St. John's Law Review

Volume 95
Number 3 *Volume 95, Summer 2022, Number 3*

Article 6

The Watercooler Is Safer Than the Schoolyard: Lower Courts Dismissal of Peer Sexual Harassment Under Title IX Is Especially Failing Our Students in the "#MeToo" World

Christine Tamer

THE WATERCOOLER IS SAFER THAN THE SCHOOLYARD: LOWER COURTS DISMISSAL OF PEER SEXUAL HARASSMENT UNDER TITLE IX IS ESPECIALLY FAILING OUR STUDENTS IN THE "#METOO" WORLD

CHRISTINE TAMER[†]

INTRODUCTION

While the term #MeToo was first coined in 2006, the movement came to the forefront of American life in October 2017 when actress Alyssa Milano tweeted, "if you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[1] Since then, the #MeToo movement has exposed the fact that sexual harassment remains all too common and has pushed for change in the legal procedures that have failed victims.[2] In the #MeToo world, sexual harassment is "finally getting the public attention it has long deserved" and the public has come together to deem it—in one word—unacceptable.[3]

While much of the #MeToo movement has focused on workplace sexual harassment,[4] less attention has been paid to sexual harassment in schools, where—even in the #MeToo world—sexual harassment remains the norm.[5] Although "silence break[ing]" is the theme of the #MeToo movement,[6] when child victims of peer sexual harassment speak up, lower courts are

---

[†] Assistant Professor of Law and the Director of Legal Writing at UNT Dallas College of Law; J.D. with highest honors University of Texas School of Law 2011. A special thank you to my talented research assistant Lindsey Daniels for your help with this project.

[1] Elliott v. Donegan, 469 F. Supp. 3d 40, 51–52 (E.D.N.Y. June 30, 2020).

[2] *See generally* Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37 (2019).

[3] Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227, 228 (2019).

[4] *See, e.g.*, Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html.

[5] *See infra* notes 37–49.

[6] Stephanie Zacharek et al., *The Silence Breakers*, TIME (Dec. 18, 2017), https://time.com/time-person-of-the-year-2017-silence-breakers/ [https://perma.cc/YK4M-M4TY].

silencing their voices before they even reach a jury. An analysis of 174 cases involving Title IX peer sexual harassment from the past three years (2017 to 2020) revealed that 58.6% of cases (102 out of 174) were dismissed at the motion to dismiss or summary judgment stage.[7] While summary judgment is appropriate only where the evidence "is so one-sided that one party must prevail as a matter of law,"[8] over the last three years, an astonishing 77.1% (64 out of 83) of motions for summary judgment were granted in cases involving Title IX peer-to-peer harassment.[9] Similarly, while a 12(b)(6) motion to dismiss "is viewed with disfavor and is rarely granted,"[10] in just the last three years, 41.7% (38 out of 91) of these motions were granted in Title IX peer-to-peer harassment cases.[11]

The Title IX cases being dismissed in the #MeToo era are hardly frivolous. For example, courts are holding that—supposedly taking "all well-pleaded facts as true [and] viewing them in the light most favorable to the plaintiff"[12]—a male middle school student threatening to tie up a female classmate in his basement, staring at her in class and making animal noises, and calling her a "bitch" is insufficient to even state a claim for harassment on the basis of sex.[13] Courts are holding that—supposedly taking "all well-pleaded facts as true [and] viewing them in the light most favorable to the plaintiff[s]"[14]—a male middle school student's "name-calling, verbal and physical harassment, sexual harassment, and physical pushing, shoving and elbowing in the school halls, during class, at recess, and on the bus" and a threat to "tie the girls up and rape them" is insufficient to state a claim for "severe [and] pervasive" harassment.[15] These

---

[7] A search was conducted on Westlaw for cases between January 1, 2017, and December 31, 2020, that cited Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Edu.**,** 526 U.S. 629 (1999) and involved Title IX claims for peer-to-peer harassment. A case list is on file with author.

[8] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

[9] *See supra* note 7.

[10] Turner v. Pleasant, 663 F.3d 770, 775 (5th Cir. 2011) (quoting Harrington v. State Farm Fire & Cas. Co., 563 F.3d 141, 147 (5th Cir. 2009)).

[11] *See supra* note 7.

[12] Yumilicious Franchise, L.L.C. v. Barrie, 819 F.3d 170, 174 (5th Cir. 2016) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[13] Diebold v. Hartford Pub. Sch., No. 1:15-CV-529, 2017 WL 4512575, at *1–*2, *6 (W.D. Mich. May 25, 2017).

[14] *Yumilicious Franchise, L.L.C.*, 819 F.3d at 174 (citing *Twombly*, 550 U.S. at 555).

[15] Feucht v. Triad Loc. Sch. Bd. of Educ., 425 F. Supp. 3d 918, 931 (S.D. Ohio 2019), *appeal dismissed*, No. 19-4270, 2020 WL 3498112 (6th Cir. May 20, 2020).

are not cases from the early 2000s. These two examples are from 2017, that is, the year of Harvey Weinstein's downfall.[16] Before dismissing victims' cases, courts often couch their opinions in language like the following: "While this Court certainly does not want to downplay the vile threat that male students allegedly made toward [the victim] and her friend that they 'would tie the girls up and rape them . . . .' "[17] However, by holding such facts do not even warrant a jury determination, courts are doing just that: downplaying the vile sexual harassment students are enduring at school. The question is, then, does Title IX require courts to grant dismissals and summary judgments so freely?

In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the Supreme Court of the United States made a conscious decision to make schoolyards less safe than the workplace when it came to peer-to-peer sexual harassment by providing schools with an almost impenetrable shield against liability.[18] Under *Davis*, a school district will not be liable to a student-plaintiff under Title IX unless: (1) the plaintiff was harassed "on the basis of [sex]"; (2) the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school"; and (3) the school had "actual knowledge" of the harassment but stayed "deliberately indifferent" to it.[19] Incredibly, however, at the motion to dismiss and summary judgment stage, lower courts are applying this already high standard to make it even higher than *Davis* requires and miles above what is required in the workplace under Title VII. This has had the effect of literally dismissing sexual harassment in schools through motions to dismiss and summary judgment and, thereby, not only normalizing sexual harassment in schools, but also making sexual harassment that would be deemed unacceptable in the workplace seemingly acceptable in schools. This Article identifies three big problem areas in the lower courts' interpretation of *Davis* at the dismissal and summary judgment stage; compares the courts treatment of adult victims of workplace sexual harassment under Title VII to children victims of peer

---

[16] Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[17] *Feucht*, 425 F. Supp. 3d at 931.

[18] 526 U.S. 629, 633 (1999).

[19] *Id.* at 650.

sexual harassment at schools under Title IX; and offers solutions for how courts should approach Title IX peer-to-peer harassment cases at the pre-trial stage without diverging from *Davis*.

The first big problem that is leading to dismissal of victims' cases is that some lower courts are holding that, in order to satisfy the "on the basis of sex" element under Title IX, student-plaintiffs must prove the subjective intent of the student harasser, who is often a young child.[20] Courts are questioning whether these young child harassers—as a matter of law—have enough "sexual awareness" to ever meet this element,[21] which is completely contrary to Title VII's "because of sex" requirement that has been held uniformly not to require evidence of a harasser's motivation.[22] While Title VII's "because of sex" requirement should be "treated interchangeably" with Title IX's "on the basis of sex" requirement,[23] courts are misinterpreting Title IX's "on the basis of sex" element to wrongly excuse the relevant actor—the school district—from addressing sexual harassment in its halls based on the subjective sexual awareness, or unawareness, of a child. This has the effect of causing children to "tolerate" sexual conduct in schools that would be deemed unacceptable had it taken place in an adult workplace.[24]

The second major problem is that lower courts are granting dismissal on the harassers conduct and/or the victim's injury, holding that the harassment at issue was not "severe and pervasive" enough, or that the injury the victim suffered from was insufficient to deprive her of educational opportunities or benefits provided by the school.[25] By granting dismissal or summary judgment with respect to the student harassers' conduct, courts send the message that such sexual conduct—despite being offensive, vile, and awful—is not an "actionable" act of sexual harassment and, accordingly, the school district is not required to address it.[26] But, arguably the most problematic is lower courts

---

[20] *See infra* Section III.A.1.

[21] Gabrielle M. v. Park Forest-Chi. Heights, IL. Sch. Dist. 163, 315 F.3d 817, 821 (7th Cir. 2003) (questioning "whether a five or six year old kindergartner can ever engage in conduct constituting 'sexual harassment' or 'gender discrimination' under Title IX").

[22] Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 278 (3d Cir. 2001).

[23] Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 866 (8th Cir. 2011).

[24] *See infra* Section III.A.2.

[25] *See infra* Section III.B.

[26] *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ. 526 U.S. 629, 651–52 (1999).

granting dismissal on the victim's injury.[27] In contrast to the workplace, where an employee is not required to show a certain amount of suffering to survive summary judgment under Title VII, lower courts applying Title IX are holding that child victims did not suffer enough—or failed to articulate their suffering enough—to proceed to a trial.[28] *Davis* does not require this outcome and, rather, dismissing a victims' Title IX cause of action because the victim was resilient and managed to overcome the sexual harassment, "turns Title IX on its head."[29]

The third major problem is that lower courts are improperly construing *Davis* to hold that deliberate indifference is only met when a school does nothing—that is, the facts of *Davis*—and, thereby, making schools not only immune from liability but also excusing schools from protecting students from extremely hostile situations.[30] This Article argues that courts must stop employing the facts of *Davis* "as the barometer for deliberate indifference" and suggests three well-settled definitions of what is "clearly unreasonable" or, rather, "clearly unreasonable" enough to require a jury to decide the issue of deliberate indifference.[31]

Finally, this Article discusses the recent deepening circuit split[32] that began in 2019 over whether *Davis* requires a student-plaintiff to show that a school's deliberate indifference "caused him to experience any separate harassment following his assault."[33] In *Farmer v. Kansas State University*, the Tenth Circuit held that "[p]laintiffs can state a viable Title IX claim for student-on-student harassment by alleging that the funding recipient's deliberate indifference caused them to be 'vulnerable to' further harassment

---

[27] *See infra* Section III.B.3.b; *see also* Grayson Sang Walker, Note, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 112 (2010) (describing the "disturbing trends in post-*Davis* litigation" of questioning victim's allegations at the dismissal and summary judgment stage).

[28] *See* Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1454 (7th Cir. 1994) (Title VII protects workers "who possess[ ] the dedication and fortitude to complete [their] assigned tasks even in the face of offensive and abusive sexual banter."); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

[29] Jennings v. Univ. of N.C., 482 F.3d 686, 706 (4th Cir. 2007) (Gregory, J., concurring).

[30] *See infra* Part IV.

[31] Foster v. Bd. of Regents of Univ. of Mich., 982 F.3d 960, 981, 981 n.8 (6th Cir. 2020) (Moore, J., dissenting).

[32] *Compare* Farmer v. Kan. State Univ., 918 F.3d 1094, 1104 (10th Cir. 2019), *with* K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1058 (8th Cir. 2017), *and* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 619–20 (6th Cir. 2019).

[33] *See infra* Section V; Rossley v. Drake Univ., 342 F. Supp. 3d 904, 930 (S.D. Iowa 2018).

without requiring an allegation of subsequent actual sexual harassment."[34] In contrast, the Eight and Sixth Circuits have recently interrupted *Davis* to require that a school's purported deliberate indifference following the actionable sexual harassment cause the student to suffer from additional, subsequent actionable harassment.[35] This Article argues that the Tenth Circuit approach is the right one and addresses how the Eighth and Sixth Circuits' requirement of further actionable harassment effectively adopts a "one free rape" rule in the context of peer sexual harassment, which not only runs counter to *Davis* and the goals of Title IX, but should be deemed particularly unacceptable in the #MeToo world.[36]

This Article has five parts. Part I explores the current problem of sexual harassment in K-12 schools and how the Supreme Court has interpreted Title IX, as contrasted with Title VII, to make the schoolyard far less safe than the watercooler. Part II analyzes how lower courts are overusing dismissal and summary judgment in the context of peer sexual harassment. Specifically, Part II analyzes how even within the last three years—since Harvey Weinstein and the emergence of the #MeToo movement—lower courts have overwhelmingly dismissed cases of peer sexual harassment at the motion to dismiss or summary judgment stage. Part III argues that lower courts are applying *Davis* too strictly, especially at the motion to dismiss and summary judgment stage, and, as a result, the schoolyard has become far less safe than the watercooler. Part III compares how lower courts have applied the "on the basis of sex," "severe and pervasive," and injury elements of a peer harassment claim under Title IX versus Title VII to normalize sexual harassment in schools. Additionally, Part III addresses how courts—within the *Davis* framework—should approach motions for dismissal or summary judgment in Title IX peer sexual harassment cases. Part IV discusses the deliberate indifference standard and how—without diverging from *Davis*—it can be interpreted to better hold

---

[34] *Farmer*, 918 F.3d at 1104.

[35] *K.T.*, 865 F.3d at 1058; *Kollaritsch*, 944 F.3d at 619–20.

[36] Spencer v. Univ. of N.M. Bd. of Regents, No. 15-CV-141 MCA/SCY, 2016 WL 10592223, at *6 (D.N.M. Jan. 11, 2016) (quoting S.S. v. Alexander, 177 P.3d 724, 741 (Wash. Ct. App. 2008); *see also* Kelly v. Yale Univ., No. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. 2003) ("[A] reasonable jury [may] conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university.").

schools accountable. Part V discusses the recent circuit split that threatens to raise the bar—even higher than it already is—for recovering under Title IX for peer harassment, which would effectively foreclose the remedy for student victims and further immunize schools from liability.

I. SUPREME COURT MAKES THE SCHOOLYARD LESS SAFE THAN THE WATERCOOLER

Within a year after the seminal Title IX case *Davis* was decided, 2,064 public school students between eighth and eleventh grade were surveyed regarding their experience with sexual harassment at school.[37] Of the students surveyed, 81% of them responded that they had experienced sexual harassment in schools at least once—with girls reporting sexual harassment more frequently than boys (83% compared to 78%).[38] The survey concluded that "sexual harassment [was] widespread in school life" and that "[b]ecause of the widespread nature of sexual harassment in school life, some students report[ed] that it [was not] a big deal and many accept[ed] it as part of everyday life."[39]

Today, sexual harassment remains a major issue in schools and because of *Davis*—and particularly the lower courts' overly strict interpretation of *Davis*—students are still being forced to "accept [sexual harassment] as part of everyday life" in schools.[40] In their most recent survey, the American Association of University Women found that sexual harassment was "part of everyday life in middle and high schools" with 48% of students reporting that they had experienced sexual harassment in the 2010–2011 school year and 87% of students saying such harassment had a negative effect of on them.[41] Students frequently experienced both sexual harassment in person and through electronic means, with girls experiencing sexual harassment more than boys.[42] The majority of harassed students

---

[37] JODI LIPSON, AM. ASS'N UNIV. WOMEN, HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 9 (May 2001), https://files.eric.ed.gov/fulltext/ED454132.pdf [https://perma.cc/KW7U-JLGG].

[38] *Id.* at 13.

[39] *Id.*

[40] *Id.*

[41] CATHERINE HILL & HOLLY KEARL, AM. ASS'N UNIV. WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2 (Nov. 2011), https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf [https://perma.cc/EL63-MRXH].

[42] *Id.* at 11.

reported that their harasser was a male peer (54%) or a group of male peers (12%).[43] Of the students who responded that they were sexually harassed, 50% of them "did nothing about it," and only 9% of them reported it to an adult at school.[44] Indeed, sexual harassment and assault by peers in schools is far more common than that by teachers. An Associated Press survey found that for every one adult sexual attack on a minor student, there are seven peer-to-peer sexual attacks.[45] In a study from fall 2011 to spring 2015, there were 17,000 reports of peer-to-peer sexual assault.[46]

Since the #MeToo movement began in 2017, there has been an increase in reported sexual assaults in primary and secondary schools.[47] The Department of Education found that reports of sexual violence at K-12 schools rose by 55% between the 2015–2016 and 2017–2018 school year.[48] Furthermore, sexual harassment complaints from K-12 schools were nearly 15 times greater in 2019 than 2009.[49] It is unclear whether this increase was because sexual assault and harassment itself has increased or because students are more likely to report it as a result of the #MeToo movement.[50]

Despite the huge problem of sexual harassment in schools and the similarity between Title VII and Title IX, the Supreme Court explicitly chose to make children at schools less protected from sexual harassment than adults in the workplace.

A. Title VII vs. Title IX

Title VII of the Civil Rights Act of 1964 is where the doctrine of sexual harassment originated. Title VII makes it "an unlawful

---

[43] *Id.* at 13.

[44] *Id.* at 27.

[45] Robin McDowell et al., *Hidden Horror of School Sexual Assaults Revealed by AP*, ASSOCIATED PRESS (May 1, 2017), https://www.ap.org/explore/schoolhouse-sex-assault/hidden-horror-of-school-sex-assaults-revealed-by-ap.html [https://perma.cc/EXA2-NHDN].

[46] *Id.* It is important to note that this is likely only a small fraction of the actual number of such assaults due to underreporting and a lack of tracking.

[47] Héctor Alejandro Arzate, *Why the Increase in Sexual Assaults Reported by Schools?*, EDUC. WEEK (July 29, 2019), https://www.edweek.org/leadership/why-the-increase-in-sexual-assaults-reported-by-schools/2019/07 [https://perma.cc/UY5L-GQHN].

[48] OFFICE OF CIVIL RIGHTS, DEP'T OF EDUC., SEXUAL VIOLENCE IN K-12 SCHOOLS (Oct. 2020), https://www2.ed.gov/about/offices/list/ocr/docs/sexual-violence.pdf ?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= [https://perma.cc/AV3B-ZLNP].

[49] *Id.*

[50] Arzate, *supra* note 47.

employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[51] Title IX of the Education Amendments Act of 1972 provides:[52] "No person . . . 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."[53]

Title IX is largely modeled after Title VII, however, there are key differences. First, Title VII provides an express cause of action,[54] whereas Title IX's private cause of action is recognized as an implied right by the courts.[55] Second, Title VII is an "outright prohibition" that "applies to all employers without regard to federal funding,"[56] whereas Title IX only applies to recipients of federal education funding and is a condition of those federal funds.[57] Additionally, the aim of Title VII is to broadly "eradicat[e] discrimination throughout the economy" and "make persons whole for injuries suffered through past discrimination,"[58] whereas Title IX "focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds."[59]

B. Title VII Hostile Environment Harassment

In 1986, the Supreme Court interpreted the word "sex" in Title VII to include sexual harassment and recognized two forms of sexual harassment claims: (1) quid pro quo claims and (2) hostile environment claims.[60] A quid pro quo claim arises when an employer demands an employee perform sexual favors in return for some job benefit.[61] A hostile environment claim—the relevant

---

[51] 42 U.S.C.A. § 2000e-2(a)(1) (WL current through P.L. 112-283, Jan. 15, 2013).

[52] *See, e.g.*, Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006 (2016); R. Kent Piacenti, *Toward a Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 VA. J. SOC. POL'Y & L. 58, 63 (2011).

[53] 20 U.S.C. § 1681(a).

[54] 42 U.S.C.A. § 2000e-5(f).

[55] Cannon v. Univ. of Chi., 441 U.S. 677, 694 (1979).

[56] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

[57] *See id.* at 286–87.

[58] *Id.* (citing Landgraf v. USI Film Prods., 511 U.S. 244, 254 (1994)).

[59] *Id.* at 287.

[60] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65–66 (1986).

