intentionally* allowing sexual harassment to occur at school.[261] The action can be brought against the college, university, board of regents, board of trustees, or other governing body for the school the victim attended.[262] Because Title IX is directed at federally funded schools, Title IX claims can only be brought against an educational institution and cannot be brought against individual harassers.[263] When no common law remedy is available for victims against an individual harasser (because a common law remedy does not exist or because a jurisdiction has rejected common law remedies), 42 U.S.C. §1983 provides victims with a private right of action against individuals for sexual harassment in schools.[264] Under §1983, a public school official acting under state law can be held liable for violating a student's constitutional rights, such as equal protection or due process.[265] Section 1983 is also attractive to plaintiffs because of its less onerous burden of proof of only gross negligence,[266] as opposed to Title IX's higher standard of deliberate indifference or actual knowledge by a school.[267]

Prior to 2008, a circuit split developed regarding whether Title IX claims displaced §1983 constitutional claims.[268] The Second, Third, and Seventh Circuits held Title IX precluded §1983 constitutional claims, construing Title IX as a

257. Dipippa v. Union Sch. Dist., 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("Generally speaking, parents of a student whose rights were violated do not have standing to assert personal claims under Title IX but do have standing to assert claims on the student's behalf.").

258. Stanley v. Carrier Mills-Stonefront Sch. Dist. No. 2, 459 F. Supp. 2d 766, 770 (S.D. Ill. 2006).

259. Lopez v. Regents of Univ. of Cal., 5 F. Supp. 3d 1106, 1115 (N.D. Cal. 2013).

260. *See supra* Part III.

261. *Davis*, 526 U.S. 629, 641 (1999).

262. *See also Williams*, 477 F.3d at 1282.

263. *See* Letter from Russlynn Ali, *supra* note 1.

264. *See* 42 U.S.C.A. § 1983 (West, Westlaw through P.L. 114–61 approved Oct. 7, 2015); Cheryl L. Anderson, *'Nothing Personal:' Individual Liability under 42 U.S.C. §1983 for Sexual Harassment as an Equal Protection Claim*, 19 BERKELEY J. EMP. & LAB. L. 60, 64 (1998).

265. Megan Chemer-Raft, Comment, *The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases*, 97 NW. U. L. REV. 1891, 1895 (2003).

266. *Id.*

267. *Id.*

268. Fitzgerald v. Barnstable Sch. Cmte., 555 U.S. at 251.

complete and exclusive remedy for sexual harassment victims in an educational setting.[269] At the same time, the Sixth, Eighth, and Tenth Circuits held Title IX was not intended to be an exclusive remedy.[270] Accordingly, these circuits held Title IX does not preclude §1983 constitutional claims.

To resolve the split, the Supreme Court granted certiorari in *Fitzgerald v. Barnstable School Committee* to address whether the Title IX implied right of action precludes a §1983 claim to remedy sex discrimination by federally schools.[271] In 2009, the Supreme Court unanimously decided filing suit under Title IX does not preclude a plaintiff from seeking civil rights relief under §1983.[272] The Court relied on the fact that §1983 and Title IX require different standards to prove liability and that Title IX lacks a comprehensive remedial scheme to find "Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools."[273] As such, §1983 suits under the Equal Protection Clause remain available to sexual harassment victims to hold an individual harasser liable for harm.

VI. RIGHTS OF ACCUSED PERSONS

A. ORIGINAL FEDERAL GUIDANCE ON TITLE IX

The Department of Justice Office of Civil Rights (OCR) provides guiding standards for Title IX compliance to all institutions which receive federal funding from the Department of Education.[274] In 2001, OCR revised their original 1997 Title IX Guidance to reflect the Supreme Court's decisions in *Davis* and *Gebser*.[275] The 2001 Guidance addressed sexual harassment of students by school employees, other students, or third parties, and reiterated the importance of having well-publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints.[276] Specifically, OCR relied on *Gebser*, where the court specifically affirmed the Department's authority to enforce and require schools to provide nondiscrimination policies and procedures, so that Title IX's nondiscrimination mandate could be carried out effectively.[277] Subsequently, OCR stipulated that the standards contained within the 2001 Guidance should be used by schools to determine

269. *Id*.
270. *Id*.
271. *Id*.
272. *Id*. at 258.
273. *Id*.
274. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated Apr. 2015).
275. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), https://www.federalregister.gov/documents/2001/01/19/01-1606/revised-sexual-harassment-guidance-harassment-of-students-by-school-employees-other-students-or.
276. *Id*. at iii.
277. *Id*.; *see also* Gebser, 524 U.S. at 281–82.