[61] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998) ("Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct

claim for purposes of this Article—occurs when the harassment is so "severe or pervasive [as] 'to alter the conditions of [the victim's] employment and create an abusive working environment.' "[62] To establish a prima facie case for hostile work environment against an employer, a plaintiff must prove: (1) she/he is a member of a protected class; (2) she/he was the subject of unwelcome sexual harassment; (3) the harassment occurred because of her/his sex; (4) the sexual harassment "ha[d] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"; and (5) a basis to hold the employer liable.[63] Because Title VII holds the employer liable—that is, not the individual harasser—the test for employer liability differs depending on whether the harassment is at the hands of a supervisor or non-supervisor (for example, coworker peers). When a supervisor sexually harasses a subordinate, an employer is vicariously liable for the acts of the supervisor under agency principles.[64] However, when the harassment is by a coworker (non-supervisor), agency principles do not apply. Rather, the employer is liable for its own actions under a negligence standard, which requires the plaintiff to show the "employer either knew (actual notice) or should have known (constructive notice) of the harassment and failed to take immediate and appropriate corrective action."[65] Actual notice requires that "management knew of the harassment," whereas constructive notice can be established "when the harassment [is] so severe and pervasive that management . . . should have known."[66] "If an employer has actual or constructive notice of harassment but takes immediate and appropriate corrective action, the employer is not liable for the harassment."[67]

---

from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.").

[62] *Meritor Sav. Bank*, 477 U.S. at 67.

[63] *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)(3)); Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999); Breda v. Wolf Camera & Video, 222 F.3d 886, 889 n.3 (11th Cir. 2000).

[64] *Burlington Indus., Inc.*, 524 U.S. at 765.

[65] Watson v. Blue Circle, Inc., 324 F.3d 1252, 1259 (11th Cir. 2003).

[66] *Id.*

[67] *Id.* at 1261.

In explaining what kind of sexual harassment is actionable under Title VII, the Supreme Court clarified that for conduct to meet the standard of "hostile work environment," it must be "sufficiently severe or pervasive to alter . . . conditions of [the victim's] employment and create . . . [an] abusive working environment."[68] To make this determination, the Court stated it would look at the totality of the circumstances, which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[69] The Court explained that the challenged conduct need not "seriously affect [the] employees' psychological well-being" and that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[70] The plaintiff is not required to show the complained conduct caused her work to be impaired or that "tangible productivity declined"; rather, the plaintiff need only prove her/his "working conditions have been discriminatorily altered."[71] In addition, the Court explained that when determining whether conduct constitutes harassment under a "hostile environment theory," it must: "(1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment."[72]

---

[68] *Id.* at 1257.

[69] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

[70] *Id.* at 22.

[71] *Id*. at 25 (Scalia, J., concurring) ("[T]he test is not whether work has been impaired, but whether working conditions have been discriminatorily altered."); *Id.* (Ginsburg, J., concurring) (" '[T]he plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.' ") (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

[72] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 205 (3d Cir. 2001) (citing *Harris*, 510 U.S. at 21–22); *see also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

C. Hostile Environment Harassment Under Title IX: Supreme Court Makes Children Much Less Protected from Extremely Hostile School Environments than Adults are from Hostile Workplaces

Similar to an employee's cause of action against an employer for "hostile environment" harassment under Title VII, the Supreme Court has held a public school student has a cause of action against a school for "hostile environment" harassment.[73] Similar to Title VII, where an employer can be liable via a hostile environment claim to a plaintiff-employee for sexual harassment committed by the plaintiff's supervisor or co-worker, a public school can be liable via a hostile environment claim to a plaintiff-student for sexual harassment committed by a school official—teacher, coach, and staff—or a fellow student.[74] However, although relying on Title VII case law, the Supreme Court explicitly refused to use Title VII liability standards in its Title IX analysis.[75] Rather, Supreme Court precedent has made clear that students in school would be less protected that adults in their workplace.

1. *Gebser*: The Supreme Court Raises the Bar for Imposing Liability Beyond That in Title VII in the Context of Teacher-Student Sexual Harassment Under Title IX

In *Franklin v. Gwinnet County Public Schools*, the Supreme Court, applying Title VII case law, held that a private cause of action for monetary damages existed for sexual harassment under Title IX.[76] In *Gebser v. Lago Vista Independent School District*, the Court defined the parameters of a Title IX private action and answered "when a school district may be held liable in damages in an implied right of action under Title IX" for teacher-student sexual harassment.[77] The plaintiff Gebser, comparing supervisor-employee sexual harassment to teacher-student sexual harassment, had argued that the Court should apply Title VII hostile workplace standards to Title IX; the Supreme Court,

---

[73] *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 637 (1999); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 74–75 (1992).

[74] *See Davis*, 526 U.S. at 637; *Franklin*, 503 U.S. at 74–75.

[75] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283–85 (1998) (holding, in a case of teacher-student sexual harassment that Title VII's agency principles did not apply to Title IX); *Davis*, 526 U.S. at 643.

[76] *Franklin*, 503 U.S. at 75–76.

[77] *Gebser*, 524 U.S. at 277.

however, rejected that argument.[78] Contrary to Title VII, where employers are held liable under principles of agency for supervisor harassment, the Court refused to hold school districts similarly liable, reasoning that "it would 'frustrate the purposes' of Title IX to permit a [monetary] damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice."[79] The Court reasoned that, unlike Title VII, which defines "employer" to expressly include its agents, Title IX does not reference agents of a school district.[80]

Moreover, the Court in refusing to adopt Title VII standards, held that the statutes had two different purposes: while Title VII is intended to punish acts of discrimination, "Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds."[81] As summarized by the Third Circuit: "The explicit cause of action in Title VII is intended to *punish* acts of discrimination, whereas the cause of action in Title IX is intended as protection for the student." [82] The Court thus held that, unlike Title VII, which contains an "outright prohibition" of sexual discrimination, Tile IX's prohibition of sexual harassment and discrimination is a "condition" to the award of federal funds.[83] Therefore, the Court held that an implied right of private action, if it were modeled after Title VII agency principles, would improperly interfere with a school district's "opportunity for voluntary compliance" and the administrative remedies included in Title IX.[84] Accordingly, the Court held that a school district must have "notice to an 'appropriate person' and an opportunity to rectify any violation" before damages may be imposed.[85] The Court, thus, held that in order for a student to recover damages under Title IX for sexual harassment by a teacher, the student must prove that an "appropriate" school official with "authority to take corrective action to end the discrimination" had actual knowledge of the harassing conduct but

---

[78] *Id.* at 285.
[79] *Id.*
[80] *Id.* at 283.
[81] *Id.* at 287.
[82] Warren *ex rel.* Good v. Reading Sch. Dist., 278 F.3d 163, 170 (3d Cir. 2002) (summarizing *Gebser*).
[83] *Gebser*, 524 U.S. at 286–87.
[84] *Id.* at 289.
[85] *Id.* at 290.

acted with "deliberate indifference" in his or her actions "not to remedy the violation."[86]

2. Davis: The Supreme Court Raises the Bar Even Higher for Imposing Liability in the Context of Peer-to-Peer Sexual Harassment Under Title IX

With respect to student-on-student sexual harassment, the seminal case is *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, where the Supreme Court held that students subject to peer-to-peer sex-based harassment may sue the school district for damages and set forth what is required for a plaintiff to establish a prima facie case.[87] In *Davis*, the plaintiff was the mother of a fifth grade student, LaShonda, who had been the victim of prolonged sexual harassment at her elementary school by one of her classmates, G.F.[88] The plaintiff alleged that G.F. "attempted to touch LaShonda's breasts and genital area" while making "vulgar statements such as 'I want to go to bed with you.' "[89] In one incident, G.F. put a doorstop in his pants and "act[ed] in a sexually suggestive manner toward LaShonda."[90] In another incident, G.F. "rubbed his body against [her] in the school hallway." [91] Each time LaShonda would report the incident to her mother and her teachers.[92] Additionally, the principal was made aware of the incidents, but despite the reports, no disciplinary action was taken against G.F., nor was an effort made to separate the two students.[93] LaShonda was the subject of sexually harassing behavior for six months until it finally ended when G.F. pleaded guilty to sexual battery for his conduct.[94] As a result of G.F.'s harassment, LaShonda's previously high grades dropped, she became unable to concentrate on her studies, and she authored a suicide note, which her father discovered. [95] When LaShonda's mother brought a complaint in district court under Title IX against the school district, the district court dismissed it under Federal

---

[86] *Id.*
[87] 526 U.S. 629, 633 (1999).
[88] *Id.* at 633.
[89] *Id.*
[90] *Id.* at 634.
[91] *Id.*
[92] *Id.* at 633–34.
[93] *Id.* at 635.
[94] *Id.* at 634.
[95] *Id.*

Rule of Civil Procedure 12(b)(6) for failure to state a claim.[96] The Supreme Court granted certiorari to answer the question as to whether a private cause of action under Title IX may be brought against the school district for student-on-student sexual harassment.[97]

Following its reasoning in *Gebser*, the Court held that, because Title IX was enacted pursuant to the Spending Clause, a school district can be liable for private damages when it had adequate notice of its potential liability.[98] Thus, the Court held that a school district is liable under Title IX "only for its own misconduct."[99] Summarizing its holding in *Gebser*, the Court noted:

> Accordingly, we rejected the use of agency principles to impute liability to the district for the misconduct of its teachers. Likewise, we declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have* known. Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge.[100]

Thus, following *Gebser*, the Court held that before a school district can be liable for student-on-student harassment under Title IX, the plaintiff must prove that the school official acted with "deliberate indifference" to known acts of sexual harassment and, as the Court explained, under this standard, a school district could avoid liability if it responded "to known peer harassment in a manner that is not clearly unreasonable." [101]

In addition to the actual notice and deliberate indifference standards adopted from *Gebser*, the *Davis* Court added another requirement for recovery for student-on-student harassment: the plaintiff must show the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[ ] of

---

[96] *Id.* at 636.

[97] *Id.* at 639 ("We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages.").

[98] *Id.* at 639–40.

[99] *Id.* at 640.

[100] *Id.* at 642 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283, 290 (1998)).

[101] *Id.* at 648–49.

access to educational opportunities or benefits provided by the school."[102] While the "severe" and "pervasive" language comes from Title VII hostile work environment case law, the Supreme Court adopted a higher standard and "more rigorous test" [103] for Title IX claims for peer-to-peer harassment than employees in Title VII cases. The Court held that, for Title IX claims of peer-to-peer harassment, a student must prove that the harassment was "so severe, pervasive, *and* objectively offensive," whereas, under Title VII, an employee need only show the conduct was "severe *or* pervasive."[104] "That is, Title IX focuses on a conjunctive analysis [which creates a higher threshold for actionable conduct] while Title VII focuses on a disjunctive analysis [which creates a lower threshold for actionable conduct]."[105]

The Supreme Court's reasoning in *Davis* for requiring the "severe and pervasive" test was based on the fact that, in the context of peer-to-peer harassment, "children may regularly interact in a manner that would be unacceptable among adults."[106] Indeed, the Supreme Court—though certainly aware of the Title VII test for employee harassment—did not use it and, instead, adopted a more rigorous test because "students are still learning how to interact appropriately with their peers."[107] The Supreme Court has noted that "[a] child's age is far 'more than a chronological fact' "; rather, "[i]t is a fact that 'generates commonsense conclusions about behavior and perception.' "[108] Children "generally are less mature and responsible," "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," and "are more

---

[102] *Id.* at 650.

[103] Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226–27 (D. Conn. 2006) ("In *Davis,* the Supreme Court cautioned that peer-on-peer sexual harassment is subjected to a more rigorous test than employee harassment claims under Title VII.").

[104] *Davis*, 526 at 651 (emphasis added); *see, e.g.*, Worth v. Tyler, 276 F.3d 249, 268 (7th Cir. 2001) (citation omitted) ("There is no minimum number of incidents required to establish a hostile work environment. That is because 'harassment need not be both severe *and* pervasive to impose liability; one or the other will do.' "); Morris v. City of Colo. Springs, 666 F.3d 654, 664 (10th Cir. 2012) (emphasis added) (citations omitted) (holding Title VII hostile work environment claim exists when harassment is shown to be "sufficiently severe *or* pervasive to alter the conditions of the victim's employment and create an abusive working environment").

[105] BPS v. Bd. of Trs. for Colo. Sch. for the Deaf & Blind, No. 12-CV-02664-RM-KLM, 2015 WL 5444311, at *10 n.16 (D. Colo. Sept. 16, 2015).

[106] *Davis*, 526 U.S. at 651.

[107] *Id.* at 651; *see also Riccio*, 467 F. Supp. 2d at 226.

[108] J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) (citations omitted).

vulnerable or susceptible to . . . outside pressures."[109] *Davis* made clear that "[d]amages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender."[110]

In summary, the Supreme Court in *Davis* held that a plaintiff bringing a Title IX lawsuit based on peer harassment must meet a more demanding standard than that in *Gebser* and prove: (1) the plaintiff was harassed "on the basis of [sex]"; (2) the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school"; and (3) the school had "actual knowledge" of the harassment but stayed "deliberately indifferent" to it.[111]

II. PEER SEXUAL HARASSMENT IS RAMPANT IN SCHOOLS AND LOWER COURTS ARE TRIGGER-HAPPY TO DISMISS IT BEFORE IT EVER REACHES A JURY

In the context of Title VII, courts and commentators alike have been critical of the overuse of summary judgment and dismissal.[112] For example, in *Gallagher v. Delaney*, Judge Weinstein of the Second Circuit fervently cautioned against the "dangers of robust use of summary judgment to clear trial dockets"

---

[109] *Id.* (citations omitted) (cleaned up).

[110] *Davis*, 526 U.S. at 652.

[111] *Id.* at 650; *see generally* Christine Tamer, *Bullied LBGQ Students Are Afraid but Their Schools Aren't (and That's the Problem): Why It's Time to Move on from Broken Title IX to State Tort Law as a Solution*, 25 TEX. J.C.L. & C.R. 153, 164–70 (2020).

[112] Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 98 (1999) (discussing how "many courts have been too quick to grant summary judgment" in cases of sexual harassment in the employment context); B. Glenn George, *If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133, 159 (2001) (discussing how "some courts seem to be going out of their way to protect the employer" in granting summary judgment in Title VII cases); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 710 n.180 (2000) (noting that "[t]here is an emerging literature questioning the appropriateness of summary judgment in this context [of workplace sexual harassment] for a host of reasons"); Ann C. McGinley, *#MeToo Backlash or Simply Common Sense?: It's Complicated*, 50 SETON HALL L. REV. 1397, 1420 (2020) (noting that "federal courts have aggressively granted summary judgment to defendants in sexual harassment cases, often deciding issues of fact that would be more appropriate for a jury to decide"); *see generally* Elizabeth M. Schneider*, The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 737–54 (2007) (examining meritorious sex discrimination cases that were never litigated because a summary judgment ruling disposed of the case).

in sexual discrimination cases, noting that "[w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications."[113] Courts have been mindful that "many employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper," cautioning that such cases are "rarely appropriate for disposition on summary judgment, however liberalized it be."[114] That is not to say that courts do not still dismiss meritorious Title VII harassment claims or that there is not progress to be made,[115] but the #MeToo impact has at least made progress in the context of Title VII.

The same cannot be said of Title IX. Even in the #MeToo world, courts are almost trigger-happy to dismiss student victims of peer sexual harassment and assault at the motion to dismiss and motion for summary judgment stage. An analysis of 174 cases from 2017 to 2020 that involved peer harassment claims under Title IX revealed that 102 cases out of 174 (58.6%) were dismissed at the motion to dismiss or summary judgment stage.[116]

In *Davis*, the Supreme Court expressly gave lower courts permission to protect schools from liability by dismissing cases—either for failure to state a claim or on summary judgment—under the deliberate indifference standard, explaining "[i]n an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law."[117] The deliberate indifference standard is by far the "main issue used to eliminate cases on preliminary motions under Title IX, as well as the principal one used by litigators to decide whether cases for survivors will be brought at all."[118] Of the 102 cases

---

[113] Gallagher v. Delaney, 139 F.3d 338, 342–43 (2d Cir. 1998).

[114] Nazir v. United Airlines, Inc., 178 Cal. App. 4th 243, 286, 100 Cal. Rptr. 3d 296, 331–32 (Ct. App. 2009).

[115] Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN STATE L. REV. 463, 495 (2018) ("[C]ourt interpretations of Title VII favor employers and undermine the ability of Title VII to deter harassment.").

[116] *See supra* note 7.

[117] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999).

[118] Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2040–41, 2040 n.5 (2016); *see*

where dismissal or summary judgment was granted or upheld, 82 cases (80.3%) did so in whole or in part on the deliberate indifference element.[119] But, as discussed *infra*, courts are not only granting dismissal and summary judgment on the deliberate indifference element. Of the 102 cases where a motion to dismiss or a motion for summary judgment was granted, 20 granted dismissal without ever reaching the deliberate indifference element.[120] Many of these courts did so because they harassment alleged by the student-plaintiff was, in the courts' eyes, not sex-based enough or not severe and pervasive enough to require a response from the school. [121]

---

also Margaret Nolan, *It Is Not Working: Examining an Employment Law Model for Determining Institutional Liability in Cases of Sexual Assault by Student-Athletes*, 27 JEFFREY S. MOORAD SPORTS L.J. 329, 335 (2020) ("A significant portion of cases brought against schools for sexual assault under Title IX have been dismissed on summary judgment or a motion to dismiss for failure to satisfy the prongs of actual notice and deliberate indifference.").

[119] *See supra* note 7.

[120] *See id.*

[121] *See id.*; *see also e.g.*, Feucht v. Triad Loc. Sch. Bd. of Educ., 425 F. Supp. 3d 914, 918, 931 (S.D. Ohio 2019), *appeal dismissed*, No. 19-4270, 2020 WL 3498112 (6th Cir. May 20, 2020) (granting motion to dismiss in case where a female middle school victim died by suicide because harassment, which included "name-calling, verbal and physical harassment, sexual harassment, and physical pushing, shoving and elbowing in the school halls, during class, at recess, and on the bus" and a threat by peers that they "would tie the girls up and rape them" did not "rise to the level of sexual harassment that is so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school."); C.M. v. Pemberton Twp. High Sch., No. CV 16-9456 (RMB/JS), 2017 WL 384274, at *6 (D.N.J. Jan. 27, 2017) (dismissing student's Title IX claim against school because student has "not alleged harassment that is 'so severe, pervasive, and objectively offensive' such that it has deprived [the student] access to the educational opportunities or benefits provided by her school."); Schaefer v. Yongjie Fu, 272 F. Supp. 3d 285, 288 (D. Mass. 2017) (granting motion to dismiss because peer harassment was not "severe and pervasive sexual harassment, as required for a Title IX claim.") (citation omitted); Chavez v. Richardson Indep. Sch. Dist., No. 3:16-CV-2563-B, 2017 WL 3620388, at *10 (N.D. Tex. Aug. 23, 2017) (granting motion to dismiss because the harassment the student suffered was not sex-based or pervasive); Humphries v. Penn. State Univ., 492 F.Supp.3d 393, 403 (M.D. Pa. Oct. 2, 2020) (granting motion to dismiss because student "does not allege that he was harassed because of [his] sex"); Doe v. Bd. of Visitors of Va. Mil. Inst., 494 F. Supp. 3d 363, 379 (W.D. Va. Oct. 14, 2020) (granting motion to dismiss for failure to show harassment was on the basis of sex); D.S. *ex rel.* C.S. v. Rochester City Sch. Dist., No. 6:19-CV-6528 EAW, 2020 WL 7028523, at *11 (W.D.N.Y. Nov. 30, 2020) (granting motion to dismiss because plaintiff failed to prove actionable harassment on the basis of sex); Doe T.L.J. v. Univ. of Cent. Mo., No. 4:20-00714-CV-RK, 2020 WL 7700101, at *3 (W.D. Mo. Dec. 28, 2020) (granting motion to dismiss because plaintiff only alleged single incident of sexual assault which did not meet severe and pervasive standard).

Additionally, courts are oftentimes choosing to "beat a dead horse," meaning that courts are dismissing on the deliberate indifference element plus additional element or elements, even though granting dismissal on deliberate indifference alone would have been sufficient. Of the 82 cases where dismissal was granted at the motion to dismiss or summary judgment stage, 58 cases were dismissal on only the deliberate indifference element and 24 granted dismissal on deliberate indifference plus another element.[122]

A review of lower court opinions in the context of Title IX demonstrate that lower courts are necessarily departing from the motion to dismiss and summary judgment standards to reach their conclusions in many cases where the facts could plainly be characterized as actionable sexual harassment and deliberate indifference on the part of the schools. In his recent dissenting opinion, Justice Moore of the Sixth Circuit aptly made this point, explaining that "[c]ourts ordinarily begin their analysis with a recitation of the standards that govern their review of the issues presented," a "practice [that] may not lead to the flashiest opinions—the practice may even seem a bit dull—but it serves at least a few important functions," including "remind[ing] the writer [that is, the court] of [its] role" which is not that of making "[c]redibility judgments and weighing . . . the evidence."[123]

What is the court's role in deciding a motion to dismiss? At the 12(b)(6) stage, courts are supposed to accept "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff . . . and ask whether the pleadings contain 'enough facts to state a claim to relief that is plausible on its face.' "[124] A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[125] While a motion to dismiss under 12(b)(6) "is viewed with disfavor and is rarely granted,"[126] in just the last three years, of the 91 motions to dismiss brought in Title IX causes of action for peer-to-peer harassment, 38 (or 41.8%)

---

[122] *See supra* note 7.

[123] Foster v. Bd. of Regents of Univ. of Mich., 982 F.3d 960, 980 (6th Cir. 2020) (Moore, J., dissenting); Ahlers v. Schebil, 188 F.3d 365, 369 (6th Cir. 1999) (citing Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986)).

[124] Yumilicious Franchise, L.L.C. v. Barrie, 819 F.3d 170, 174 (5th Cir. 2016) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

[125] Colle v. Brazos Cnty., Tex., 981 F.2d 237, 243 (5th Cir. 1993) (citation omitted).

[126] Turner v. Pleasant, 663 F.3d 770, 775 (5th Cir. 2011) (citation omitted).

of all motions to dismiss brought were granted.[127] Is it that attorneys are filing frivolous cases? Generally, no. Instead, many judges are not applying the correct standard, one that allows "a well-pleaded complaint [to] proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and 'that a recovery is very remote and unlikely.' "[128]

The same question can be asked at summary judgment, which is appropriate only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[129] While summary judgment is appropriate only where the evidence "is so one-sided that one party must prevail as a matter of law,"[130] over the last three years of the 83 motions for summary judgment filed in cases involving Title IX peer-to-peer harassment, 64 motions for summary judgment brought were granted (or 77.1%).[131] Is it that "reasonable minds could [not] differ as to the import of the evidence"[132] in all these cases? Again, generally, no. Rather, many courts are not applying the correct standard, one that "draw[s] all reasonable inferences in favor of the non-moving party and construe[s] all evidence in the light most favorable to the non-moving party."[133]

For example, how can a court—taking "all well-pleaded facts as true [and] viewing them in the light most favorable to the plaintiff"[134]—hold that a male middle school student threatening to tie a female classmate up in his basement, staring at her in class and making animal noises, and calling her a "bitch" is insufficient to even state a claim for harassment on the basis of sex?[135] How can a court—taking "all well-pleaded facts as true [and] viewing them in the light most favorable to the plaintiff[s],"[136] including a middle school female who died by suicide, hold that a middle school male's "name-calling, verbal and physical harassment, sexual harassment, and physical pushing, shoving and elbowing in the

---

[127] *See supra* note 7.

[128] *Twombly*, 550 U.S. at 556 (citation omitted).

[129] Fed. R. Civ. P. 56(a).

[130] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

[131] *See supra* note 7.

[132] *Anderson*, 477 U.S. at 250.

[133] Tingle v. Arbors at Hilliard, 692 F.3d 523, 529 (6th Cir. 2012).

[134] Yumilicious Franchise, L.L.C. v. Barrie, 819 F.3d 170, 174 (5th Cir. 2016) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[135] Diebold v. Hartford Pub. Sch., No. 1:15-CV-529, 2017 WL 4512575, at *1–*2, *6 (W.D. Mich. May 25, 2017).

[136] *Yumilicious Franchise, L.L.C.*, 819 F.3d at 174 (citing *Twombly*, 550 U.S. at 555).

school halls, during class, at recess, and on the bus" and a threat to "tie the girls up and rape them" is insufficient to state a claim for "severe [and] pervasive" harassment?[137] The Southern District of Ohio court gave the following reasoning:

> While this Court certainly does not want to downplay the vile threat that male students allegedly made toward Bethany and her friend that they "would tie the girls up and rape them," or any alleged sexual harassment that she endured, the factual content alleged in the Complaint, while unacceptable, "does not rise to the level of sexual harassment that is so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school."[138]

Translated: the court did not want to "downplay" what it admitted was "vile" sexual conduct but held that such conduct was not sufficient to even to state a claim that could meet the low bar of being "plausible on its face."[139]

Holdings like these would be disturbing at any point in time, however, the fact that these holdings were made in the #MeToo era and that holdings like these are still being made is shocking. With what we know about the prevalence of sexual harassment and how victims respond,[140] it is past time to address the fact that courts are not correctly applying the motion to dismiss or motion for summary judgment standards in the context of Title IX peer-harassment and instead are regularly holding children victims to impossible standards. If, at the motion to dismiss or motion for summary judgment stage, the harassment is held to be not sexual enough, the harassment is held not to be severe and pervasive enough, or the suffering is held not to be concrete enough, under Title IX, a school district does not even have to respond to it—that is, it does not even trigger a burden on the school district to act in a way that is not "clearly unreasonable."[141] This has the dire effect

---

[137] Feucht v. Triad Loc. Sch. Bd. of Educ., 425 F. Supp. 3d 914, 918, 931 (S.D. Ohio 2019), *appeal dismissed*, No. 19-4270, 2020 WL 3498112 (6th Cir. May 20, 2020).

[138] *Id.* at 931 (emphasis added).

[139] *Id.* at 922, 931; *see generally* Turner v. Pleasant, 663 F.3d 770, 775 (5th Cir. 2011).

[140] Arzate, *supra* note 47; Andrea Giampetro-Meyer et al., *Sexual Harassment in Schools: An Analysis of the "Knew or Should Have Known" Liability Standard in Title IX Peer Sexual Harassment Cases*, 12 WIS. WOMEN'S L.J. 301, 304–05 (1997) (listing the physical, psychological, and social problems that may develop as the result of being the victim of sexual harassment).

[141] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648–50 (1999).

of both limiting the scope of actionable sexual harassment—and, therefore, schools' responsibility to protect the children in their care—and sending schools the message that they do not need to better protect students, even in the face of egregious harassment. By holding that plaintiffs' evidence—taken as true and with all inferences drawn in their favor—does not rise to the level of so much as stating a claim or creating an issue of fact, courts—in the most literal sense of the word—*dismiss* victims of sexual harassment.[142]

III. BEYOND DELIBERATE INDIFFERENCE AND BEATING A DEAD HORSE: LOWER COURTS' RAISING THE BAR BEYOND *DAVIS* AND OVERUSE OF SUMMARY JUDGMENT AND DISMISSAL TO NARROW THE SCOPE OF ACTIONABLE HARASSMENT UNDER TITLE IX

While it is troubling that lower courts are too easily dismissing cases under the deliberate indifference standard and thereby "permit[ting] a wide margin of tolerance for sexual abuse,"[143] discussed further in Part IV, it is even more troubling that lower courts are dismissing cases before they even reach the deliberate indifference standard or *in addition to* the deliberate indifference standard. Courts are granting dismissal and summary judgment because the harassment alleged was not sexual enough, or because the sexual harassment suffered was not severe and pervasive enough, or because the injury the plaintiff suffered was not concrete enough. That is, as high as the *Davis* standard is, lower courts have interpreted every element to make it unduly higher, which has the effect of normalizing sexual harassment in schools and making sexual harassment that would be deemed unacceptable in the workplace, perfectly acceptable in schools.

This Part identifies three areas where the courts have interpreted *Davis* to make the playground less safe than the watercooler, comparing how courts apply the "on the basis of sex" element, the harassers' conduct element, and the injury element under both Title VII and Title IX. This Part shows how lower courts are applying *Davis* too strictly—especially at the motion to

---

[142] Walker, *supra* note 27, at 112–13 (noting that "[o]ne of the most disturbing trends in post-*Davis* litigation is the subtle questioning of a survivor's allegations in resolving motions for dismissal or summary judgment despite the fact that '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor.' ").

[143] MacKinnon, *supra* note 118, at 2040–41.

dismiss and summary judgment stage—and, as a result, children are left unprotected from peer sexual harassment in schools. Finally, this Part addresses how courts—within the *Davis* framework—can and should approach motions to dismiss and motions for summary judgment in Title IX peer sexual harassment cases.

While it would be ideal to have the Supreme Court lessen the *Davis* standard, it seems unlikely to happen. However, as set forth below, courts can better protect students within the current confines of the law through a proper application of the motion to dismiss and summary judgment standards and a proper interpretation of *Davis*.

A. The "Looking at the Sexual Motivation of a Child" Problem

In order to establish a Title IX cause of action, a student-plaintiff must prove that she suffered harassment because of his sex.[144] Harassment "on the basis of sex is the sine qua non of a Title IX sexual harassment case, and a failure to plead that element is fatal."[145] For harassment to be "on the basis of sex," "the conduct at issue [must have] a sexual or gender-based component"[146] and "must be based on sex, rather than personal animus or other reasons."[147] In determining whether harassment is "on the basis of sex," courts look to Title VII legal analysis[148] and

---

[144] 20 U.S.C. § 1681(a).

[145] Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002).

[146] McSweeney v. Bayport Bluepoint Cent. Sch. Dist., 864 F. Supp. 2d 240, 257 (E.D.N.Y. 2012).

[147] Burwell v. Pekin Cmty. High Sch. Dist. 303, 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002); Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., No. 3:08-CV-1559-BF, 2010 U.S. Dist. LEXIS 11073, at *2 (N.D. Tex. Feb. 8, 2010) *aff'd*, 647 F.3d 156 (5th Cir. 2011).

[148] *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 647 (1999) (relying on Title VII jurisprudence for Title IX sexual harassment case); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (same); Fuhr v. Hazel Park Sch. Dist., 710 F.3d 668, 673 (6th Cir. 2013) ("[T]he standards articulated by Title VII cases are sufficient to establish the applicable legal framework here."); Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 866 (8th Cir. 2011) ("We recognize *Oncale* is a Title VII case and is premised on different language than a Title IX case. Specifically, Title VII requires a plaintiff to prove 'discriminat[ion] . . . because of . . . sex,' [ ], whereas Title IX requires proof of discrimination 'on the basis of sex.' But, these two phrases are treated interchangeably."); Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 89 (2d Cir. 2011) ("[A] Title IX sex discrimination claim requires the same kind of proof required in a Title VII sex discrimination claim"); Mabry v. State Bd. of Cmty. Colls. & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate

specifically, *Onacle v. Sundowner Offshore Services, Inc.*,[149] where the Supreme Court provided multiple "evidentiary route[s]" for a plaintiff to prove that "the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.' "[150]

In *Oncale*, a Title VII case, the Supreme Court was clear that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[151] Rather, the Supreme Court laid out multiple "evidentiary route[s]" to prove an inference of discrimination on the basis of sex. [152] To the contrast, in the context of Title IX and peer-to-peer harassment, courts are holding that in order to satisfy the "on the basis of sex" element of their claim, plaintiffs must prove the subjective sexual motivation of the student harasser, who is often a young child, and questioning whether theese young child harassers—as a matter of law—have enough "sexual awareness" to ever meet this element.[153] Not only is the requirement of a showing of sexual awareness or motivation on the part of the student harasser legally unsound and not required by Title IX, it is wrongly excusing the relevant actor—the school district—from addressing sexual harassment in its halls based on the subjective sexual awareness,or unawareness, of a child and thereby, as a matter of law, causing children to "tolerate" sexual conduct in schools, which would be deemed unacceptable in an adult workplace.

---

analogue when defining Title IX's substantive standards."); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (applying Title VII principles in interpreting Title IX, and holding that the distinction between sexual orientation discrimination and gender stereotyping discrimination "is illusory and artificial").

[149] 523 U.S. 75, 80–81 (1998).

[150] *Id.* at 81.

[151] *Id.* at 80.

[152] First, the Court held the inference is "easy to draw" when the conduct "involves explicit or implicit proposals of sexual activity" between opposite sexes because "it is reasonable to assume those proposals would not have been made to someone of the same sex." *Id.* Second, the Court held the inference can be met when, for example, a woman harasses another woman "in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Id.* Third, the court held sex-based discrimination could be shown through "com-parative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id.* at 81.

[153] Gabrielle M. v. Park Forest-Chi. Heights, IL. Sch. Dist. 163, 315 F.3d 817, 826, 827 (7th Cir. 2003) (Rovner, J. concurring in part and concurring in the judgment); *Id.* at 821 (questioning "whether a five or six year old kindergartner can ever engage in conduct constituting 'sexual harassment' or 'gender discrimination' under Title IX.").

1. The Playground: Lower Courts are Excusing Schools from Liability by Requiring a Showing of a Student's Sexual Motivation to Satisfy Title IX's "on the Basis of Sex" Element

A female kindergartener, age five, stated that a peer, age six, was "bothering" her and did "nasty stuff" to her at the start of school in August and, by September, the victim "became reluctant to go to school," was "crying at the door when it was time to go," and "began wetting her bed and having nightmares around this time."[154] By October, the teachers saw the boy "jump[ed] on" the plaintiff, "lean[ed] against [her] with his hands on his crotch," "unzip[ed] his pants" on more than one occasion in front of the class, put his "hands down [another girl's] pants during storytime," and kissed classmates at recess.[155] The plaintiff's father testified that his daughter told him that the boy "fondled" her and touched her "private parts [and] chest."[156] Is this harassment sex-based?

In the context of both Title VII and Title IX, courts have uniformly held that sexual harassment includes both sexual advances as well as attacks on the victim's masculinity or femininity, that is, the victim's failure to conform to masculine or feminine stereotypes.[157] Therefore, the answer to the above question, one would think, should be "yes" or, at the very least, the conduct—looked at in the light most favorable to the victim—raises, at a minimum, a genuine issue of material fact with respect to whether the harassment is sex-based. However, the Seventh Circuit in *Gabrielle*—while not reaching a holding on the issue—said that the facts raised "a threshold question, altogether reasonable and rational, of whether a five or six year old

---

[154] *Id.* at 818–19.

[155] *Id.*

[156] *Id.* at 821.

[157] Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874–75 (9th Cir. 2001) (holding that "the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act" constituted actionable harassment under Title VII); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090–92 (D. Minn. 2000) (applying Title VII precedents to Title IX claim, the court concluded that allegations of harassment because of the plaintiff's failure to meet masculine stereotypes states a cognizable claim of sex discrimination); Schroeder *ex rel.* Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 879–80 (N.D. Ohio 2003) (holding that gay slurs and physical violence could be based on sex even when there was no sexual assault); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 972 (D. Kan. 2005) ("[A] rational trier of fact could infer that plaintiff was harassed because he failed to satisfy his peers' stereotyped expectations for his gender because the primary objective of plaintiff's harassers appears to have been to disparage his perceived lack of masculinity.").

kindergartner can ever engage in conduct constituting 'sexual harassment' or 'gender discrimination' under Title IX."[158] The court noted that "[c]ommon sense, at least, would reject any such extension of Title IX."[159]

In *Wolfe v. Fayetteville, Arkansas School District*, between sixth- and tenth-grade, a male student was relentlessly bullied by his peers.[160] They pushed him, shoved him, called him "faggot," "queer bait," and "homo."[161] They slammed his head into a window, created a Facebook page called "Every One [sic] That Hates Billy Wolfe," and photoshopped his face "onto a figure in a green fairy costume with the word 'HOMOSEXUAL' written across it."[162] They graffitied "highly offensive, homosexual accusations about [him] on bathroom walls and in classroom text books."[163] The victim argued that the bullying he suffered was an attempt to degrade his masculinity.[164] However, the peers argued that they bullied the victim simply because they did not like him and thought he was a bad person.[165] Is this harassment sex-based? The Eighth Circuit answered in the negative, explaining that it was insufficient under Title IX "to show the harassers used name-calling and spread rumors in an effort to debase his masculinity."[166] Instead, the court held that to prove the harassment was "on the basis of sex," the plaintiff must establish "underlying intent, and therefore, motivation, on the part of the actor to discriminate because of one's sex or gender."[167]

Similarly, in *I.V. v. Wenatchee School District No. 246*, the middle school victim was relentlessly bullied by a male peer, who would "twist [his] nipples" and call him names including "fat", "faggot", "man boobs," "gay," and "bitch."[168] However, the court held that, "[a]lthough some of the complained of conduct is arguably 'tinged' with sexual connotation," the plaintiff failed to prove the harassment was "because of sex" because there was no evidence of the bully's motivation. [169] Indeed, the court noted that

---

[158] *Gabrielle*, 315 F.3d at 821.
[159] *Id.* at 821–22.
[160] 648 F.3d 860, 862 (8th Cir. 2011).
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.* at 865.
[165] *Id.* at 862–63.
[166] *Id.* at 865.
[167] *Id.*
[168] 342 F. Supp. 3d 1083, 1087–88 (E.D. Wash. 2018).
[169] *Id.* at 1096.

the plaintiff "did not even depose" the bully as to his motivation.[170] The court in granting summary judgment to the school district, relied on expert testimony that the "terms, 'fag,' 'faggot,' 'bitch' and 'gay' are ubiquitous," and "used with high frequency by boys too young to initially know that the terms have any sexual connotation."[171]

Thus, courts have held that—regardless of the child's age—we need to look at the subjective intent and motivation of the harasser, who is often a minor, to determine whether harassment is on the basis of sex.

2. The Watercooler: Courts Do Not Excuse an Employer from Liability Because of a Failure to Prove an Adult Harasser's Motive

The holdings reached in the context of Title IX are wholly at odds with Title VII, even though courts are uniform in holding that Title VII's "discriminat[ion] . . . because of . . . sex" requirement should be "treated interchangeably" with Title IX's "on the basis of sex" requirement.[172] In the context of Title VII, courts hold that the "Supreme Court precedent does not support the need for a plaintiff to demonstrate direct evidence of her harasser's motivation for discrimination against her."[173] This is because "[p]articularly in the discrimination area, it is often difficult to determine the motivations of an action and any analysis is filled with pitfalls and ambiguities . . . . [A] discrimination analysis must concentrate not on individual incidents, but on the overall scenario."[174] For example, in *Evans*, a female employee was subjected to remarks such as that she "made too much money for a goddamn woman" and, as a male employee "grabbed [her] buttocks from behind while she was bending over her files," he said that "she smelled good."[175] The Third Circuit held: "We generally presume that sexual advances of the kind alleged in this case are sex-based, whether the motivation is desire or hatred," dismissing the defendant's argument that "the overtly sexual acts did not

---

[170] *Id.* at 1095.

[171] *Id.*

[172] *Wolfe*, 648 F.3d at 866 (citations omitted).

[173] Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 278 (3d Cir. 2001).

[174] Durham Life Ins. Co. v. Evans, 166 F.3d 139, 149 (3d Cir.1999) (citations omitted).