compliance with Title IX and that compliance with these standards would be used by OCR as a condition of the receipt of federal financial assistance in light of *Gebser* and *Davis*.[278]

In 2011, OCR released a "Dear Colleague" letter that expanded upon the 2001 Guide by providing additional guidance for cases involving sexual violence.[279] Like the 2001 Guide, the "Dear Colleague" letter did not carry the force and effect of law, but rather set forth the policies and practices that, if violated, would lead OCR to initiate proceedings to terminate federal financial assistance under existing regulations implemented to effectuate Title IX and other civil rights.[280]

The "Dear Colleague" letter instituted several procedural requirements for Title IX hearings in sexual violence cases, many of which were designed to "protect the complainant and ensure his or her safety, as necessary."[281] Title IX does not require institutions to provide separate grievance procedures for sexual harassment and sexual violence complaints.[282] Institutions may use standard student disciplinary procedures or other separate procedures so long as the procedures are Title IX compliant.[283] To be compliant with OCR's Title IX requirements, an institution receiving federal funds must adopt and publish grievance procedures that resolve complaints of sexual harassment or sexual violence in a prompt and equitable manner.[284]

The "Dear Colleague" letter made clear that a prompt and equitable resolution could be achieved only by applying a preponderance of the evidence standard throughout a school's Title IX investigation and hearing.[285] Indeed, "[g]rievance procedures that use [a] higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX."[286] Preponderance of the evidence had previously been used as the standard in Title VII civil litigation and state-level civil litigation of sexual assault cases.[287] Furthermore, OCR's own use of the preponderance of the evidence standard for evaluating Title IX claims predated the 2011 Dear Colleague Letter by more than a decade.

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278. REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, *supra* note 275, at iv.

279. Letter from Russlynn Ali, *supra* note 1, at 1–2.

280. Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Dep't of Educ., to James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt. (Feb. 17, 2016) (on file with author).

281. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 3 (2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

282. Letter from Russlynn Ali, *supra* note 1, at 8.

283. *But see id*. at 8 n. 22 (noting that student athletes must be subject to the same grievance procedures as other students and complaints against them should not be addressed solely by athletics department procedures).

284. *Id*. at 8.

285. *Id*. at 11.

286. *Id*.

287. Letter from Catherine E. Lhamon, *supra* note 280.

In 1995, following an investigation into Evergreen State College's grievance procedures, OCR held that Evergreen "failed to provide a prompt and equitable resolution" of a student's Title IX sexual harassment complaint by applying a clear and convincing proof standard.[288] Instead, OCR determined that, to comply with Title IX, preponderance of the evidence should be used in analyzing all sexual harassment complaints, a finding reiterated in a similar letter addressed to Georgetown University in 2003.[289] Additionally, a vast majority of schools already applied preponderance of the evidence as the evidentiary standard required in Title IX hearings prior to the release of the Dear Colleague Letter.[290] OCR later used this statistic to support its interpretation that preponderance of the evidence is the only evidentiary standard sufficient for a "prompt and equitable resolution."[291]

The "Dear Colleague" letter also seemed to alter the traditional burden under *Davis*'s three-factor test. Although *Davis* held that "severe and pervasive" conduct sufficient to sustain a Title IX claim would almost always have to be persistent and systemic, OCR held that:

> The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.[292]

Furthermore, whereas *Davis* required a showing that conduct was objectively offensive, OCR required that it merely be "unwelcome" to the complainant. "Unwelcome" conduct, in a student-on-student context, is that which creates a hostile environment.[293] In evaluating whether conduct was severe and pervasive enough to have created a hostile environment, OCR analyzed the situation not only from an objective perspective, per *Davis*, but also a subjective perspective.[294]

Finally, although the Supreme Court required the school to have "actual knowledge" of misconduct under Title IX, OCR deemed a school to have notice

288. Letter from Gary D. Jackson, Reg'l Civil Rights Dir., Region X, U.S. Dep't of Educ., to Jane Jervis, President, The Evergreen State Coll. (Apr. 4, 1995).

289. *Id.*; Letter from Howard Kallem, Chief Attorney, D.C. Enf't Office, to Jane E. Genster, Vice President & Gen. Counsel, Georgetown Univ. (Oct. 16, 2003).

290. *See* FOUNDATION FOR THE INDIVIDUAL RIGHTS IN EDUCATION, STANDARD OF EVIDENCE SURVEY 2-5 (2011), https://www.thefire.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/.

291. Letter from Catherine E. Lhamon, *supra* note 280.

292. Letter from Russlynn Ali, *supra* note 1, at 3; *see also Davis*, 526 U.S. at 652–53.

293. REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, *supra* note 275, at 78.

294. *Id.*

of student-on-student sexual violence "if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence."[295] In doing so, OCR seems to reject the Supreme Court's "actual knowledge" standard articulated in both *Gebser* and *Davis*.[296]

Under the OCR standard, every school is required to have a Title IX coordinator in charge of overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints.[297] A "responsible employee" includes any employee who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.[298] Responsible employees are then required to report incidents of alleged sexual violence to the Title IX coordinator.[299]

OCR also determined that a "prompt and equitable" proceeding pursuant to Title IX required an adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence.[300] During the course of the investigation, both the complainant and the alleged perpetrator must have been afforded similar and timely access to any information that would be used at the hearing.[301] Furthermore, the school could not conduct any pre-hearing meeting at which the alleged perpetrator was able to present his or her side of the story, without providing the complainant the same opportunity, nor should an alleged perpetrator have been allowed to review the complainant's statement without also allowing the complainant to review the alleged perpetrator's statement.[302] Finally, a hearing officer or disciplinary board should not have allowed only the alleged perpetrator to present character witnesses.[303]

OCR's recommendations for conducting an "equitable" proceeding included several more stipulations directly protecting the interests of the complainant and discouraging direct interaction between the parties. OCR advised that it would be improper for any student who had brought a complaint of sexual harassment to be required to work out the problem directly with the alleged perpetrator.[304] Furthermore, if a complainant were to voluntarily engage in mediation with the alleged perpetrator, than the school should be involved either through the

295. *Id*. at 13.
296. *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 290.
297. Letter from Russlynn Ali, *supra* note 1, at 7.
298. REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, *supra* note 275, at 13.
299. *Id*. at 13.
300. Letter from Russlynn Ali, *supra* note 1, at 9.
301. *Id*. at 11.
302. *Id*.
303. *Id*.
304. *Id*. at 8.

presence of a trained counselor, mediator, or, if appropriate, an administrator, and the complainant should be informed of their right to end the informal mediation process at any time in favor of lodging a formal complaint.[305] However, in no circumstance would it be appropriate to engage in mediation between an accuser and the accused, even on a voluntary basis, if the allegation involved sexual assault.[306]

In the context of a formal hearing, OCR also strongly discouraged schools from allowing parties to question or cross-examine each other, because "[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."[307] In a 2014 Questions and Answers document meant to clarify and expand upon the 2011 Dear Colleague Letter, OCR suggested an alternative would be to allow the parties to submit questions to a trained third party to ask the questions on their behalf.[308] They further recommended that the third party screen the questions submitted by the parties and only ask those it deemed appropriate and relevant to the case.[309]

The confidentiality of the complainant should also be protected throughout the process, though the right to confidentiality is not absolute. Under the Family Educational Rights and Privacy Act (FERPA), the accused has the right to view his or her own "education record" maintained by the school, which includes any "information directly related to [the] student," including allegations of misconduct.[310] However, in the event that FERPA requires disclosing parts of the complaint to the accused, schools must redact the complainant's name and other identifying information "before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her."[311] The school should inform the complainant if it cannot ensure confidentiality.[312] OCR also noted that nothing in FERPA should be read to conflict with the federally protected due process rights of the accused. Per the 2001 Guides, "[p]rocedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions."[313]

305. Letter from Russlynn Ali, *supra* note 1, at 8.

306. *Id*.

307. *Id*. at 12.

308. QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, *supra* note 281, at 31.

309. *Id*.

310. 20 U.S.C.A §§ 1232g(a)(1)(A)–(4)(A)(i) (West 2019).

311. Letter from Russlynn Ali, *supra* note 1, at 5 n.15; *see also* Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480, 492 (Iowa 2012) (citing DOE regulations to support withholding education records in their entirety where the student's identity would be known to the requester even with redactions).