[175] *Id.* at 145–46.

occur and that the non-sexual actions taken against [the victim] have innocent explanations."[176]

Thus, unlike the Title IX cases *supra*, in the context of Title VII, courts do not hold that a failure to prove the harasser's motivation is dispositive, nor do courts "take the bully's word for it" that the harassment was not sex-based. For example, in contrast to its holding in *Wolfe*, in the context of Title VII, the Eighth Circuit has held that "[s]exual harassment can take place in many different ways"; that "obscene name-calling" can amount to harassment based on sex; and that a harasser's explanation that the conduct was because he "did not get along" with the victim is not dispositive of whether harassment is sex-based.[177] Whereas in *Wolfe*, the Eighth Circuit held that the plaintiff failed to prove the harassment was on the basis of sex in light of the bullies' testimony that their motivation was personal animus as opposed to sex, in the workplace the Eighth Circuit has held that "[t]here is no excuse in any work environment for subjecting a female worker to such verbal abuse even if the harasser and the plaintiff did not like each other, especially when this dislike results in a steady stream of sexual harassment."[178]

3. *Davis* Does Not Instruct Lower Courts to Focus on the Sexual Motivation of the Student Harasser and Lower Courts Must Stop Dismissing Harassment Away Under This Element

In *Wolfe*, the Eighth Circuit stated that "[o]ur reading of Title IX as requiring proof of the underlying motivation for the discrimination is consistent with the Supreme Court's analysis in *Oncale* and *Davis*."[179] However, neither case actually supports requiring proof of sexual motivation. First, "*Oncale* made abundantly clear that, for a plaintiff to prove that she was sexually

---

[176] *Id.* at 148–49.

[177] Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 964–65 (8th Cir. 1993) ("We cannot accept the employer's callous explanation that since Ottaway and Burns did not get along together, his 'verbal assault on Plaintiff would have occurred even if Plaintiff had not been a woman.' There is no excuse in any work environment for subjecting a female worker to such verbal abuse even if the harasser and the plaintiff did not like each other, especially when this dislike results in a steady stream of sexual harassment. Vulgar and offensive epithets such as these are 'widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express phonetically.' ").

[178] *Compare* Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 865 (8th Cir. 2011), *with Burns*, 989 F.2d at 965.

[179] *Wolfe*, 648 F.3d 860, 865–66 (8th Cir. 2011) (citations omitted).

harassed, she need not show that the harasser was 'motivated by sexual desire.' "[180] Second, *Davis* did not hold that the standard of whether conduct is gender- or sex-based differed in the school setting versus employment setting. Rather, lower courts have been misapplying *Davis* and the motion to dismiss and summary judgment standards to dispose of plaintiffs' cases on the "on the basis of sex" element.

a. The Supreme Court Was Clear That the Relevant Actor Is the School District Under Title IX Such That the Sexual Motivation of the Harasser Is Irrelevant

In the Title VII hostile work environment context, the relevant actor is the employer—not the individual harasser—as it is the employer that is made liable under Title VII. [181] Accordingly, "any inquiry into the discriminatory motive or intent behind the actual harassment is necessarily one step removed from the defendant in the case."[182] The Ninth Circuit explained that in the context of Title VII a plaintiff need not prove that the employee "had a specific intent to discriminate against women or to target them 'as women,' . . . whether sexually or otherwise" because "Title VII is not a fault-based tort scheme."[183] Rather, "Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation of co-workers or employers" such that "conduct may be 'unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.' "[184] This is because "it is the employer that is held liable for workplace harassment," and thus "it is the

---

[180] Love v. Motiva Enterprises LLC, 349 Fed. App'x 900, 907–08 (5th Cir. 2009) (Dennis, J., dissenting) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

[181] Julie A. Seaman, *Form and (Dys)function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII*, 37 ARIZ. STATE L.J. 321, 425 (2005).

[182] *Id.* at 426.

[183] E.E.O.C. v. Nat'l Educ. Ass'n, Alaska, 422 F.3d 840, 844–45 (9th Cir. 2005) (citing Ellison v. Brady, 924 F.2d 872, 880 (9th Cir.1991)).

[184] *Id.* at 844–45 (citations omitted) (cleaned up); *see also* Petrosino v. Bell Atlantic, 385 F.3d 210, 221–223 (2d Cir. 2004) (discussing why the "objective hostility of a work environment" does not depend on the perpetrator's motivations, but rather, "depends on the totality of the circumstances" as viewed by a "reasonable person in the plaintiff's position"); Yuknis v. First Student, Inc., 481 F.3d 552, 554 (7th Cir. 2007) (citations omitted) (holding that the motivations of the actors are not determinative: "[W]e do not mean to suggest that there must be an intention of causing distress or offense. A working environment may be deeply hurtful to women even though the men who created it were merely trying to please themselves, and were thus guilty of insensitivity rather than aggression.").

employer's response to the harassment, and not the perpetrator's intent, that matters."[185]

Similar to Title VII, where the relevant actor is the employer, the *Davis* Court was clear that, in Title IX, the relevant actor is the school district. The Supreme Court emphasized that a school district is liable under Title IX "only for its own misconduct."[186] Therefore, similar to Title VII, because the defendant in a Title IX cause of action is the school district, not the peer harasser, "any inquiry into the discriminatory motive or intent behind the actual harassment is [likewise] necessarily one step removed from the defendant in the case."[187] And it is more true in the context of Title IX, because children do not have the same level of understanding as adults—something the *Davis* Court was also clear about.[188] Indeed, "whatever the children's comprehension may have been, the adults charged with their care and education had the ability to appreciate the inappropriate and potentially harmful nature of the conduct."[189] Thus, the validity of a Title IX claim for sexual harassment should not depend "upon the sexual awareness of the harasser or harassee."[190] Rather, the court should look at the record and see if it "supports the inference that [the] acts were based on sex."[191] This is precisely what courts do in the context of Title VII—the intent or motivation of the harasser is not determinative.[192] As explained by the Ninth Circuit: "[S]o long as the environment itself is hostile to the plaintiff because of [her or his] sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point."[193]

In the *Gabrielle* case, Judge Rovner in his concurring opinion noted that, even though the six-year-old bully "likely did not

---

[185] Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist. 163, 315 F.3d 817, 827 (7th Cir. 2003).

[186] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999).

[187] Seaman, *supra* note 181, at 426; *see Gabrielle*, 315 F.3d at 827 (Rovner, J., concurring in part and concurring in the judgment) ("The knowledge and intent of the school district are therefore central to the liability determination; the knowledge and intent of the student perpetrating the harassment are really irrelevant.").

[188] *See Davis*, 526 U.S. at 651 (1999).

[189] *Gabrielle*, 315 F.3d at 827 (Rovner, J., concurring in part and concurring in the judgment).

[190] *Id.* at 826.

[191] *Id.* at 827.

[192] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066 (9th Cir. 2002) (en banc).

[193] *Id.* (quoting Doe *ex rel.* Doe v. City of Belleville, Ill., 119 F.3d 563, 578 (1997), *vacated,* City of Belleville v. Doe *ex rel.* Doe, 523 U.S. 1001 (1998)).

realize that he was harming his female classmate[,] . . . his ignorance says nothing about the extent to which his actions interfered with [the victim's] educational opportunities or about the school district's awareness of and response to his conduct," and, "[c]onversely, [the bully's] knowledge and intent, even if culpable, would not suffice to render the school district liable—only the district's own deliberate indifference to the harassment could do that."[194] Thus, the concurring justice opined that the focus of Title IX's "on the basis of sex" requirement should not rest on what the bully "was capable of realizing at age six" because "[i]t is the school district, not [the student harasser], that is charged with liability," such that "[t]he question we must decide is whether the school, when confronted with acts that amounted to sex-based harassment, evinced deliberate indifference to that harassment."[195]

Therefore, in *Gabrielle*, the unwelcome touching of genitals, even if the harasser was unaware of the sexual significance, should be inferred to be "on the basis of sex."[196] Similarly, in *Wolfe*, calling someone "faggot," "queer bait," and "homo," photoshopping his face on a green fairy, and graffitiing "highly offensive, homosexual accusations," should be sufficient to create a fact issue that such conduct is gender-based.[197] The court was incorrect to require evidence of the harassers' subjective motivation because it is the school district's knowledge of and action in response to the harassers' conduct that is relevant to liability under Title IX, not the subjective intent or motivation of the harassers. Likewise in *I.V.*, a failure to depose the harassers of their motivation or the fact that the harassers were "too young" to know that words like "fag," "faggot," "bitch" and "gay" had a gendered or sexual meaning should not have been dispositive,[198] because—similar to Title VII—"[s]o long as the environment itself is hostile to the plaintiff because of [her or his] sex," it "is beside the point" "why the harassment was perpetrated."[199]

---

[194] *Gabrielle*, 315 F.3d at 827–28 (Rovner, J., concurring in part and concurring in the judgment).

[195] *Id.* at 826, 827, 828.

[196] *Id.* at 826–27.

[197] Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 862 (8th Cir. 2011).

[198] I. V. v. Wenatchee Sch. Dist. No. 246, 342 F. Supp. 3d 1083, 1095–96 (E.D. Wash. 2018).

[199] *See* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066 (9th Cir. 2002) (en banc).

b. Davis Did Not Hold That the Age of the Child Affects Whether Conduct Is Sex-Based

In *Burwell v. Pekin Community High School District 303*, the plaintiff argued that the harassment was on the basis of sex because "she was called sexual names, such as bitch, pussy, and slut."[200] The court, in granting defendant's motion to dismiss, held: "[T]here is little in the record other than Plaintiff's speculative inferences regarding the male students' motivation to support this argument."[201] The court held that it was improper to rely on Title VII case law that "argues that the use of gender-based terms 'can be interpreted by a trier of fact as motivation and intent to discriminate on the basis of sex' " because "*Davis* specifically stated that courts must bear in mind that schools are unlike adult workplaces and that children may regularly interact in ways that would be unacceptable among adults."[202] However, *Davis* did not hold that the standard of whether conduct is gender- or sex-based differed in the school setting versus employment setting. Rather, *Davis* held that whether gender- or sex-based conduct rose to the level of *actionable* harassment depended on a "constellation of surrounding circumstances, expectations and relationships" because "children may regularly interact in a manner that would be unacceptable among adults."[203] Thus, to prove "actionable harassment" in Title IX, plaintiffs must satisfy the more difficult "severe and pervasive" test, whereas in Title VII plaintiffs must satisfy the less difficult "severe or pervasive" test.[204]

Importantly, while the standard of conduct—"severe or pervasive" in Title VII versus "severe and pervasive" in Title IX—was intended to be different in the workplace and schoolyard, the standard for whether the conduct was "on the basis of sex" was not. It cannot be that being "called sexual names, such as bitch, pussy, and slut,"[205] is gender- or sex-based conduct in the workplace, but not in the schoolyard. It might be that in the workplace such is *actionable* sex-based conduct, whereas in the schoolyard such is not given the higher "severe and pervasive"

---

[200] 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002).

[201] *Id.* at 930–31.

[202] *Id.* at 931 (citing Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999)).

[203] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

[204] *Compare id.*, *with* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993).

[205] *Burwell*, 213 F. Supp. 2d at 930.

Title IX standard, but, regardless of whether in the schoolyard or workplace, use of sexual epithets, such as "bitch, pussy, and slut" is gender- or sex-based conduct in both. Therefore, the *Burwell* court was wrong to hold that, what the court itself labeled as, "gender-based terms" and "sexual names," were insufficient to meet the low of threshold of stating a plausible claim of sex-based conduct.[206]

It is also important to bear in mind that children are less developed than adults and may not have the maturity to know why they are targeting another child, or, even if they know why, they may not be able to communicate it.[207] These children "may act out ingrained notions of sexuality and gender expectations without any conscious intent to treat persons differently based on their sex" such that imposing a requirement to prove motive or intent to discriminate on the basis of sex in the context of Title IX "would effectively immunize peer sexual harassment from the reach of Title IX."[208] As put by one court, because "[s]ex-based harassment includes when someone is harassed because of his sex, even if it is not sexual in nature, . . . whether the [children] knew their conduct was sexual is beside the point."[209]

c. Courts Must Stop Giving Every Inference in Favor of the School Districts

While requiring a plaintiff to prove sexual motivation is incorrect, the bigger problem ultimately is that courts are not correctly applying the Rule 12(b)(6) or Rule 56 standard in granting dismissal "on the basis of sex." First, even assuming for sake of argument that it were correct to require sexual motivation on the part of the student harasser, "[i]ssues of causation, intent, and motivation are questions of fact" that should be left to the jury.[210] "Although summary judgment in discrimination cases is 'fully appropriate, indeed mandated, when the evidence is insufficient to support the non-moving party's case,' [and] 'when, as is often the case in sexual harassment claims,' fact questions

---

[206] *Id.* at 930–31.

[207] Deborah Brake, *The Cruelest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J. GENDER & L. 37, 88–89 (1999).

[208] *Id.*

[209] Doe *ex rel.* Doe v. Chi. Bd. of Educ., No. 15 CV 5018, 2019 WL 3554207, at *3 (N.D. Ill. Aug. 2, 2019).

[210] Redd v. N.Y. Div. of Parole, 678 F.3d 166, 178 (2d Cir. 2012) (citations omitted).

such as 'state of mind or intent are at issue,' summary judgment 'should be used sparingly.' "[211]

As the Second Circuit held in the context of Title VII, "[t]he interpretation of ambiguous conduct is 'an issue for the jury.' "[212] For example, had the court in *I.V.* applied the correct standard on summary judgment—taking all inferences in the plaintiff's favor—it cannot be that "no reasonable juror" could have determined that "twist[ing] nipples" and calling a peer names including "fat", "faggot", "man boobs," "gay," and "bitch" was harassment on the basis of sex.[213] While it is possible a jury could have concluded that the harassment occurred simply because "[the harasser] was a bully, and, as bullies tend to do, he targeted a weaker student"—as the court held in granting summary judgment—a jury could also reasonably conclude that the harassment was because of the victim's failure to conform with male stereotypes.[214]

Additionally, when a court admits that conduct is of a sexual nature but holds that such conduct cannot plausibly be sex-based, that court is necessarily not applying the correct standard of review. For example, in *Eilenfeldt v. United C.U.S.D. #304 Board of Education*, the court held the plaintiff, who was a seventh-grade boy, failed to state a Title IX claim pursuant to Rule 12(b)(6) when he alleged that students—while pushing, punching, and kicking him—called him a "rapist," "pedophile," "child molester," and said "he was sexually attracted to young boys."[215] Students also "produced pictures, graffiti artwork, and videos depicting [the plaintiff] as a pedophile and child molester."[216] The court reasoned that, although the harassment was "of a sexual nature," the plaintiff failed to allege he was harassed "*because* of his male gender or his failure to conform to male gender norms."[217] It should not be that a court dismisses a claim under Rule 12(b)(6) for not being on "on the basis of sex" when the court—like *Eilenfeldt*—admits that the harassment was "of a sexual nature."[218]

---

[211] *Id.* (citations omitted).

[212] *Id.* (citation omitted).

[213] I.V. v. Wenatchee Sch. Dist. No. 246, 342 F. Supp. 3d 1083, 1087–88 (E.D. Wash. 2018).

[214] *See id.* at 1096.

[215] 30 F. Supp. 3d 780, 784–85 (C.D. Ill. 2014).

[216] *Id.*

[217] *Id.* at 788.

[218] *Id.*

Compare the approach in *Eilenfeldt* to that in *S.E.S. ex rel. J.M.S. v. Galena Unified School District No. 499*, where a middle school male student was called names such as "gay," "queer," "bitch," "fag," and "faggot" throughout middle school.[219] The *J.M.S.* court, in denying summary judgment, held the summary judgment evidence could produce a "rational finding that the alleged discrimination . . . resulted from reasons completely unrelated to J.M.S.'s gender or perceived sexual orientation," however, the court added, "[b]ut, the opposite is equally true: a rational trier of fact also could conclude the harassers' comments were based on J.M.S.'s failure to conform to the other male students' stereotypes for masculinity—*i.e.*, how a stereotypical middle school aged boy should look and act."[220] The court held that "[o]n summary judgment, the court isn't free to weigh the evidence and competing inferences and declare a winner," but, "[t]o the contrary, [the] jury must decide whether J.M.S.'s peers engaged in the conduct at issue here based on J.M.S.'s sex."[221] This is the correct approach because—at the motion to dismiss and summary judgment stages—courts should not be weighing "competing inferences."[222]

In summary, whether conduct is sexual should not depend on where it takes place (the schoolyard versus the workplace) or the age of actors (children versus adults). Under both Title VII and Title IX, the analysis of whether conduct was "on the basis of sex" should be the same.[223] *Davis* did not depart from *Onacle*'s holding that sexual motivation is not required, [224] nor did it hold that conduct that it is objectively sexual is not sexual in the context of Title IX because of the age of the child harasser. It is problematic that courts are dismissing at the failure to state a claim or summary judgment stage in Title IX causes of action on the ground that the plaintiff failed to prove the conduct was "on the basis of sex," when a very reasonable inference from many of these cases' facts is that the conduct was sex-based.

---

[219] 446 F. Supp. 3d 743, 762 (D. Kan. 2020).
[220] *Id.* at 789–90.
[221] *Id.* at 790 (citation omitted).
[222] *Id.*
[223] *See supra* note 148.
[224] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998).

B. The "Child It Wasn't That Bad and You Didn't Suffer Enough" Problem

After proving the harassment was "on the basis of sex," a plaintiff bringing a Title IX cause of action for peer-to-peer harassment must next prove that the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school."[225] Courts regularly grant dismissal or summary judgment because the plaintiff fails to prove that the harassment was "bad enough"—that is, severe and pervasive—and/or because the plaintiff fails to prove that he or she "suffered enough"—that is, deprived of educational access or benefits.

When it comes to the act of harassment, in determining whether the peer's conduct rises to the level of actionable harassment—that is, was bad enough—the Supreme Court was clear that the Title IX standard would be higher than the Title VII standard. While the "severe" and "pervasive" language comes from Title VII hostile work environment caselaw, under Title VII, an employee need only show the conduct was "severe *or* pervasive,"[226] whereas for Title IX claims of peer-to-peer harassment, a student must prove that the harassment was "severe, pervasive, *and* objectively offensive."[227] In the context of Title IX, the Supreme Court adopted a higher standard and "more rigorous test"[228] based on the fact that, in the context of peer-to-peer harassment "[school]children may regularly interact in a manner that would be unacceptable among adults."[229] That is, the Supreme Court made clear that sex-based conduct that is unacceptable in an adult workplace could be deemed acceptable, or, at least, not actionable, in the schoolyard if it was not both

---

[225] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999).

[226] *See, e.g.*, Worth v. Tyler, 276 F.3d 249, 267, 268 (7th Cir. 2001) (emphasis added) (citations omitted) ("There is no minimum number of incidents required to establish a hostile work environment. That is because 'harassment need not be both severe *and* pervasive to impose liability; one or the other will do.' "); Morris v. City of Colo. Springs, 666 F.3d 654, 664 (10th Cir. 2012) (quotation omitted) (emphasis added) (holding Title VII hostile work environment claim exists when harassment is shown to be "sufficiently severe *or* pervasive to alter the conditions of the victim's employment and create an abusive working environment.").

[227] *Davis*, 526 U.S. at 650 (emphasis added).

[228] Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226–27 (D. Conn. 2006) ("In *Davis,* the Supreme Court cautioned that peer-on-peer sexual harassment is subjected to a more rigorous test than employee harassment claims under Title VII.").

[229] *Davis*, 526 U.S. at 651.

severe and pervasive.[230] This means the scope of peer-based sexual conduct that a school must respond to is narrower under Title IX than under Title VII.

When it comes to the impact, under Title IX a plaintiff must show the harassment was "so severe, pervasive, and objectively offensive that *it can be said to deprive the victims of access to educational opportunities or benefits provided by the school*."[231] At first glance, this seems analogous to Title VII, where a plaintiff must show that "the harassment affected a term, condition, or privilege of employment."[232] However, under Title IX, courts are granting motions to dismiss or summary judgment when there is egregious harassment—harassment that is deemed "severe, pervasive, and objectively offensive"[233]—because the impact is not sufficient.[234] That is, courts are holding that if a student cannot prove she or he personally suffered enough, then the conduct—no matter how bad or egregious it was—is not actionable. Thus, the resilient victim—one who is the victim of severe, pervasive, and objectively offensive conduct but manages to nevertheless succeed—will have her or his cause of action dismissed.

1. The Playground: Lower Courts Are Limiting the Scope of Actionable Harassment by Dismissing the Conduct, the Injury, or Both

In the context of Title IX, a review of the caselaw shows that lower courts are limiting the scope of actionable harassment by dismissing cases either on the conduct of the harasser or the impact of the harassment on the victim—even in cases with egregious facts that certainly warrant a jury determination on the issue.