312. Letter from Russlynn Ali, *supra* note 1, at 5.

313. REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, *supra* note 275, at 22.

At the conclusion of a Title IX hearing and investigation, both accuser and accused should be informed of the outcome.[314] OCR recommended that the parties be alerted of the outcome concurrently and held that "Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant."[315] Post-secondary institutions have additional obligations under the Clery Act, to disclose the final results of a sexual harassment or assault hearing to both the accuser and the accused.[316] The information contained therein should include only the name of the accused student, the violation committed, and any sanction imposed by the institution against the student.[317] Additionally, postsecondary institutions may not require a complainant to abide by any nondisclosure agreement, in writing or otherwise, with regard to information attained through the Clery Act.[318] Finally, the Clery Act allows a postsecondary institution to disclose to anyone—not just the parties involved—the final results of a disciplinary proceeding if it determines that that the accused student has violated the institution's rules or policies with respect to allegations of a crime of violence or a non-forcible sex offense.[319]

More generally, the Clery Act requires universities to prepare an annual security report for the Department of Education detailing crime statistics of all sex offenses that were reported to a campus security authority and occurred on campus, in a university-owned property, or at a public property adjacent to campus.[320] "Campus security authorities" include not only campus police and security departments, but any individual or organization who has significant responsibility for student and campus activities.[321] Per this expansive definition, individuals may be a campus security authority regardless of whether or not they are a responsible employee under Title IX.[322] A campus security authority is obligated to report any crime reported to them by students to be included in the institution's annual security report. However, Clery Act reporting does not require initiating an investigation or disclosing personally identifying information about the victim.

The Dear Colleague Letter failed to address any specific protections for the accused alone, only noting that schools "must provide due process to the alleged

314. Letter from Russlynn Ali, *supra* note 1, at 13.

315. *Id.*

316. 34 C.F.R. § 668.46(k)(2)(v) (2019).

317. 34 C.F.R. § 99.39 (2019).

318. Letter from Russlynn Ali, *supra* note 1, at 14.

319. 34 C.F.R. § 99.31(a)(14)(i) (2019); *cf.* Krakauer v. State, 445 P.3d 201, 209–10 (Mont. 2019) (holding John Doe, a student accused of sexual assault, retained his expectation of privacy in his education record where the commissioner of higher education held that no violation occurred).

320. 34 C.F.R. § 668.46(b) (2019).

321. *Id.* §§ 668.46(a)(ii)–(iv).

322. *See* QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE., supra note 281, at 17 n. 24 (noting Resident Assistants are campus security authorities under the Clery Act "regardless of whether an RA is a responsible employee under Title IX").

perpetrator."[323] However, OCR went on to note that schools "should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant."[324]

B. DEVOS CHANGES TO TITLE IX PROCEEDINGS

Under Obama-era guidance on Title IX, over 200 students filed lawsuits against universities, alleging that their school disciplined them for sexual misconduct without providing due process protections.[325] On November 18, 2018, United States Secretary of Education Betsy D. DeVos released proposed Title IX rules to provide "reliable procedures that provide adequate due process protections for those involved in the grievance process."[326] The new rules include some notable changes from the Obama-era guidance to establish due process protections of accused students.[327] This section will discuss DeVos' changes to Title IX proceedings and the potential consequences of these changes.

First, the proposed rule allows schools to choose either "preponderance of evidence" standard or the higher "clear and convincing" threshold for establishing claims of sexual misconduct. [328] During the Obama-era, schools were directed to apply a "preponderance of evidence" standard in cases where the issue of sexual misconduct existed. Under the "preponderance of evidence" standard, a party must prove that it is more likely than not its version of the facts is true. The preponderance of evidence standard is a lower standard of proof and is used by federal courts in civil rights cases. Unlike the Obama-era guidance, which directed schools to apply a "preponderance of evidence" standard, the proposed regulation allows schools to set their own standard of evidence for findings of misconduct, as long as it is consistent with standards used for other kinds of campus-based misconduct.[329] Schools are allowed to apply either that minimal standard or the higher "clear and convincing evidence" threshold—both less stringent than the "beyond a reasonable doubt" standard usually needed for criminal convictions.[330] The Department of Education ("Department") explained this change by stating that some Title IX grievance procedures are analogous to certain civil cases that

323. Letter from Russlynn Ali, *supra* note 1, at 12.

324. *Id.*

325. DEP'T OF EDUCATION, NOTICE OF PROPOSED RULEMAKING: TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 14 (2018), https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf.

326. DEP'T OF EDUCATION, SECRETARY DEVOS: PROPOSED TITLE IX RULE PROVIDES CLARITY FOR SCHOOLS, SUPPORT FOR SURVIVORS, AND DUE PROCESS RIGHTS FOR ALL (2018), https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all.

327. *Id.*

328. DEP'T OF EDUCATION, U.S. DEPARTMENT OF EDUCATION PROPOSED TITLE IX REGULATION FACT SHEET (2018), https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf.

329. Andrew Kreighbaum, *College Groups Blast DeVos Title IX Proposal*, INSIDE HIGHER ED (Jan. 31, 2019), https://www.insidehighered.com/news/2019/01/31/higher-ed-groups-call-major-changes-devos-title-ix-rule.

330. Rebecca Bailey & Christopher B. Gilbert, *An Update on Title IX*, HOUS. L. REV. 24, 26 (2019).

require a high standard of proof.[331] The Department reasoned that, because findings of serious sexual misconduct also carry grave consequences for the accused students, a clear and convincing standard is adequate if a finding of responsibility carries grave consequences for a respondents' reputation and ability to pursue a profession or career.[332] Therefore, the Department decided that the schools should have the discretion to use either a preponderance or a clear and convincing standard in their grievance procedures.[333]

Second, the proposed regulation allows for live-hearings and cross-examinations.[334] During the Obama-era, the guidance did not require schools to hold a formal hearing.[335] Instead, it noted that a school's investigation "may" include a hearing to determine whether the prohibited conduct occurred.[336] Many schools chose not to conduct hearing to adjudicate claims of sexual misconduct. These schools implemented what is known as an "investigator-only" model, in which the investigator is also the adjudicator. [337] Investigator-only model was economical for schools and made the investigation process less formal.[338] In few claims where a school allowed a live-hearing, cross-examination was prohibited because the Obama-era guidance discouraged schools from allowing the parties to cross-examine each other during a hearing.[339] In contrast to the Obama-era guidance, the proposed rules require colleges and universities to hold a live-hearing where cross-examination is conducted through the parties' advisors.[340] The Department explained that the requirement of cross-examination is crucial in determining the truth because sexual-misconduct cases often involve individuals' diverging stories of what happened.[341] Furthermore, schools would not be allowed to use a "investigator-only" model.[342] Instead, the new regulation requires that the fact-finder investigating the misconduct be a different individual than the decision-maker at a live-hearing.[343] The Department explained that these changes would make all evidence in investigative proceedings available to both parties and

331. NOTICE OF PROPOSED RULEMAKING: TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, *supra* note 325.

332. *Id*

333. *Id*.

334. *Id*.

335. Michelle J. Harnik, *University Title IX Compliance: A Work in Progress in the Wake of Reform*, 19 NEV. L.J. 647, 668 (2018).

336. *Id*.

337. *Id*. at 671.

338. Jeannie Suk Gersen, *Assessing Betsy DeVos' Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault.

339. Harnik, *supra* note 335.

340. NOTICE OF PROPOSED RULEMAKING: TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, *supra* note 326 (finding that rape shield protections apply to rape complainants, prohibiting asking about the complainant's sexual history, but allowing personal confrontation during a cross-examination).

341. Gersen, *supra* note 338.

342. NOTICE OF PROPOSED RULEMAKING: TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, *supra* note 326.

343. Gersen, *supra* note 338.

eliminate restrictions on parties' rights to speak about allegations.[344] While these changes may promote fairness in the Title IX investigation and proceedings, the live-hearing requirement may significantly increase the time to complete investigations.[345] Furthermore, the cross-examination requirement may discourage victims from coming forward because questioning an alleged victim may be traumatic, intimidating, and could escalate or perpetuate a hostile environment.[346]

Third, DeVos' proposed regulations narrowed the definition of sexual harassment and relieve schools from the obligation of investigating incidents that occur outside the school's own program or activity. Previously, Obama-era guidance defined sexual harassment as unwelcome conduct of a sexual nature that "includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[347] It instructed schools to use a relatively broad definition of sexual harassment under Title IX because the statistics on sexual violence in 2007 showed a crisis-like situation. [348] One in five female students were victims of completed or attempted sexual assault, and schools did not respond to the sexual harassment complaints properly.[349] Many women complained that their allegations were not taken seriously.[350] However, the critics of the Obama-era guidance argued that the definition is unfairly expansive and does not align with the Supreme Court's definition employed in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*. [351] In *Davis*, the Supreme Court defined the actionable student-on-student sexual harassment under Title IX as unwelcome conduct based on sex that is so "severe, pervasive, and objectively offensive" that it effectively denies a person's equal access to education.[352] To address concerns that expansive definitions of sexual harassment could easily lead to absurd and unfair results to the accused student, DeVos' regulation adopts the definition employed by the Supreme Court in *Davis*.[353] With a narrower definition of what constitutes "sexual harassment," the new rules could make it difficult for student victims to hold their schools accountable for failing to correctly investigate or adjudicate sexual assault cases because schools could