For example, in *Leffler ex rel. Leffler v. Memphis City School Board of Education*, an elementary school male student told a female classmate, "I want to put my dick in your pussy," and he

---

[230] *Id.* at 653 ("By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.").

[231] *Id.* at 650 (emphasis added).

[232] Stuart v. Gen. Motors Corp., 217 F.3d 621, 632 (8th Cir. 2000) (citation omitted).

[233] *Davis*, 526 U.S. at 633.

[234] *See Stuart*, 217 F.3d at 631–33; Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993).

physically "rubbed her" on two occasions, once while in class and once in the library.[235] The evidence showed that the female student began bringing home Fs on her homework assignments, had trouble concentrating in school, and "complain[ed] of a different ailment each day to avoid going to school."[236] The *Leffeler* court—granting the defendant's motion for summary judgment—held that such conduct "did not amount to sexual harassment under Title IX."[237] The court said the conduct was "clearly offensive," but "not sufficiently severe or pervasive to amount to a violation of Title IX" and explained it could be,

> distinguished from the facts in *Davis*, where the Supreme Court found that a girl had been subjected to a sexually hostile environment when a male student, over a period of five months, attempted to touch the girl's breasts and genital area, made vulgar statements, placed a door stop in his pants while acting in a sexually suggestive manner, and rubbed his body against her in the hallway.[238]

The court explained that, in contrast to *Davis*, the plaintiff here "was *only* subjected to one vulgar statement and offensive touching on two occasions over a period of two weeks."[239] This was supposedly the court "[v]iewing the evidence in the light most favorable to the [p]laintiffs" and "tak[ing] as true" the plaintiffs' allegations.[240]

In *Hawkins v. Sarasota County School Board*, an eight-year-old male "would cross his hands, gesture to his genitals, and tell [female classmates] to 'suck it' " and would "hold two fingers up" to indicate to "meet me in bed in two seconds."[241] He would say "that he wanted to 'suck [the girls'] breasts till the milk came out,' that he wanted [the girls] to 'suck the juice from his penis,' and that 'he wanted [the girls] to have sex with him.' "[242] The evidence showed that "he referred to . . . the girls as 'sexy baby' and stated that 'you have a bun, and I have a hot dog, and I want to eat them both.' "[243] "At the playground, he . . . chase[d] the girls" and attempted "to touch them on their chests" or "kiss them"

---

[235] No. 04-2141, 2005 WL 2008234, at *1 (W.D. Tenn. Aug. 22, 2005).
[236] *Id.* at *2, *4.
[237] *Id.* at *4, *6.
[238] *Id.* at *4 (citing *Davis*, 526 U.S. at 634).
[239] *Id.* (emphasis added).
[240] *Id.*
[241] 322 F.3d 1279, 1281 (11th Cir. 2003).
[242] *Id.*
[243] *Id.*

and, "[a]t the bus stop, he" sometimes "grab[bed one of the girls] and look[ed] up her skirt," or "rub[bed]" up against her.[244] The harassed "girls stated that this conduct took place over a period of several months."[245] The court found that "the conduct alleged was persistent, continuing to occur on a frequent basis for several months"; "included sexually explicit and vulgar language and acts of objectively offensive touching"; and, "[a]lthough neither the perpetrator nor the victims fully understood its ramifications, the harassment was unwelcome and intimidating."[246]

Nevertheless, the court granted summary judgment because "[e]ven assuming that the behavior was severe, pervasive, and objectively offensive, it was not *so* severe, pervasive, and objectively offensive that it had the systemic effect of denying the girls equal access to education."[247] The court held that the evidence—which showed that the girls "cried more frequently, appeared anxious, and were reluctant to go to school" and further, that some of the girls even "faked being sick in order not to go to school"—"reflect[ed] no concrete, negative effect on either the ability to receive an education or the enjoyment of equal access to educational programs or opportunities."[248] The court reasoned that there was not a sufficient injury because "none of the girls' grades appeared to suffer," the teachers did not observe a change in the girls classroom behavior, and although the girls "testif[ied] that they were upset about the harassment"—some "upset" enough to fake sickness to avoid school—they were "not [upset] enough to tell their parents until months after [the harassment] began."[249]

In *Gabrielle M. v. Park Forest-Chi. Heights, Illinois School District*, an elementary school girl, age 5, stated that a boy was "bothering" her at the start of school in August and by September "became reluctant to go to school," was "crying at the door when it was time to go," and "began wetting her bed and having nightmares around this time."[250] By October, the teachers saw the

---

[244] *Id.*
[245] *Id.*
[246] *Id.* at 1288.
[247] *Id.*
[248] *Id.* at 1281, 1289.
[249] *Id.*
[250] 163, 315 F.3d 817, 818 (7th Cir. 2003); *see also* Pahssen *ex rel.* v. Merrill Cmty. Sch. Dist., 668 F.3d 356, 360, 363 (6th Cir. 2012) (holding that three separate occasions of sexual harassment—a male student shoving a female student into a

boy jump on the plaintiff, lean against her with his hands on his crotch, unzip his pants on more than one occasion in front of the class, put his hands down another girl's pants during story time, and kiss classmates at recess.[251] The plaintiff's father testified that his daughter told him that the boy touched her on the "private parts, chest."[252] The plaintiff was later taken to her pediatrician for "bedwetting, insomnia, nightmares, and loss of appetite" and was "diagnosed . . . with acute stress disorder and separation anxiety due to [the boy's] behavior toward her."[253] As a result, the school district granted a request for her to be transferred to a different school.[254] However, the court held the conduct did not have a " 'concrete, negative effect' on the victim's education."[255] The court gave examples of what may have a "negative impact on access to education," such as "dropping grades," "becoming homebound or hospitalized due to harassment," or "physical violence."[256] The court held that "there [was] no evidence that [the plaintiff] was denied access to an education" because "[a]lthough she was diagnosed with some psychological problems, the record shows that her grades remained steady and her absenteeism from school did not increase."[257]

Leffler, *Hawkins*, and *Gabrielle* all involved facts that are difficult for an ordinary person to stomach, and all three courts were presented with the following question: viewing all evidence in light most favorable to the plaintiffs, could reasonable minds differ that the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school"?[258] All three courts—applying *Davis*—answered in the negative.

---

locker, demanding that she perform oral sex on him, and making obscene sexual gestures at her—was not "severe, pervasive, and objectively offensive").

[251] *Gabrielle*, 315 F.3d at 818–19.

[252] *Id.* at 821.

[253] *Id.* at 820.

[254] *Id.*

[255] *Id.* at 823 (citations omitted).

[256] *Id.* (citations omitted).

[257] *Id.*

[258] Leffler *ex rel.* Leffler v. Memphis City Sch. Bd. of Educ., No. 04-2141, 2005 WL 2008234, at *1, *4 (W.D. Tenn. Aug. 22, 2005); Hawkins v. Sarasota Cnty. Sch. Bd., 322 F.3d 1279, 1289 (11th Cir. 2003); *Gabrielle*, 315 F.3d at 821–23 (citations omitted).

2. The Watercooler: Less Egregious Conduct is Permitted and Employees Are Not Required to Show a Certain Amount of Suffering to Survive Dismissal of Their Case

In the workplace, actionable sexual harassment is that which is "severe or pervasive," meaning "[t]here is no minimum number of incidents required to establish a hostile work environment."[259] Under the more liberal "severe or pervasive test," "[h]arassment need not be both severe and pervasive to impose liability; one or the other will do."[260] While courts have said "the standard for establishing that the offending behavior constituted sexual harassment is rather high,"[261] it is undisputed that this standard is significantly lower than Title IX's "severe and pervasive" standard and "requiring harassing conduct to be 'both severe and pervasive in order to be actionable imposes a more stringent burden on the plaintiff than required by law.' "[262] Under the severe or pervasive standard, "isolated incidents, if egregious, can alter the terms and conditions of employment," whereas "under a conjunctive standard [severe and pervasive], infrequent conduct, even if egregious, would not be actionable because it would not be 'pervasive.' "[263]

When it comes to the impact, in the context of Title VII, a plaintiff must show that the "harassment affected a term, condition, or privilege of employment."[264] The Supreme Court explained that "Title VII comes into play before the harassing conduct leads to a nervous breakdown" because "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[265] "The criterion is not what a

---

[259] Worth v. Tyler, 276 F.3d 249, 268 (7th Cir. 2001) (citation omitted).

[260] Hostetler v. Quality Dining, Inc., 218 F.3d 798, 806, 808 (7th Cir. 2000) (emphasis omitted) (citations omitted).

[261] Singleton v. Dep't of Corr. Educ., 115 Fed. Appx. 119, 122 (4th Cir. 2004); *see also* Hamel v. Bd. of Educ. of Harford Cnty., Civ. No. JKB-16-2876, 2018 WL 1453335, at *8 (D. Md. Mar. 23, 2018) (citations omitted) ("In short, the standard for proving a hostile work environment is intentionally 'very high'; it is 'designed to "filter out complaints attacking the ordinary tribulations of the workplace." ' ").

[262] Guadalajara v. Honeywell Int'l, Inc., 224 F. Supp. 3d 488, 501 (W.D. Tex. 2016) (quoting Harvill v. Westward Commc'ns., L.L.C., 433 F.3d 428, 435 (5th Cir. 2005)) (emphasis omitted).

[263] Harvill v. Westward Commc'ns., L.L.C., 433 F.3d 428, 435 (5th Cir. 2005).

[264] Stuart v. Gen. Motors Corp., 217 F.3d 621, 631 (8th Cir.2000).

[265] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

reasonable . . . employee is capable of enduring, but whether the offensive acts alter the conditions of employment."[266] A plaintiff "need not show that a campaign of harassment interfered with her work performance in order to establish a violation of Title VII."[267] In the context of Title VII, harassment that is otherwise actionable as severe or pervasive is not excused simply because the employee managed to still perform his or her job adequately—a "plaintiff is not required to show his work suffered as a result of the harassment."[268] In this way, an employee is not penalized just because she is—for whatever reason—able to personally overcome and manage to maintain her work performance even in face of harassment. An employee is not required to show a certain amount of suffering to survive dismissal.[269]

3. Without Diverging from *Davis* or Subjecting School Districts to Greater Liability, Courts Can Apply Title IX to Better Protect Children and Encourage School Districts to Be More Proactive

In interpreting Title IX's second element, the Supreme Court in *Davis* gave lower courts some guidance—guidance that was later disregarded or misapplied in *Leffler*, *Hawkins*, and *Gabrielle*. First, it instructed that courts must consider the "constellation of surrounding circumstances, expectations, and relationships," and remember that "children may regularly interact in a manner that would be unacceptable among adults."[270] Second, the Supreme Court set two floors: (1) "simple acts of teasing and name-calling among school children" fall short; and (2) with respect to deprivation of access to educational opportunities, a "mere 'decline in grades is [not] enough to survive' a motion to dismiss."[271] Third, the Supreme Court noted that "in theory, a single instance of sufficiently severe one-on-one peer harassment could" meet the standard.[272]

---

[266] King v. Hillen, 21 F.3d 1572, 1583 (Fed. Cir. 1994) (citations omitted).

[267] Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1455 (7th Cir. 1994) (citation omitted).

[268] White v. Fid. Brokerage Servs., LLC, No. 19-CV-00582, 2019 WL 6052398, at *6 (N.D. Ill. Nov. 15, 2019).

[269] *See Dey*, 28 F.3d at 1454 (stating that Title VII protects the worker "who possesses the dedication and fortitude to complete her assigned tasks even in the face of offensive and abusive sexual banter"); *Harris*, 510 U.S. at 22.

[270] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

[271] *Id.* at 652.

[272] *Id.* at 653.

a. Without Diverging from Davis, Courts Can Apply Title IX to a Wider Range of Peer-to-Peer Conduct Constituting "Actionable Harassment"

Courts should exercise extreme restraint when it comes to granting summary judgment on the "severe and pervasive" element of a Title IX peer harassment cause of action. As recently noted by the Tenth Circuit, "the severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is 'quintessentially a question of fact,' " and it is even less suited for dismissal on the pleadings.[273] Problematically, when courts grant dismissal or summary judgment with respect to the severe and pervasive element—that is, because the harassers' conduct was not sufficiently "bad"—it necessarily sends a message that schools are allowed to ignore such kind of behavior because it does not rise to the level of "actionable 'harassment.' "[274]

While the Supreme Court instructed lower courts to protect school districts from liability or frivolous litigation through the deliberate indifference standard, noting that "[i]n an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law,"[275] "matters of degree—such as severity and pervasiveness—are often best left to the jury."[276] If courts refrained from granting dismissal and summary judgment with respect to the harassers' conduct, then such conduct would be classified as an actionable act of harassment, thereby triggering a duty on the school to respond. Schools would not be overburdened by liability, however, because *Davis* instructed that school districts are not going to be held liable for the peer harassers' conduct unless the plaintiff shows that the school district: (1) actually knew about the harassment; and (2) still responded with deliberate indifference.[277] Therefore, school districts will still escape liability at the dismissal or summary judgment stage if it can be shown that the school's response was not "clearly unreasonable in light of the known circumstances." [278] Thus, the upside of courts not granting dismissal or summary judgment on this element is that schools

---

[273] O'Shea v. Yellow Tech. Servs., Inc., 185 F.3d 1093, 1098 (10th Cir. 1999).
[274] *Davis*, 526 U.S. at 651 (citing *Oncale*, 523 U.S. at 82).
[275] *Id.* at 649.
[276] Doe v. Sch. Dist. No. 1, Denver, Colo., 970 F.3d 1300, 1311–12 (10th Cir. 2020).
[277] *Davis*, 526 U.S. at 650.
[278] *Id.* at 648.

will be more cognizant to respond to harassment and the downside is none—a school district can still escape liability because school administrators "enjoy the flexibility they require" and are deemed deliberately indifferent only to the extent that their "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."[279]

Courts should especially refrain from granting dismissal or summary judgment with respect to the severe and pervasive element when the court would already grant summary judgment as to the third element of plaintiff's cause of action—deliberate indifference. By granting summary judgment with respect to the conduct, the court sends the following message: the conduct the plaintiff complained of—despite being offensive, vile, and awful—is not "actionable 'harassment' " and, accordingly, the school district is not required to address it.[280] For example, in *Gabrielle*, the majority also granted summary judgment based on the fact that there was insufficient proof that the school acted with deliberate indifference.[281] Thus, the same result could have been reached regardless. Likewise, in *Leffler*, the court would have reached the same result since it also granted summary judgment because it found the school did not act with deliberate indifference, holding "[e]ven assuming that DJ's conduct amounted to actionable harassment under Title IX, the Plaintiffs have failed to show that the Defendant ignored the situation."[282] In *Hawkins*, the trial court also granted summary judgment on the element of deliberate indifference, although, on appeal, the Eleventh Circuit did not reach the issue.[283]

It is also problematic that courts—in granting dismissal or summary judgment on the harassers' conduct, that is, the severe and pervasive element—can be seen as clinging to the "kids will be kids" or "boys will be boys" rationale to support their

---

[279] *Id.*

[280] *Id.* at 651 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

[281] Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist., 163, 315 F.3d 817, 824 (7th Cir. 2003).

[282] Leffler *ex rel.* Leffler v. Memphis City Sch. Bd. of Educ., No. 04-2141, 2005 WL 2008234, at *1, *5 (W.D. Tenn. Aug. 22, 2005).

[283] Hawkins v. Sarasota Cnty. Sch. Bd., 322 F.3d 1279, 1287–88 (11th Cir. 2003) ("We have therefore decided that the better course is to refrain from answering the notice and deliberate indifference issues involved in the first question and to rest our opinion on the denial of access issue.").

decisions.[284] Not only that, but courts are excusing the behavior of the harasser because of his/her age, while at the same time weaponizing the age of the victim to defeat his/her claim. For example, in *Gabrielle*, the Seventh Circuit affirmed summary judgment in favor of the school district, holding that the plaintiff failed to prove the second *Davis* element.[285] The court explained that, in determining whether the peer harasser's conduct was "so severe, pervasive, and offensive as to create a cause of action under Title IX," per *Davis*, the court needed to take into account the "obvious fact that young children are still in the process of learning appropriate behavior."[286] The court then explained that the peer harasser's conduct was "so vague and unspecific that it cannot provide a basis to determine whether that conduct was severe, pervasive, and objectively offensive harassment."[287] At the same time, however, the court held the testimony by the five-year-old plaintiff that the peer harasser did "nasty stuff" or wanted to play in "funny ways" was akin to "[s]imilar allegations of unarticulated conduct [that] have been shown to be insufficient to defeat summary judgment in hostile-work-environment cases."[288] That is, the court excused the behavior of the peer harasser because of his age, but held that the testimony of the child plaintiff should rise to the level of an adult in a workplace harassment claim. This double standard is extremely troubling because courts are making age allowances for children peer harassers, and thereby schools, but not children victims, effectively "eviserat[ing] the law's protective purpose" because if victims "falter at any stage of [the] reporting process, then they will be unable to access the protections of Title IX, and schools need not act to protect the students from nor address their sexual harassment in school."[289]

---

[284] Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99, 100 (2018) ("Courts normalize egregious behaviors among boys by opining that 'boys will be boys.' "); Kelly Dixson Furr, *How Well Are the Nation's Children Protected from Peer Harassment at School?: Title IX Liability in the Wake of* Davis v. Monroe County Board of Education, 78 N.C.L. REV. 1573, 1583 (2000) ("Courts frequently have encountered difficulty in defining student-on-student sexual harassment and in evaluating the harm and liability in such cases because of students' immaturity.").

[285] *Gabrielle*, 315 F.3d at 824.

[286] *Id.* at 822.

[287] *Id.*

[288] *Id.*

[289] Emily Suski, *The Title IX Paradox*, 108 CAL. L. REV. 1147, 1166, 1167 (2020).

b. Courts Must Stop Granting Dismissal and Summary Judgment on the Injury. Period.

Even worse than courts granting dismissal and summary judgment on the harasser's conduct, is courts granting dismissal and summary judgment on the victim's impact or injury. In the context of Title IX, courts are holding that children are not suffering enough to show an effect on their education.[290] It is deeply disturbing that courts are regularly holding that a child's suffering, even when looked at in "the light most favorable to the [child]" and resolving all doubts in favor of the child,[291] does not rise to the level of creating an issue of fact as to whether it had a concrete, negative effect on his or her education.[292] In *Gabrielle*, a five-year-old girl—who did not want to go school, started wetting the bed, could not sleep, could not eat, and was "diagnosed . . . with acute stress disorder and separation anxiety due to [the boy's] behavior toward her"—was held to not have had her education affected in a concrete, negative way.[293] Why? Because, according to the Seventh Circuit, her grades did not drop.[294] This raises an obvious question: do kindergarteners even have grades?

(1) Courts Need to Take into Account the Age of the Victim in Determining Whether She Was Deprived of an Educational Opportunity or Benefit

Although courts regularly consider the harassers' age in determining whether his conduct was "severe and pervasive," courts are not similarly considering the victim's age in determining whether the harassers' conduct had a concrete, negative effect on the victim. *Gabrielle* was a stark example of this. As noted by Justice Rovner in *Gabrielle*, grades not dropping in kindergarten should not ever be "dispositive" of a Title IX cause

---

[290] Roe v. Northeastern Univ., No. CV No. 16-03335-C, 2019 WL 1141291, at *20 (Mass. Super. Mar. 8, 2019) ("Plaintiff's claimed psychological discomfort alone will not suffice to trigger a Title IX violation."); Doe *ex rel.* Doe v. Chi. Bd. of Educ., No. 15 CV 5018, 2019 WL 3554207, at *4 (N.D. Ill. Aug. 2, 2019) ("Doe's emotional and psychological suffering is not concrete enough to show that he was denied equal access to education.").

[291] *See* Yumilicious Franchise, L.L.C. v. Barrie, 819 F.3d 170, 174 (5th Cir. 2016) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[292] Walker, *supra* note 27, at 112 (describing the "disturbing trends in post-*Davis* litigation" of questioning victim's allegations at the dismissal and summary judgment stage).