344. Simone C. Chu & Iris M. Lewis, *What Happens Next With Title IX: DeVos' Proposed Rule, Explained*, THE HARVARD CRIMSON (Feb. 27, 2019), https://www.thecrimson.com/article/2019/2/27/title-ix-explainer/.

345. Kreighbaum, *supra* note 329.

346. Chu & Lewis, *supra* note 344.

347. OFFICE FOR CIVIL, RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (2011). https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

348. Amy B. Cyphert, *The Devil Is in the Details: Exploring Restorative Justice As an Option for Campus Sexual Assault Responses Under Title IX*, 96 DENV. L. REV. 51, 58 (2018).

349. Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 U. KAN. L. REV. 915, 915 (2016).

350. *Id.*

351. Sara O'Toole, *Campus Sexual Assault Adjudication, Student Due Process, and A Bar on Direct Cross-Examination*, 79 U. PITT. L. REV. 511, 519 (2018).

352. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 652 (1999).

353. SECRETARY DEVOS: PROPOSED TITLE IX RULE PROVIDES CLARITY FOR SCHOOLS, SUPPORT FOR SURVIVORS, AND DUE PROCESS RIGHTS FOR ALL, *supra* note 327.

argue that the reported sexual misconduct was not "severe, pervasive, and objectively offensive."[354]

Furthermore, under DeVos' new regulation, a school's responsibility to investigate only applies to alleged incidents occurring on campus or within an educational program or activity.[355] While Title IX limits its application to the discrimination occurring "under any education program or activity" receiving federal funds, there is no artificial bright-line between harassment occurring "on campus" versus "off-campus."[356] In determining whether Title IX is applicable, schools should look to factors such as whether the harassment occurred at a location or under circumstances where the school owned the premises, exercised oversight, supervision over the location or participants, or funded, sponsored, promoted or endorsed the event or circumstance where the harassment occurred.[357] Although schools have the discretion to consider different factors in determining whether to investigate an incident under Title IX, this change may allow schools to exclude investigations of many alleged incidents of sexual misconduct that occur at off-campus apartments.[358] It may sound reasonable to exclude sexual misconduct occurring off-campus under the purview of Title IX, but this becomes untenable when many students live or interact off-campus.[359] Sexual assault often occurs off-campus, and the effects of that assault could be experienced on campus when the victim and perpetrator share classes or other activities.[360]

VII. IMPACT OF #METOO ON SEXUAL HARASSMENT IN EDUCATION

In 2006, Tarana Burke founded the "MeToo" movement inspired by her passion to empower women of color who had survived sexual violence.[361] The MeToo movement has brought to light the prevalence of women who suffered from sexual harassment and misconduct in a variety of industries. For example, in 2016, Gretchen Carlson filed a sexual harassment suit against Fox News head

354. Michele Landis Dauber & Meghan O. Warner, *Legal and Political Responses to Campus Sexual Assault*, 15 ANN. REV. L. & SOC. SCI. 311, 320 (2019).

355. Bailey & Gilbert, *supra* note 330.

356. DEP'T OF EDUCATION, BACKGROUND & SUMMARY OF THE EDUCATION DEPARTMENT'S PROPOSED TITLE IX REGULATION (2018), https://www2.ed.gov/about/offices/list/ocr/docs/background-summary-proposed-ttle-ix-regulation.pdf. [http://2V8VfIE].

357. DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, *supra* note 347.

358. Sarah Brown & Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, THE CHRON. OF HIGHER EDUC. (Nov. 16, 2018), https://www.chronicle.com/article/What-You-Need-to-Know-About/245118. [http://bit.ly/37LEd6f].

359. Gersen, *supra* note 339.

360. Dauber & Warner, *supra* note 354.

361. Abbey Ohlheiser, *The woman behind 'Me Too' knew the power of the phrase when she created it — 10 years ago*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/. [https://wapo.st/2PdGnVB].

Roger Ailes which resulted in his resignation.[362] In 2017, an essay published by Uber employee Susan Fowler which described the toxic workplace culture at Uber, including rampant sexual harassment and misconduct, resulted in the resignation of Uber Co-founder and CEO Travis Kalanick and twenty employers.[363] The MeToo Movement caused significant social developments both within the United States and internationally. In October 2017, worldwide use of the hashtag flooded social media platforms such as Instagram, Twitter, and Facebook and the movement rapidly became a campaign designed to increase the visibility of sexual assault survivors.[364] One of the most notable outcomes of the MeToo movement was exposing the magnitude of sexual assault worldwide.[365]

The social pressures of the movement has spurred federal and state legislatures to introduce over one hundred and fifty federal laws and six hundred state bills instigating change pertaining to sexual misconduct.[366] Washington State, for example, has adjusted the statute of limitations for sexual assault because the limitation restricted prosecutors' ability to hold perpetrators accountable when reports of crimes were delayed.[367] At least six states recognized March 8, 2019 as "International Women's Day," and a federal bill expressing support and recognition for the day was submitted to the Senate.[368] Several state legislatures have also proposed bills that would ban the use of non-disclosure agreements in sexual assault and sexual harassment cases, as well as more general bills that would create more equitable workplace conditions all employees regardless of gender.[369] On the federal side, the Tax Cuts Jobs Act of 2017 prohibits tax deductions for settlements involving non-disclosure agreements and sexual harassment.[370]

Congress and state legislatures have also been tackling sexual harassment within higher education. In 2014, Congress introduced the Campus Accountability and Safety Act (CASA) with the goal of reducing sexual violence in college and university campuses.[371] Major provisions included the Clery Amendments, which require schools to publish statistics relating to crime on their campuses, and also

362. Elena Nicolaou & Courtney Smith, *A #MeToo Timeline to Show How Far We've Come - How Far We Need To Go*, REFINERY29 (Oct. 5, 2019), https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein.

363. *Id*.

364. Genevieve Hampson, *Campus-Based Sexual Assault: The #MeToo Movement and Students' Understanding of Issues Around Consent* (March 29, 2019) Unpublished Master's Thesis, Louisiana State University (on file with author), https://digitalcommons.lsu.edu/gradschool_theses/4901. [http://38SzAbW].

365. *Id*. at 52.

366. *#MeToo, Time's Up and Legislation Behind the Movement*, BILL TRACK 50 (Feb. 15, 2018), https://www.billtrack50.com/blog/social-issues/civil-rights/metoo-times-up-and-the-legislation-behind-the-movement/. [http://bit.ly/2T4ycvU].

367. S.B 5649, 66 Leg., Reg. Sess. (Wa. 2019).

368. *See, e.g*. S.Res. 101, 116st Cong. (2019).

369. Prasad Vasundhara, *If Anyone is Listening, #MeToo Breaking the Culture of Silence Around Sexual Abuse*, 59 B.C. L. REV. 2507, 2510 (2018).

370. Jonathan Ence, *I Like You When You Are Silent*, J. DISP. RESOL. 165, 166 (2019).

371. S. 976, 116th Cong. (2019).

require confidential advisors in schools to assist sexual harassment victims.[372] The Department of Education also ruled that institutions may not require a complainant to abide by a nondisclosure agreement, thereby effectively reducing the power of the agreement.[373] On the state level, for example, Michigan has modified education curriculum and instruction to include sexual harassment and violence.[374] In 2018, Massachusetts and Florida respectively passed bills creating a task force on sexual misconduct climate surveys for colleges and universities within their states.[375]

Although the MeToo movement has brought greater social awareness of sexual harassment through social media platforms, sexual harassment and sexual assault remain serious problems on college campuses. One in five college women experience unwanted sexual contact.[376] Unfortunately, a 2019 study found that men do not actively encourage sexual harassment prevention programs on college campuses.[377] Although the Obama administration had implemented guidelines expanding the scope of Title IX protections for sexual harassment victims on college campuses, on September 22, 2017, the U.S. Department of Education Office for Civil Rights (DOE-OCR) under President Trump repealed sexual harassment prevention guidelines that had required colleges to appoint a Title IX compliance officer and prosecute sexual harassment claims.[378] These guidelines were repealed despite the fact that sexual harassment experts view these guidelines as essential resources needed to eradicate on-campus sexual harassment.[379]