[293] *Gabrielle*, 315 F.3d at 820, 823.

[294] *Id.* at 823.

of action given that "[c]ertainly at the kindergarten level, where learning social skills is at least as important as academic instruction, grades do not tell the complete story of how well a student is doing."[295] In *Gabrielle*, despite maintaining her grades, the record "readily support[ed] the inference that Gabrielle suffered a psychological injury as a result of the harassment, an injury that not only made her reluctant to attend school but ultimately required months of psychotherapy to address."[296] In *Hawkins*, eight-year-old girls "cried more frequently, appeared anxious, . . . were reluctant to go to school," and "faked being sick . . . in order not to go to school," but were held to not have had their education effected in a concrete, negative way.[297] Again, why? The court reasoned it was because they did not tell their parents right away.[298] However, it is a well-known fact that young victims are reluctant to speak of or report sexual harassment or abuse.[299] Because there is no "normal" response when it comes to sexual harassment or abuse, "[c]ourts cannot expect that children will be as willing or able to report sexual abuse and harassment as adults in the workplace."[300] Yet, courts are doing just that and, worse, courts are expecting more of children than adults—children must have more suffering, suffering of a specific kind, and more particularized reporting.[301] "Courts have thus established a

---

[295] *Id.* at 828 (Rovner, J., concurring in part and concurring in the judgment).

[296] *Id.* at 829.

[297] Hawkins v. Sarasota Cnty. Sch. Bd., 322 F.3d 1279, 1281, 1289 (11th Cir. 2003).

[298] *Id.* at 1289.

[299] Ali Davison, Note, *Shackled and Chained in the Schoolyard: A New Approach to Schools' Section 1983 Liability Under the Special Relationship Test*, 19 CARDOZO J.L. & GENDER 273, 289 (2012); *see also* Alexandra Emily Bochte, *The Double-Edged Sword of Justice: The Need for Prosecutors to Take Care of Child Victims*, 35 CHILD.'S LEGAL RTS. J. 200, 211 (2015) ("[T]here are numerous reasons why a child may not disclose abuse immediately."); Christopher Uggen & Heather R. Hlavka, *Does Stigmatizing Sex Offenders Drive Down Reporting Rates? Perverse Effects and Unintended Consequences*, 35 N. KY. L. REV. 347, 352 (2008) (noting that common reasons for not reporting sexual abuse include "embarrassment, shame, stigma, desire for privacy, fear of being blamed for the assault, fear of retaliation, fear of disrupting friends and/or family, distrust of the criminal justice system, and . . . a desire to protect the offender and others").

[300] Does 1,2,3,4 v. Covington Cnty. Sch. Bd., 969 F. Supp. 1264, 1282 (M.D. Ala. 1997).

[301] Suski, *supra* note 289, at 1151 ("[C]ourts require children to not only make the decision to report their sexual harassment but also to do so in unrealistically precise ways.").

paradox for students, requiring them to do the nearly impossible in order to find protection under Title IX."[302]

In Title VII cases, courts do not require a plaintiff to show that the harassment "interfered with her work performance" and a victim's ability to do her job in spite of the harassment is not dispositive.[303] In the context of Title IX, "courts ought to be more flexible in assessing the harms that a child experiences as a result of harassment, given that children (especially young children) are far less able to articulate the fact and extent of their injuries and may manifest an array of different reactions to the harassment."[304] "[W]hat students put up with, without objection or protest, does not mark the bounds of permissible classroom conduct."[305] Requiring children to "run a gauntlet of sexual abuse" "in return for the privilege of being" allowed to have an education is in a word: unacceptable.[306] Dismissing a victim's Title IX cause of action because the victim was resilient and managed to overcome the sexual harassment, "turns Title IX on its head."[307]

While perhaps it is understandable that in an educational environment where "students are still learning how to interact appropriately with their peers"[308] a more rigorous severe and pervasive test is necessary to limit the scope of actionable conduct, there is no rational reason why a greater injury should be required in the educational environment than the workplace. Of all the problems of Title IX's application by courts, this one seems to be the easiest to fix and also the problem in most dire need of fixing. In the context of Title VII and adults in the workplace, courts recognize that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or

---

[302] *Id.* at 1152.

[303] Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1455 (7th Cir. 1994).

[304] Gabrielle M. v. Park Forest-Chi. Heights, IL. Sch. Dist. 163, 315 F.3d 817, 828 (7th Cir. 2003) (Rovner, J., concurring in part and concurring in the judgment).

[305] Hayut v. State Univ. of N.Y., 352 F.3d 733, 749 (2d Cir. 2003).

[306] *See* Henson v. Dundee, 682 F.2d 897, 902 (11th Cir.1982) ("[A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.").

[307] Jennings v. Univ. of N.C., 482 F.3d 686, 706 (4th Cir. 2007) (Gregory, J., concurring).

[308] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999); *see also* Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226–27 (D. Conn. 2006).

keep them from advancing in their careers."[309] Likewise, and even more in a school setting, the "mere presence of sexual harassment" by peers "undermines the very educational process that is supposed to occur in school."[310] While no victim's manifestation of their suffering is uniform, it is well-established that peer sexual harassment can cause low self-esteem, anxiety, inability to concentrate, depression, and psychosomatic symptoms such as headaches, change in appetite, and insomnia—all of which can seriously affect a student's learning. [311]

(2) Courts' Misapplication of the Dismissal and Summary Judgment Standards Is Most Obvious (and Troubling) When It Comes to the Injury

Courts are necessarily not appropriately applying the correct standard when they dismiss or grant summary judgment based on the injury, even though "[c]onstruing the record favorably to [the victim], one may readily infer that the alleged harassment traumatized her psychologically."[312] For example, in *Doe ex rel. Doe v. Chicago Board of Education*, the court held that a kindergarten boy "subjected to being pantsless in a bathroom with other exposed boys, an attempted kiss, an incidence of unspecified 'sexual contact,' and an exchange of 'kisses' on his and his classmate's penises" was sufficient to be deemed "sufficiently severe and offensive."[313] Nevertheless, the court granted summary judgment on the ground that the plaintiff failed to "point[] to any evidence that the conduct at issue had a 'concrete, negative effect' on his education."[314] The evidence in that case showed that, as a result of harassment, the victim's "behavior changed—he had emotional outbursts and physical confrontations at school, and he was angry and destructive at home"; he said "he no longer wanted to live"; and he "sometimes asked to stay home from school because

---

[309] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

[310] Tianna McClure, *Boys Will Be Boys: Peer Sexual Harassment in Schools and the Implications of* Davis v. Monroe County Board of Education, 12 HASTINGS WOMEN'S L.J. 95, 104, 105 (2001).

[311] Stacy M. Chaffin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 782–83 (2008); Giampetro-Meyer, *supra* note 140, at 304–05; Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment,* 2 UCLA W.L.J. 85, 97 (1992).

[312] Gabrielle M. v. Park Forest-Chi. Heights, IL. Sch. Dist. 163, 315 F.3d 817, 828–29 (7th Cir. 2003) (Rovner, J., concurring in part and concurring in the judgment).

[313] No. 15 CV 5018, 2019 WL 3554207, at *4 (N.D. Ill. Aug. 2, 2019).

[314] *Id.*

he did not feel safe."[315] Surely, this evidence—which must be taken as true and all justifiable inferences drawn in its favor[316]—is sufficient to allow a jury to infer that the victim was deprived of educational opportunities. Indeed, the court admitted that "[o]ne might argue that a reasonable jury could infer that Doe's emotional disturbance resulted from the sexual harassment he suffered and that it shows his education was concretely and negatively harmed." [317]

Nevertheless, relying on *Gabrielle*, the court held that "Doe's emotional and psychological suffering is not concrete enough to show that he was denied equal access to education" because he "participated in school activities, maintained his grades, and improved his attendance record."[318] Thus, the court essentially admitted that a genuine dispute of material fact existed, that is, "reasonable minds could differ as to the import of the evidence," [319] yet still granted summary judgment.[320] In stark contrast to Title VII, where courts do not require a certain amount or kind of suffering by the employee,[321] in the context of Title IX some courts require not only suffering but suffering that fits into a cookie-cutter mold. What's worse is that the court's holding was entirely unnecessary—the same result could have been reached regardless if the court also granted summary judgment on deliberate indifference.[322] After dismissing the injury of the kindergarten victim, in the next paragraph the court wrote: "In any event, the Board's response to R.O. and Doe's conduct was not 'clearly unreasonable.' "[323]

Similarly, in *Roe v. Pennsylvania State University*, the lower court granted a motion to dismiss on the injury in a case involving a female victim who was raped without a condom while unconscious.[324] As a result of the rape, she missed a week of

---

[315] *Id.*

[316] *See id.* at *1.

[317] *Id.* at *4.

[318] *Id.*

[319] Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986) (citations omitted).

[320] *Doe ex rel. Doe*, 2019 WL 3554207, at *6.

[321] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); *see also* 1 W. (FIRM), HR SERIES FAIR EMPLOYMENT PRACTICES § 9:32 (2021) ("If the environment unreasonably interferes with an employee's work performance or is intimidating, offensive, or hostile, it is irrelevant whether it also causes the victim to suffer psychological harm.").

[322] *Doe ex rel. Doe*, 2019 WL 3554207, at *5.

[323] *Id.* (citation omitted).

[324] No. 18-2142, 2019 WL 652527, at *2 (E.D. Pa. Feb. 15, 2019).

classes for medical treatment, had to take HIV medication which caused her not to pass a physical exam needed for her military career, and had "nightmares, trouble trusting others, and anxiety when alone."[325] In response to her Title IX cause of action, the university filed a 12(b)(6) motion to dismiss on three elements: (1) actual knowledge; (2) deliberate indifference; and (3) that "she was effectively barred equal access to an educational opportunity or benefit."[326] The court decided not to discuss the first two arguments because it held it was "clear" the victim failed to allege deprivation of access.[327] The court explained that, while the victim was required to take HIV medication as a result of the rape, she failed to "provide any nexus between her military career and a Penn State educational benefit or opportunity."[328] Additionally, the court held that while she missed class, she failed to show that it affected her ability to learn or her grades and that "some psychological problems" suffered by the victim were an insufficient injury to support an actionable Title IX claim.[329] Incredibly, the *Roe* court claimed that—in dismissing the victim's claim at the 12(b)(6) stage on the injury—it was "by no means downplay[ing] the significant effect that sexual assault has on individuals" or the "enormous amounts of pain" endured.[330] However, isn't that exactly what these courts are doing? They are dismissing away the real, concrete, negative effects of sexual harassment and assault. Indeed, they are "downplay[ing] the significant effect that sexual assault has on individuals."[331]

IV. DELIBERATE INDIFFERENCE AND THE "BUT WE NEED TO PROTECT THE SCHOOLS" NON-PROBLEM

What about schools? Do we need to worry about protecting them from liability? The deliberate indifference standard in *Davis* was adopted to do just that. Not only does it protect schools from liability—thereby negating the need for courts to dismiss cases on the other *Davis* elements—courts are interpreting the standard to effectively immunize schools from liability. For a school to be liable, a plaintiff must meet the difficult burden of proving a school

---

[325] *Id.* at *8.
[326] *Id.* at *5.
[327] *Id.*
[328] *Id.* at *8.
[329] *Id.* (citations omitted).
[330] *Id.*
[331] *See id.*

district's actual knowledge of sexual harassment followed by a deliberately indifferent response.[332] The Supreme Court made clear that "the school authorities whom we must trust to care for and educate our children are held to a much lower standard than employers who permit hostile work environments to occur."[333] While under Title VII, employers are liable for their negligence when they "knew or should have known" of sexual harassment and failed to address it,[334] under Title IX a school's "negligent, lazy, [and] careless" response to known sexual misconduct is not sufficient to trigger liability.[335]

It is without doubt that the Supreme Court in *Davis* was greatly concerned with not imposing "sweeping liability" on schools under Title IX for peer-to-peer harassment.[336] It is also without a doubt that the policy under Title IX is to protect students from discrimination and harassment on the basis of sex. However, the effect of *Davis*, and particularly the way the deliberate indifference standard has been interpreted, has practically insulated schools from liability under Title IX for peer-to-peer harassment. Put another way, the pendulum has swung too far in favor of protecting schools from liability, and it is time for courts to balance it. Under *Davis*, courts can and should do both—protect students and protect schools. Justice Kennedy aptly noted in his dissenting opinion: "The majority does not explain how a school is supposed to discern from this mishmash of factors what is actionable discrimination. Its multifactored balancing test is a far cry from the clarity we demand of Spending Clause legislation."[337]

This Part argues that in applying the deliberate indifference standard courts have set the bar far too low for what is "not clearly unreasonable," which has had the effect of insulating schools from

---

[332] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646–47 (1999); Jennifer James, *We Are Not Done: A Federally Codified Evidentiary Standard Is Necessary for College Sexual Assault Adjudication*, 65 DEPAUL L. REV. 1321, 1327 (2016) ("Needing to prove 'actual knowledge' of the assault and a 'deliberately indifferent' response creates a high, difficult burden for plaintiffs to establish a violation of Title IX, leaving a defendant-university with a greater likelihood to prevail on a motion to dismiss or a motion for summary judgment.").

[333] Ann C. McGinley, *Schools as Training Grounds for Harassment*, 2019 U. CHI. LEGAL F. 171, 209 (2019).

[334] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998).

[335] Karasek v. Regents of Univ. of Cal., 956 F.3d 1093, 1108 (9th Cir. 2020) (quoting Oden v. N. Marianas Coll., 440 F.3d 1085, 1089 (9th Cir. 2006)); Lossmann v. Sage Int'l Sch. of Boise, 810 Fed. App'x 577, 578 (9th Cir. 2020) (quoting *Karasek*, 956 F.3d at 1108).

[336] *Davis*, 526 U.S. at 652.

[337] *Id.* at 675 (Kennedy, J., dissenting).

liability—and therefore responsibility—as long as the schools did more than nothing. This was not the intention of *Davis* and—especially in the #MeToo world—it is time for courts to redefine "clearly unreasonable" to raise the bar, even if slightly, so that schools will better protect students from and respond to peer sexual harassment.

A. Courts Require Children to Report Sexual Harassment in Unrealistic, Age-Inappropriate Ways

Before even getting to the deliberate indifference standard, schools are shielded from liability by the actual knowledge standard where "courts require children to not only make the decision to report their sexual harassment but also to do so in unrealistically precise ways."[338] In the #MeToo world especially, we know that the prevalence of false reporting of sexual assault or harassment is low.[339] Yet, under Title IX, courts are granting dismissal if the victim does not report the harassment at the right time, with the right amount of detail, and to the right person.[340] For example, a child reporting sexual harassment or assault to a guidance counselor, coach, security officer, or even a teacher has been held insufficient to trigger actual knowledge for Title IX liability.[341] Then, assuming a child reports the sexual harassment to the right person, courts will still dismiss claims under the actual knowledge requirement if the detail provided to the school is deemed insufficient.[342] For example, in *Gabrielle*, the Seventh

---

[338] Suski, *supra* note 289, at 1151.

[339] NAT'L SEXUAL VIOLENCE RESOURCE CTR., FALSE REPORTING OVERVIEW (2012), https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf.

[340] *See e.g.*, Warren *ex rel.* Good v. Reading Sch. Dist., 278 F.3d 163, 173–75 (3d Cir. 2002) (finding that the school guidance counselor was not the "appropriate person" whose knowledge could have subjected school district to liability); C.S. v. Couch, 843 F. Supp. 2d 894, 914 (N.D. Ind. 2011) (concluding that the fifth grade teacher and football coaches were not appropriate persons); Plamp v. Mitchell Sch. Dist. No. 17-2, 565 F.3d 450, 457–58 (8th Cir. 2009) (finding that the school guidance counselor and high school teachers were not appropriate persons); Ross v. Univ. of Tulsa, 859 F.3d 1280, 1289–90(10th Cir. 2017) (rejecting the conclusion that the campus security officers were appropriate persons); G.D. *ex rel.* A.D. v. Lansing United Sch. Dist. #469, No. 2:18-CV-02243-HLT, 2018 WL 5724042, at *3 (D. Kan. Nov. 1, 2018) (granting motion to dismiss because the teacher who oversaw study hall was not the appropriate person); Gabrielle M. v. Park Forest-Chi. Heights, IL. Sch. Dist. 163, 315 F.3d 817, 822 (7th Cir. 2003) (holding that the victim's testimony was too "vague and unspecific" to establish actual knowledge).

[341] *See Warren ex rel. Good*, 278 F.3d at 173–175.

[342] *See* Suski, *supra* note 289, at 1151.

Circuit held that the kindergartner girl's testimony about her classmate "bothering" her, doing "nasty stuff," and wanting to play in "funny ways" at recess was too "vague and unspecific" to establish actual knowledge, as was the victim's father's testimony that the student touched the victim's "[p]rivate parts, chest" because it did not "present details of when, where, or how often this alleged conduct occurred and whether it was reported."[343] In *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*, the Tenth Circuit dismissed the Title IX cause of action of a mentally disabled, middle school victim who was harassed by boys who "persistently and continuously pestered her for oral sex" and coerced her into performing oral sex.[344] Although the student lacked some language skills due to her brain injury and did not know the word for assault, she did report that "these boys were bothering me."[345] The court held the school did not have actual knowledge of the sexual harassment—nor was it required to follow up on the student's complaint to determine what "bothering me" meant.[346] As noted by the concurring opinion,

> [o]ne would think a trained middle school counselor, faced with a mildly retarded young student who was severely distressed about being 'bothered' by some boys in her class, would ask the obvious follow-up question—in what way are they bothering you?—especially since one of the boys had previously been disciplined for engaging in sexual harassment.[347]

Thus, courts are requiring children to provide particularized information to trigger actual knowledge "without regard for children's capacity to provide such information" despite the fact that "[b]oth behavioral psychology and developmental neuroscience indicate that children face significant obstacles in making such complex decisions as to whether to report their sexual harassment at all, let alone in the particularized ways required by Title IX jurisprudence."[348] While the Supreme Court has recognized that "[a] child's age is far 'more than a chronological fact,' " and instead, "is a fact that 'generates commonsense conclusions about behavior and perception,' "[349] courts are holding children to unrealistic standards to protect

---

[343] *Gabrielle M.*, 315 F.3d at 822.
[344] 511 F.3d 1114, 1117 (10th Cir. 2008).
[345] *Id.* at 1119–20.
[346] *Id.*
[347] *Id.* at 1127. (McConnell, J., concurring in part and dissenting in part).
[348] *See* Suski, *supra* note 289, at 1169.
[349] J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) (citations omitted).

schools from liability under Title IX, and this is before courts even reach the deliberate indifference standard.

B. It Is Time We Redefine "Clearly Unreasonable"

Assuming the plaintiff has shown the school had actual knowledge of the severe, pervasive, and objectively offensive sexual harassment, the plaintiff still must jump through the final, most difficult hoop: proving the school responded with deliberate indifference. All cards are seemingly stacked against finding a school district liable under the deliberate indifference standard. This is because to avoid liability all the school must show is that its response was not "clearly unreasonable."[350] And, when assessing whether the school district's response was "clearly unreasonable," victims do not have a right to seek a "particular disciplinary action"; there is no requirement that the school purge themselves from "actionable peer harassment," and courts are instructed to "refrain from second-guessing the disciplinary decisions made by school administrators."[351] Additionally, *Davis* instructed lower courts that "there is no reason" they could not dismiss a case pre-trial on the deliberate indifference element,[352] and this has had the effect of lower courts "repeatedly and disproportionately" deploying the standard against victim's causes, including when the school acted "concededly callous, incompetent, unresponsive, inept, and inapt."[353]

In granting dismissal or summary judgment, lower courts are hesitant to "second-guess[ ] the disciplinary decisions made by school administrators,"[354] consequently making a victim's surviving dismissal or summary judgment next to impossible as long as a school district did more than nothing in response.[355] The "not clearly unreasonable" floor is so low and the standard so easy for school districts to satisfy that the school district will be

---

[350] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).