There is still a possibility that the MeToo movement will positively change the position of women at institutes of higher education. Even though the Obama Era Title IX guidelines are no longer compulsory, there is strong societal pressure placed on colleges to remain vigilant against sexual harassment.[380] A 2019 study indicated that college students feel strongly about explicit consent when initiating sexual contact.[381] Survey results also indicated that college students today are discussing consent with friends of all gender identities, partners, hookups, professors, and family members.[382] In fact, only seven percent of survey participants claimed to have never partaken in a conversation about consent on a college campus.[383] Further, the survey indicated that eighty-four percent of those surveyed

372. *Id*.
373. 38 C.F.R. 99.33(c) (2019).
374. BILL TRACK 50, *supra* note 366.
375. *Id*.
376. Hampson, *supra* note 364, at 2.
377. *Id*. at 52.
378. Marc Edelman, *The Future of Sexual Harassment Policies at U.S. Colleges: From Repeal of the 2011 DOE-OCR Guidelines to Launch of the #MeToo Movement on Social Media*, 12 WAKE FOREST L. REV. Online 12, 13 (2018).
379. *Id*. at 13.
380. *Id* at 29.
381. Hampson, *supra* note 364, at 51.
382. *Id*.
383. Iman Hariri-Kia, *College Men Are Finally Asking for Consent - But Only Because They're Afraid of Being MeToo'd*, ELITE DAILY, (Aug. 6, 2019), https://www.elitedaily.com/p/college-men-are-

say their previous sexual partners have asked them for active, verbal consent while having sex since 2017.[384] A 2018 study conducted in Sweden has indicated that these impacts are not limited to the United States. The study found that Swedish college students were discussing and deliberating the #MeToo movement, and students believed that conversations on the topics of sexual harassment and misconduct would continue to take place at their workplaces and schools.[385] With time, the MeToo movement may instigate more significant changes in higher education institution programs for preventing sexual assault and harassment.

VIII. CONCLUSION

The Civil Rights Restoration Act of 1987 amended Title IX to protect those participating in programs or activities in educational institutions that receive federal financial assistance.[386] The Supreme Court has expanded Title IX further to include sexual harassment in educational institutions in *Franklin v Gwinnett County Public Schools*.[387] In *Meritor*, the Supreme Court interpreted Title IX to include damage remedies, further increasing legal protection from sexual harassment in education.[388] The specific requirement for establishing Title IX liability against an educational institution was established in *Gebser*, a teacher-on-student harassment case. Nevertheless, the *Gebser* standard did not establish the definition of "actual notice" or "an appropriate person," which has created additional litigation.[389]

Davis finalized a three-factor test for a Title IX liability requiring (1) severe pervasive & objective offensive action, (2) actual knowledge, and (3) deliberate indifference.[390] *Davis* specified that a victim can bring a Title IX action against a school district for intentionally allowing sexual harassment to occur on school grounds.[391] Due to these standards and societal pressures, administrations have implemented procedural requirements to ensure the safety of students on college campuses.[392] To facilitate protection, the OCR under President Obama loosened the *Davis* "severe pervasive & objective" factor to "unwelcome conduct."[393] OCR also rejected the "actual knowledge" standard loosening the requirement

finally-asking-for-consent-but-only-because-theyre-afraid-of-being-metood-18366000. [http://elitedai.ly/2SLWLz2].

384. *Id*.

385. Olivia Mardock & Samatha Nadjafi, *A Compliment immediately becomes a harassment*, JONKOPING UNIV. (2018), http://www.diva-portal.org/smash/get/diva2:1219605/FULLTEXT01.pdf. [http://bit.ly/2PcYcUP].

386. *See infra*, Part I.

387. *See infra*, Part II.

388. *See infra*, Part II.

389. *See infra*, Part II.

390. *See infra*, Part III.

391. *See infra*, Part IV.

392. *See infra*, Part V.

393. *See infra*, Part VI.

for notice and implemented Title IX coordinators to enforce the new procedures.[394] Secretary DeVos and the Trump Administration rescinded these interpretations, narrowing the applicability of Title IX.[395] However, these adverse changes may be mitigated by societal movements advocating for the rights of sexual harassment and assault victims.

Sexual harassment in education continues to be an important topic. The MeToo movement has led to an increased social pressure to tackle sexual harassment. While it is not yet clear if this pressure will lead to a relaxation of the stringent legal standard for Title IX cases, there is evidence to support the idea that more substantive legal and social changes will take place over the next several years.

394. *See infra*, Part VI.
395. *See infra*, Part VI.