[351] *Id.*

[352] *Id.* at 649.

[353] MacKinnon, *supra* note 118, at 2040–41.

[354] *Id.* at 2067.

[355] Burwell v. Pekin Cmty. High Sch. Dist. 303, 213 F. Supp. 2d 917, 934 (C.D. Ill. 2002) ("However, this court concludes that this was not a case where the school made no effort whatsoever to investigate or put an end to reported harassment."); *see also* Susan P. Stuart, *Jack and Jill Go to Court: Litigating a Peer Sexual Harassment Case Under Title IX*, 29 AM. J. TRIAL ADVOC. 243, 276–77 (2005) ("Thus, prevailing at the summary judgment level on this element can be difficult for victim-litigants because of schools' discretion in matters of discipline and management.").

protected from liability even when the school district is "negligent, lazy, and careless,"[356] and its actions are "concededly callous, incompetent, unresponsive, inept, and inapt."[357] Indeed, the requirement of a clearly unreasonable response in cases of peer sexual harassment is such a "high standard" for victims to meet that it "precludes a finding of deliberate indifference in all but 'limited circumstances.' "[358] Predictably, under the deliberate indifference standard, which "permits a wide margin of tolerance for sexual abuse," "overall data on the occurrence of sexual abuse in schools has not moved an inch."[359]

In *Davis*, the court held the defendant school district acted with deliberate indifference when—despite knowledge of ongoing sexual harassment—the school took "no disciplinary action" and "fail[ed] to respond in any way over a period of five months to complaints of [the harasser's] in-school misconduct."[360] While *Davis* was clear that the deliberate indifference standard was a high one and that the facts before it met the deliberate indifference standard, problematically courts have been misapplying *Davis* to hold that any response by the school above no action at all will suffice to shield the school from liability. The recent Sixth Circuit case, *Foster v. Board of Regents of University of Michigan*, is illustrative of this and the particularly troubling trend toward making the deliberate indifference standard even more difficult to establish by using the facts of *Davis* as the floor.[361] In *Foster*, a female student was repeatedly sexually assaulted and harassed by a male student and, despite reporting it the university, the male harasser continued to repeatedly violate a no-contact order and sexually harass the victim.[362] In holding that the plaintiff failed to create a fact-issue with respect to deliberate indifference, the Sixth Circuit identified the facts of *Davis* as "add[ing] contour to the deliberate-indifference standard" and held "[g]auged by these standards, the University of Michigan did not show deliberate indifference."[363] As demonstrated by *Foster*, lower courts are

---

[356] Karasek v. Regents of Univ. of Cal., 956 F.3d 1093, 1106 (9th Cir. 2020).

[357] MacKinnon, *supra* note 118, at 2040–41.

[358] Doe v. Bd. of Educ. of Prince George's Cnty., 982 F. Supp. 2d 641, 654 (D. Md. 2013).

[359] MacKinnon, *supra* note 118, at 2040–41.

[360] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 634, 649 (1999).

[361] 982 F.3d 960, 965–66 (6th Cir. 2020).

[362] *Id.* at 962–65.

[363] *Id.* at 965–66.

improperly construing *Davis* to hold that deliberate indifference is only met when a school does nothing (that is, the facts of *Davis* itself) and thereby making schools not only immune from liability but also excusing schools from protecting students from extremely hostile situations. Courts, in granting dismissal under the deliberate indifference standard, are regularly reasoning that "[t]his is not a situation where a school district learned of a problem and did nothing."[364] However, while a school's total failure to respond to known sexual harassment (the facts of *Davis*) is certainly deliberate indifference, "*Davis* does not stand for the proposition that *any* response to sexual harassment—no matter how lacking—is enough to clear the deliberate indifference bar."[365]

While it is important to ensure courts are not creating a "heavy-handed judicial intrusion into school disciplinary issues,"[366] it cannot be the case that the deliberate indifference standard is so low that any response by the school will result in a grant of dismissal or summary judgment under this element—that is, any response will be determined "not clearly unreasonable as a matter of law" because "if it was, there would be no need to ask whether a response was 'clearly unreasonable.' "[367] Therefore, it is important for courts to define what is "clearly unreasonable" or, rather, "clearly unreasonable" enough to require a jury to decide the issue, while being mindful that "[d]eliberate indifference is more than a mere reasonableness standard that transforms every

---

[364] Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114,1121–22 (10th Cir. 2008) (citations omitted); *see also* Facchetti v. Bridgewater Coll., 175 F. Supp. 3d 627, 638 (W.D. Va. 2016) (citation omitted) (dismissing the victims' claim under deliberate indifference and explaining that the plaintiff's "allegations of deliberate indifference pale in comparison to other cases where a plaintiff's Title IX claim has survived dismissal or summary judgment. Most often, those cases involved allegations of complete inaction in the face of known harassment.").

[365] *Foster*, 982 F.3d at 981 n.8 (Moore, J., dissenting).

[366] Doe v. St. Francis Sch. Dist., 694 F.3d 869, 873 (7th Cir. 2012) ("Judges must be sensitive to the effects on education of heavy-handed judicial intrusion into school disciplinary issues, or heavy-handed administrative intrusion required by judges interpreting Title IX and other statutes that, along with free-wheeling interpretations of the speech and religion clauses of the First Amendment, have made education one of the most heavily regulated American industries. . . . Let us not forget that one component of academic freedom is the right of schools to a degree of autonomy in the management of their internal affairs.") (citations omitted); *see, e.g.*, Barbara A. Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope*, 36 J.C. & UNIV. L. 649, 654, 667 (2010).

[367] *Foster*, 982 F.3d at 981 n.8 (Moore, J., dissenting) (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999)).

school disciplinary decision into a jury question."[368] To do this, courts must stop employing the facts of *Davis* "as the barometer for deliberate indifference" because "[a] case involving *no* response to sexual harassment does nothing to explain the range of actual responses that a jury could reasonably find clearly unreasonable, let alone the range of responses that would be not clearly unreasonable as a matter of law."[369]

Even considering that "deliberate indifference will often be a fact-based question, for which bright line rules are ill-suited,"[370] there are three floors that can be safely set at the dismissal and summary judgment stage.

1. Courts Should Hold Deliberate Indifference Is a Question for the Jury When a School Fails to Evaluate the Effectiveness of Its Response

First, courts should deny dismissal and summary judgment when the school district's response meets the so-called Einstein definition of insanity: "doing the same thing over and over again and expecting different results."[371] "We have recognized that if an institution learns that its initial response is inadequate, it may be required to take further steps to prevent harassment."[372] While courts should not dictate discipline measures or second guess the discipline measures the school employs, when the record shows that the school employed a discipline measure and that discipline measure failed to quell the harassment, a court should hold that a rational trier of fact could find it was "clearly unreasonable" to not employ a different discipline method thereafter.[373] That is, when the school knows the strategies used in the past were ineffective

---

[368] Doe *ex rel.* Doe. v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 447 (D.Conn.2006) (citation omitted).

[369] *Foster*, 982 F.3d at 981 n.8 (Moore, J., dissenting).

[370] *Doe ex rel. Doe*, 451 F. Supp. 2d at 447 (citation omitted).

[371] *See* Sarah Pruitt, *Here Are 6 Things Albert Einstein Never Said*, HISTORY (Apr. 7, 2017), https://www.history.com/news/here-are-6-things-albert-einstein-never-said (last updated Sept. 20, 2018).

[372] Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 175 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009).

[373] Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 966 (D. Kan. 2005) (denying summary judgment on the ground of deliberate indifference when in response to harassment that lasted for years "the school rarely took any disciplinary measures above and beyond merely talking to and warning the harassers. . . . While the court recognizes that the school was not legally obligated to put an end to the harassment, a reasonable jury certainly could conclude that at some point during the four-year period of harassment the school district's standard and ineffective response to the known harassment became clearly unreasonable.").

but nevertheless decides to "do[ ] the same thing over and over again," a court should hold that a rational juror could find that the school acted "clearly unreasonable."[374]

The recent case, *S.E.S. ex rel. J.M.S. v. Galena Unified School District No. 499*, is a good example of the court applying the correct standard and denying summary judgment.[375] In *J.M.S.*, the record showed the school responded to the known harassment through a variety of methods, including speaking with the parents of the victim, verbally reprimanding the offending students, engaging in counseling sessions with the offending students, and, suspending the offending students when there was physical conduct.[376] However, the court held that "the evidence demonstrate[d] repeated harassment over two years" and that although "[t]he school district took some action in response to [the] harassment," "more harassment continued and in a manner where a reasonable jury could find the school district knew that its earlier responses were ineffective to deter the persistent harassment of [the victim], requiring the school district to do more in light of the circumstances."[377] This is the right result. Courts should hold that it is a question for the jury when the evidence shows, despite some response by the school, persisting harassment and failure to

---

[374] *See* Pruitt, *supra* note 371; *see also* Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 262 (6th Cir. 2000) (holding that a school acted with deliberate indifference when the evidence showed that "in numerous instances, [the school district] continued to use the same ineffective methods to no acknowledged avail. Although 'talking to the offenders' produced no results, Spencer continued to employ this ineffective method."); Patterson v. Hudson Area Sch., 551 F.3d 438, 449 (6th Cir. 2009), *abrogated by* Foster v. Bd. of Regents of the Univ. of Mich., 982 F.3d 960 (6th Cir. 2020) (citation omitted) (holding that given that the school district knew that its methods were ineffective, but did not change those methods, "a reasonable jury certainly could conclude that at some point during the . . . period of harassment[,] the school district's standard and ineffective response to the known harassment became clearly unreasonable."); Belcher v. Robertson Cnty., Tenn., No. 3-13-0161, 2014 WL 6686741, at *10 (M.D. Tenn. Nov. 26, 2014) (citations omitted) ("The plan it developed, however, was not explained to the appropriate persons and recommended a strategy (isolation or separation) which had not worked in the past. Although the deliberate indifference standard does not mean the Court can second guess a school's disciplinary actions, the Court must act when the school's response to sexual harassment of students, or lack thereof, is clearly unreasonable in light of the circumstances.").

[375] 446 F. Supp. 3d 743, 803 (D. Kan. 2020).

[376] *Id.*

[377] *Id.* at 803, 806; *see also Theno*, 377 F. Supp. 2d at 977 ("[T]he court believes that a rational trier of fact could find the requisite nexus between the lack of the adequacy of the prior response and later harassment. Consequently, the adequacy of the school's response to known acts of harassment is an issue that must be resolved by the jury.").

reevaluate the response's adequacy.[378] That is, "[t]he failure to undertake different or additional measures where it has become apparent that the initial approach has proved to be woefully insufficient supplies a factual basis to permit a finding of deliberate indifference."[379]

Problematically, many courts are granting dismissal and summary judgment as long as the school did more than nothing and, if the recent Sixth Circuit *Foster* case is representative of what is to come, schools will continue to escape liability as long as they did more than nothing. To reach these decisions, judges are improperly weighing the evidence themselves—which is inapposite to what summary judgment (much less a motion to dismiss) requires.[380] As noted by the Sixth Circuit dissent in *Foster*, "[d]enying the [school] summary judgment is a far cry from concluding ultimately that it acted with deliberate indifference, let alone that [the plaintiff] has proved she is, in fact, entitled to damages. It simply represents a judicial determination that the victim of sexual harassment has raised questions of fact that should be resolved by the jury, not this court."[381]

2. Courts Should Hold Deliberate Indifference Is a Question for the Jury When a School Fails to Investigate

Second, courts should hold that dismissal is inappropriate when the record reveals a failure by the school to properly investigate.[382] From *Davis*, we know that deliberate indifference is satisfied when there is "no effort whatsoever . . . to investigate";[383] however, it cannot be that the bar is so low that anything above "no effort whatsoever to investigate" will suffice to shield the school from liability. Rather, even if schools investigate, investigations that are untimely, do not interview all relevant witnesses, and do not consider relevant evidence should—*at a*

---

[378] *See, e.g.*, *Theno*, 377 F. Supp. 2d at 966.

[379] S.K. v. N. Allegheny Sch. Dist., 168 F. Supp. 3d 786, 802 (W.D. Pa. 2016).

[380] Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.").

[381] Foster v. Bd. of Regents of Univ. of Mich., 982 F.3d 960, 988–89 (6th Cir. 2020) (Moore, J., dissenting).

[382] S.S. v. Alexander, 143 Wash. App. 75, 104, 177 P.3d 724, 738 (Wash. Ct. App. 2008) (citations omitted) ("An institution's failure to properly investigate a claim of discrimination is frequently seen as an indication of deliberate indifference.").

[383] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 654 (1999).

minimum—create a fact issue with respect to deliberate indifference. Courts should hold such a lacking investigation is something a jury could find to be clearly unreasonable. For example, *in Doe v. Forest Hills School District*, the district court determined that the record did not support the school's motion for summary judgment on deliberate indifference even though the school "did not ignore the complaints or completely fail to act, as in *Davis*" because of the school's "limited investigation into the initial report of sexual assault."[384] The district court did what all district courts should do in deciding a motion for summary judgment—it actually applied the standard.[385] The court went back and forth with the evidence and looked at what a jury could reasonably conclude based on it.[386] For instance, the court reasoned that the jury "could find that the investigation in its scope and the delay to ultimate conclusion was clearly unreasonable and represented deliberate indifference by the school and administrators" when it failed to interview certain witnesses, did not follow its own Title IX procedures, and did not seek certain evidence.[387] However, the court also noted that "[a]lthough the investigation could have been more thorough, a jury could determine that it was not clearly unreasonable."[388]

In another case, *G.C. ex rel. Counts v. N. Clackamas School District*, the district court applied the correct summary judgment standard and refused to immunize the school against liability just because it took some action.[389] That case involved the sexual harassment of a special education student by another special education student, and the school district moved for summary judgment on deliberate indifference by citing the following evidence of its response:

> (1) the District cooperated with the police and undertook its own investigation of KW's [another alleged victim] allegations against AY [harasser]; (2) the District explored the possibility of moving AY from the school; (3) the District performed functional behavioral assessments on AY, KW, and plaintiff; (4) the District created a plan to place AY on high level line-of-sight supervision, under which he would never be left unsupervised; (5) The District instructed AY and plaintiff not to talk about KW's allegations

---

[384] No. 1:13-CV-428, 2015 WL 9906260, at *1, *10, *11 (W.D. Mich. Mar. 31, 2015).
[385] *Id.* at *10, *11.
[386] *Id.*
[387] *Id.* at *10.
[388] *Id.* at *11.
[389] 654 F. Supp. 2d 1226, 1238 (D. Or. 2009).

> with each other and separated them while at school; and (6) the District modified AY's IEP to include training on appropriate interaction with females.[390]

The court explained that while "[c]learly, these facts show that the District did not completely fail to act in response to [the] allegations" and that it was a "close case," it could not "conclude that the evidence is such that whether defendants were deliberately indifferent would not be subject to debate amongst reasonable jurors."[391] Important to the court's conclusion was that "[c]onstruing the inferences created by this evidence in plaintiff's favor," a reasonable juror could find the school's "investigation was flawed in some regard" and that the school's "failure to ensure that its principal, and its teachers, received training in handling reports of sex abuse, could be viewed by a reasonable juror as evidence that the District does not take such allegations with the seriousness such allegations deserve."[392]

Similarly, courts should hold a fact issue is created with respect to deliberate indifference when there is an investigation and response—perhaps even a thorough one—but it is unjustifiably delayed. In *Doe ex rel. Doe v. Coventry Board of Education*, while the school district did eventually respond months after the incident, the court held that the school's failure to take disciplinary action for a six-month period could be found by the jury to be "lengthy and unjustified."[393] Similarly, in *Roussaw v. Mastery Charter High School*, the district court found a delay of thirteen days in which the school "took no action to address the sexual assault" was "unreasonable under the circumstances."[394]

3. Court Should Hold Deliberate Indifference Is a Question for the Jury When a School Fails to Train Its Employees

Third, while a school district's failure to follow Title IX procedures has been held insufficient to prove deliberate

---

[390] *Id.* at 1238.

[391] *Id.* at 1238, 1241.

[392] *Id.* at 1238–39.

[393] 630 F. Supp. 2d 226, 235 (D. Conn. 2009).

[394] No. 19-cv-1458, 2020 WL 2615621, at *6–*7 (E.D. Pa., May 22, 2020); *see also* Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1297 (11th Cir. 2007) (holding that "[t]he fact that the disciplinary panel ultimately decided not to sanction the alleged assailants is immaterial because it fails to explain why UGA waited almost eleven months to take corrective action").

indifference under Title IX in and of itself,[395] courts should hold a fact issue is created with respect to deliberate indifference when a school district knows it has a sexual harassment problem and fails to enact any policies to prevent it and/or fails to train its teachers and staff on preventing sexual harassment. For example, in *Roussaw*, the district court held that when the school had actual knowledge of past sexual incidents among middle school students, its "failure to institute *any* policies, procedures, or training required by Title IX was an unreasonable response."[396] Similarly, in *Doe ex rel. Doe v. Coventry Board of Education*, the court held that when the record was "unclear" as to whether the school had a policy with respect to a student arrested for sexual assault or, even if there was a policy, "a jury could find the Defendant's lack of enforcement to be unreasonable."[397]

Moreover, if we want to "avoid schools as training grounds for harassment and move toward schools as training grounds for respect, citizenship, and eliminating harassment," it is necessary that schools educate those on the front lines—their teachers and staff—about how to respond to sexual harassment.[398] A school's failure to train its teachers and staff about responding to sexual harassment must be sufficient to trigger a fact issue as to whether the school's position, with respect to sexual harassment of its students, is that of deliberate indifference. For example, the Tenth Circuit noted that "a school can be liable for an "official policy . . . of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient."[399] As put by another

---

[395] Doe v. Bd. of Educ. of Prince George's Cnty., 982 F. Supp. 2d 641, 657 (D. Md. 2013), *aff'd*, 605 Fed. App'x 159 (4th Cir. 2015) ("Plaintiffs also argue that Defendants' failure to follow the procedures set forth in AP 4170 displays deliberate indifference. The salient flaw in this argument is that the Supreme Court has held that the failure to follow sexual harassment grievance procedures does not prove deliberate indifference under Title IX.") (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291–92 (1998)); Greene v. Friendship Pub. Charter Sch., Inc., No. CV 16-00901 (ESH), 2019 WL 918307, at *10 (D.D.C. Feb. 25, 2019), *appeal dismissed*, No. 19-7023, 2019 WL 4566283 (D.C. Cir. Aug. 28, 2019) ("[A] school's failure to comply with its own internal policies does not itself establish deliberate indifference, just as a school's failure to comply with federal regulations does not do so.").

[396] *Roussaw*, 2020 WL 2615621, at *5.

[397] 630 F. Supp. 2d at 236.

[398] McGinley, *supra* note 333, at 225.

[399] Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178 (10th Cir. 2007); *see also* G.C. *ex rel.* Counts v. N. Clackamas Sch. Dist., 654 F. Supp. 2d 1226, 1238–39 (D. Or. 2009) (The "failure to ensure that [administrators or] teachers, received training in handling reports of sex abuse, could be viewed by a reasonable juror as evidence

court, a school's "failure to ensure that its principal, and its teachers, received training in handling reports of sex abuse, could be viewed by a reasonable juror as evidence that the District does not take such allegations with the seriousness such allegations deserve."[400]

Importantly, in denying dismissal and summary judgment in these circumstances, courts are not holding that deliberate indifference is "the only inference to be drawn," but rather that deliberate indifference is "one of many" when the court is "required to draw all reasonable inferences in plaintiff's favor."[401]

V. THE CIRCUIT SPLIT THREATENS TO MAKE EVERYTHING WORSE AND MUST BE RESOLVED

The deliberate indifference standard is criticized as creating an immunity-like shield from liability for schools as long as they do more than nothing in response to peer sexual harassment.[402] Therefore, it is extremely troubling that the deliberate indifference standard will potentially become even more difficult to satisfy for student-plaintiffs in cases of peer sexual harassment across the country. Since 2019, there has been a deepening circuit split[403] over whether a student plaintiff must show that a school's failure to adequately investigate a sexual assault claim "caused him to experience any separate harassment following his assault."[404] The split comes from *Davis* language regarding deliberate indifference, which provides:

---

that the District does not take such allegations with the seriousness such allegations deserve.").

[400] *G.C. ex rel. Counts*, 654 F. Supp. 2d at 1238–39.

[401] *Id.*

[402] *See, e.g.*, David Ellis Ferster, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education* Act, 43 GA. L. REV. 191, 203 (2008) ("The deliberate indifference standard is criticized as establishing a barrier to relief from all but unconscionable action or inaction by school officials."); David S. Cohen, *Limiting* Gebser*: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 315 (2004) ("*Gebser* and *Davis* have been widely and justifiably criticized: The holdings of the two cases unnecessarily thwart Title IX's purpose by establishing a difficult hurdle for students who seek to hold an institution liable for sexual harassment that adults in similar employment situations do not have to overcome. Their holdings also fail to create an incentive for schools to proactively change and police their agents.").

[403] *Compare* Farmer v. Kan. State Univ., 918 F.3d 1094, 1102–03 (10th Cir. 2019), *with* K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1058 (8th Cir. 2017), *and* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 619–20 (6th Cir. 2019).

[404] Rossley v. Drake Univ., 342 F. Supp. 3d 904, 930 (S.D. Iowa 2018).

> If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subject[s]" its students to harassment. That is, the deliberate indifference must, at a minimum, "cause [students] to undergo" harassment or "make them liable or vulnerable" to it. Random House Dictionary of the English Language 1415 (1966) (defining "subject" as "to cause to undergo the action of something specified; expose" or "to make liable or vulnerable; lay open; expose"); Webster's Third New International Dictionary 2275 (1961) (defining "subject" as "to cause to undergo or submit to: make submit to a particular action or effect: EXPOSE").[405]

The question raised by the above *Davis* language is whether a school's purported "deliberate indifference" to known actionable sexual harassment has to "cause" a plaintiff to suffer further sexual harassment in order for liability to be imposed, or whether it is sufficient that a school's "deliberate indifference" to the actionable sexual harassment made a plaintiff "vulnerable to" harassment.[406] That is, does a plaintiff have to "allege, as an element of her Title IX claim, that [a school's] deliberate indifference caused her to be subjected to actual further harassment by a student"?[407]

A. The Tenth Circuit: Deliberate Indifference Does Not Require Further Incidents of Actionable Harassment

In *Farmer v. Kansas State University*, the Tenth Circuit held that "[p]laintiffs can state a viable Title IX claim for student-on-student harassment by alleging that the funding recipient's deliberate indifference caused them to be 'vulnerable to' further harassment *without* requiring an allegation of subsequent actual sexual harassment."[408] The *Farmer* case arose from two female plaintiffs who were raped at a fraternity party. Although the plaintiffs reported the rape to the university and the university's interfraternity council, the school failed to investigate and found no adverse finding against the fraternity.[409] As a result, one plaintiff "missed classes, struggled in school, secluded herself from friends, withdrew from KSU activities in which she had previously taken a leadership role, fell into a deep depression, slept

---

[405] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999).

[406] *Farmer*, 918 F.3d at 1097.

[407] *Id.* at 1102.

[408] *Id.* at 1104 (emphasis added).

[409] *Id.* at 1099–100.

excessively, and engaged in self-destructive behaviors such as excessive drinking and slitting her wrist."[410] The other plaintiff's "grades plummeted," "she lost her academic scholarship," and she "exhibited symptoms of post-traumatic stress disorder."[411] The university filed a motion to dismiss, which was denied by the district court. [412] On appeal, the university argued that, even accepting that it acted with deliberate indifference, plaintiffs failed to state a claim because they did not "allege that the university's deliberate indifference caused each of them to undergo *further incidents* of actual harassment by other students."[413]

The Tenth Circuit rejected the university's argument and held that "[t]he Supreme Court has already answered the legal question presented here, ruling, as Plaintiffs allege, that a funding recipient's 'deliberate indifference must, at a minimum, cause students to undergo harassment *or make them liable or vulnerable to it*.' "[414] The court explained: "It is sufficient for [the plaintiff] to allege that [the school's] deliberate indifference made [the plaintiff] 'vulnerable to' sexual harassment" and that "Title IX does not require a subsequent sexual assault before a plaintiff can sue."[415] Based on the facts of the case, the court held that the "Plaintiffs ha[d] sufficiently alleged that KSU's deliberate indifference made each of them 'vulnerable to' sexual harassment by allowing their student-assailants—unchecked and without the school investigating—to continue attending KSU along with Plaintiffs."[416]

The First and Eleventh Circuits have also held that a requirement of subsequent actionable harassment is inconsistent with *Davis* and Title IX.[417] While the Ninth Circuit recently declined to address the split,[418] district courts in the Ninth Circuit

---

[410] *Id.*

[411] *Id.* at 1101 (cleaned up).

[412] *Id.* at 1101.

[413] *Id.* at 1097 (emphasis added).

[414] *Id.* (emphasis added) (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999)).

[415] *Id.* at 1103.

[416] *Id.* at 1097.

[417] Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172–73 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009) (holding that per *Davis*, "funding recipients may run afoul of Title IX not merely by 'caus[ing]' students to undergo harassment but also by 'mak[ing] them liable or vulnerable' to it.") (quoting *Davis*, 526 U.S. 629, 645 (1999)); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1296–98 (11th Cir. 2007) (holding that further actionable harassment was not required).

[418] Karasek v. Regents of Univ. of Cal., 956 F.3d 1093, 1106 n.2 (9th Cir. 2020).

have followed the *Farmer* opinion.[419] Similarly, other district courts across the country have held that, "Title IX does not require that a defendants' deliberate indifference lead to subsequent actionable harassment."[420]

B. The Eighth and Sixth Circuits: Deliberate Indifference Must Have Caused Further Actionable Harassment

In contrast with the *Farmer* court, the Eighth and Sixth Circuits have recently interrupted *Davis* to require that a school's purported deliberate indifference, following the actionable sexual harassment, cause the student to suffer from additional, subsequent actionable harassment.[421] In *K.T. v. Culver-Stockton College*, the plaintiff, who was a junior in high school, visited the defendant college and was allegedly sexually assaulted at a fraternity party.[422] The plaintiff sued the college under Title IX and alleged the college acted with deliberate indifference by failing to investigate the incident or provide her with medical services or treatment and that, as a result, she suffered "post-trauma syndrome and psychiatric overlay."[423] The Eighth Circuit, in affirming the grant of the college's motion to dismiss, held that the

---

[419] *See, e.g.*, Richardson-Bass v. State Ctr. Cmty. Coll. Dist., No. 1-19-CV-01566-AWI-SAB, 2020 WL 5658225, at *14 (E.D. Cal. Sept. 23, 2020) (adopting *Farmer* holding); Barnett v. Kapla, No. 20-CV-03748-JCS, 2020 WL 6737381, at *9 (N.D. Cal. Sept. 28, 2020) (same).

[420] Wells v. Hense, 235 F. Supp. 3d 1, 8 (D.D.C. 2017); *see also* Doe v. Baylor Univ., 240 F. Supp. 3d 646, 660 (W.D. Tex. 2017) ("[T]he discriminatory harm can include the harm faced by student-victims who are rendered vulnerable to future harassment and either leave school or remain at school and endure an educational environment that constantly exposes them to a potential encounter with their harasser or assailant.") (citations omitted); Spencer v. Univ. of N.M. Bd. of Regents, No. 15-CV-141 MCA/SCY, 2016 WL 10592223, at *6 (D.N.M. Jan. 11, 2016) ("In the context of Title IX, 'there is no "one free rape" rule'; and a victim does not have to be raped twice before the school is required to respond appropriately.") (quoting S.S. v. Alexander, 177 P.3d 724, 741 (Wash. Ct. App. 2008); Karasek v. Regents of the Univ. of Cal., No. 2:15-cv-04418-CAS(SHx), 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015) ("[I]t is possible for a plaintiff to bring a Title IX claim against an educational institution even in the absence of any further affirmative acts of harassment by the alleged harasser or other students or faculty."); Takla v. Regents of the Univ. of Cal., 2015 WL 6755190, at *5 (C.D. Cal. Nov. 2, 2015) (citations omitted) ("The Court agrees with plaintiffs that placing undue emphasis on whether further harassment actually occurred to gauge the responsiveness of an educational institution would penalize a sexual harassment victim who takes steps to avoid the offending environment in which she may again encounter the harasser.").

[421] K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1058 (8th Cir. 2017); Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 619–20 (6th Cir. 2019).

[422] 865 F.3d at 1056.

[423] *Id.* at 1058.

college's deliberate indifference after the reporting of the sexual assault could not "be characterized as deliberate indifference that caused the assault."[424]

Similarly, in the 2019 case *Kollaritsch v. Michigan State University Board of Trustees*, the Sixth Circuit granted the university's motion to dismiss in a lawsuit stemming from student-on-student sexual assault, by holding that the plaintiff failed to allege some "further actionable harassment [that] would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response."[425] The Sixth Circuit went to the extreme of actually "parsing" out the elements of a Title IX claim into "two separate components, comprising separate-but-related torts by separate-and-*un*related tortfeasors: (1) 'actionable harassment' by a student, and (2) a deliberate-indifference intentional tort by the school."[426] After the student-plaintiff proves there was actionable severe, pervasive, and objectively offensive harassment, the student must next prove "four elements of a deliberate-indifference-based intentional tort: (1) knowledge, (2) an act, (3) injury, and (4) causation."[427]

Under this four-part "tort," element one (knowledge) means that a student must show that the school had actual knowledge of the actionable harassment; element two (act) means a response by the school that was "clearly unreasonable" thereby showing deliberate indifference; and element three (injury) "means the deprivation of 'access to the educational opportunities or benefits provided by the school.' "[428] These first three "elements" are familiar, however, the Sixth Circuit's addition of a new causation requirement (element four) now demands that "the 'Act' caused the 'Injury,' such that the injury is attributable to the post-actual-knowledge further harassment, which would not have happened but for the clear unreasonableness of the school's response."[429] Thus, the Sixth Circuit requires not only that the plaintiff prove the school's response was "clearly unreasonable" (deliberate indifference), but also that it led "to further harassment," with "the critical point [being] that the response must bring about or fail to

---

[424] *Id.* (emphasis omitted) (citations omitted).

[425] 944 F.3d at 623–24.

[426] *Id.* 619–20 (quoting Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 643, 651–52 (1999)).

[427] *Id.* at 621.

[428] *Id.* at 621–22 (first quoting *Davis*, 526 U.S. at 642, 650; then quoting *McCoy v. Bd. of Educ.*, 515 F. App'x 387, 392 (6th Cir. 2013)).

[429] *Id.* at 622 (emphasis omitted) (quoting *Davis*, 526 U.S. at 644).

protect against the further harassment."[430] As summarized by the court:

> We hold that the plaintiff must plead, and ultimately prove, an incident of actionable sexual harassment, the school's actual knowledge of it, some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment.[431]

The Supreme Court denied the petition for writ of certiorari arising from the Sixth Circuit case.[432]

C. Adding a Requirement That Deliberate Indifference Cause Further Actionable Harassment Would Slam the Title IX Door Shut on Victims of Peer Harassment

As set forth *supra*, recovering under Title IX for peer-to-peer sexual harassment is already exceedingly difficult for victims. If the Eighth and Sixth Circuit interpretations of the deliberate indifference standard were adopted, recovery would become borderline impossible. The Sixth Circuit's "troubling" addition of a "but for" causation requirement "runs counter to the goals of Title IX and is not convincing."[433]

First, the *Davis* court's use of the word "or" "clearly states alternate ways a plaintiff may satisfy the [deliberate indifference] element:"[434] "the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment *or* '*make them liable or vulnerable*' *to it.*"[435] As noted by the Tenth Circuit, requiring subsequent actionable sexual harassment would fail to "give effect to each part of [the *Davis*] sentence" by rendering the "or 'ma[d]e

---

[430] *Id.*

[431] *Id.* at 623–24.

[432] Kollaritsch v. Mich. State Univ. Bd. of Trs., 141 S.Ct. 554 (2020).

[433] *Sixth Circuit Requires Further Harassment in Deliberate Indifference Claims* Kollaritsch v. Michigan State University Board of Trustees, 944 F.3d 613 (6th Cir. 2019), 133 HARV. L. REV. 2611, 2617 (2020) [hereinafter *Sixth Circuit Requires Further Harassment*] (noting that the "but-for causation standard adopted in *Kollaritsch* risks undermining the deterrence objectives of Title IX by setting a significantly higher bar for student-victims") (emphasis omitted); Barnett v. Kapla, No. 20-CV-03748-JCS, 2020 WL 6737381, at *9–10 (N.D. Cal. Sept. 28, 2020) (citation omitted).

[434] *Barnett*, 2020 WL 6737381, at *9–10.

[435] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999) (emphasis added).

them liable or vulnerable' to it" language superfluous.[436] Additionally, the *Davis* court specifically referred to the definition of "subject" as including "expose" such that it is sufficient that a defendant's deliberate indifference "exposes" a plaintiff to harassment—that is, makes a plaintiff "vulnerable to sexual harassment"—as opposed to requiring a plaintiff to prove further actionable harassment.[437]

Second, adding a further actionable harassment requirement "conflat[es] the two analytically separate elements of causation and injury."[438] Under normal tort principles, a plaintiff must prove that the defendant's wrongful act (that is, a school's deliberate indifference to known severe and pervasive sexual harassment) caused the plaintiff's injury (that is, deprivation of access to educational opportunities or benefits).[439] However, under the Tenth and Sixth Circuit approaches, a plaintiff must prove that defendant's wrongful act (that is, a school's deliberate indifference to known severe and pervasive sexual harassment) caused the plaintiff to suffer *not* from her injury (that is, deprivation of access to educational opportunities or benefits) but instead caused further actionable harassment by a third-party.[440] This approach lacks support not only in *Davis*, but basic principles of tort law that link together the defendant's wrongful act and the plaintiff's injury.[441]

Third, *Davis* was very clear that a school would be liable "only for its own misconduct."[442] However, the addition of a further actionable harassment requirement necessarily means that a school that was deliberately indifferent to known "severe, pervasive, and objectively offensive" sexual harassment may nevertheless escape liability because its liability hinges on a subsequent act of the harasser—that is, another party who is not the school. This "runs counter to the goals of Title IX and is not convincing" because "a student must be harassed or assaulted a second time before the school's clearly unreasonable response to the initial incident becomes actionable, irrespective of the

---

[436] Farmer v. Kan. State Univ., 918 F.3d 1094, 1103–04 (10th Cir. 2019) (emphasis omitted) (citations omitted).

[437] *Id.* at 1104 (quoting *Davis*, 526 U.S. at 645) (cleaned up).

[438] *Sixth Circuit Requires Further Harassment*, *supra* note 433, at 2617.

[439] Dan B. Dobbs et al., *Defining Torts*, THE LAW OF TORTS § 1 (2d ed. 2011).

[440] K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1058 (8th Cir. 2017); Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 619–20 (6th Cir. 2019).

[441] *See* Dobbs, *supra* note 439, § 1.

[442] *Davis*, 526 U.S. at 640.

deficiency of the school's response, the impact on the student, and the other circumstances of the case . . . ."[443] For example, if—after suffering the severe and pervasive sexual harassment that the school knew about and acted deliberately indifferent in response to—a plaintiff left school because of the incidents or, worse, died by suicide there would never be an opportunity for further actionable harassment by a third-party. Yet, under the Eighth and Sixth Circuit approaches, the school would escape liability despite the fact that the lack of further actionable harassment had nothing to do with the school's "good" conduct but, instead, was due to the extreme harm caused by the school's deliberate indifference. For example, in *Williams v. Board of Regents of University System of Georgia*, the plaintiff was sexually assaulted by other students, reported the sexual assault to the university, and "the response to her complaints did nothing to assuage her concerns of a future attack should she return to [campus]."[444] The plaintiff dropped out of the university because of fear of being attacked again.[445] The court held that the plaintiff had a Title IX claim because the fact that no further sexual assault occurred had nothing to do with the university's response and, instead, the plaintiff's decision to withdraw was *because* of the university's deliberate indifference, which "effectively bar[red] [her] access to an educational opportunity."[446]

Also, it is often the case that—after suffering the severe and pervasive sexual harassment the school knew about and acted deliberately indifferent in response to—that a plaintiff will take affirmative steps to avoid further harassment by, for example, taking a different route in the hallways to avoid her harasser. "[P]lacing undue emphasis on whether further harassment actually occurred to gauge the responsiveness of an educational institution would penalize a sexual harassment victim who takes steps to avoid the offending environment in which she may again encounter the harasser." [447]

---

[443] Farmer v. Kan. State Univ., 918 F.3d 1094, 1104 (10th Cir. 2019) (quoting Karasek v. Regents of Univ. of Cal., No. 15-cv-03717-WHO, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015)).

[444] 477 F.3d 1282, 1296–98 (11th Cir. 2007).

[445] *Id.* at 1298.

[446] *Id.* at 1296–1298.

[447] *Karasek*, 2015 WL 8527338, at *12; *see also Sixth Circuit Requires Further Harassment*, *supra* note 433, at 2617 (noting that "the but-for causation standard adopted in *Kollaritsch* risks undermining the deterrence objectives of Title IX by setting a significantly higher bar for student-victims").

Finally, the Eighth and Sixth Circuit approaches run afoul not only to common sense, but the very heart of Title IX, which includes "protecting individual students against discriminatory practices."[448] "The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender."[449] Therefore, the proper reading of *Davis* and the deliberate indifference requirement is that Title IX liability "derives from the school's deliberate indifference to known student-on-student sexual harassment, which leaves victims vulnerable to additional harassment," or, put another way, Title IX liability should be imposed when "a school's inadequate response creates a hostile environment that deprives victims of the school's educational opportunities and benefits."[450] As put by one court, "[i]n the context of Title IX, 'there is no "one free rape" rule'; and a victim does not have to be raped twice before the school is required to respond appropriately."[451] However, by adding a requirement of further actionable harassment, the Eighth and Sixth Circuits incorrectly adopt a "one free rape" rule in the context of peer harassment. Namely, following *K.T.* and *Kollaritsch*, if a student was raped by another student and the school knew about it and responded with deliberate indifference, the student could not recover unless she subsequently suffered further actionable harassment.[452] Yet, *Davis* was clear that "a single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution's response, after learning of it, unreasonable enough to have the combined systemic effect of denying access to a scholastic program

---

[448] *Farmer*, 918 F.3d at 1104 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

[449] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999).

[450] Doe 1 v. Howard Univ., 396 F. Supp. 3d 126, 135 (D.D.C. 2019), *motion to certify appeal granted, reconsideration denied*, No. 17-CV-870 (TSC), 2019 WL 4860717 (D.D.C. Oct. 1, 2019) *and appeal dismissed*, No. 19-7163, 2020 WL 2611030 (D.C. Cir. Apr. 20, 2020) (citing *Davis*, 526 U.S. at 650).

[451] Spencer v. Univ. of N.M. Bd. of Regents, No. 15-CV-141, 2016 WL 10592223, at *6 (D.N.M. Jan. 11, 2016) (quoting S.S. v. Alexander, 177 P.3d 724, 741 (Wash. Ct. App. 2008)); *see also* Kelly v. Yale Univ., No. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003) (explaining that "a reasonable jury could conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university").

[452] K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1058 (8th Cir. 2017); Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 619–20 (6th Cir. 2019).

or activity."[453] Thus, not only is a "one free rape" rule contrary to Title IX policy, but it is also explicitly negated by *Davis* itself.

CONCLUSION

In a recent Title VII hostile work environment case, the plaintiff invoked the #MeToo movement in an attempt to support his claim.[454] The court was quick to dismiss the plaintiff's "frivolous argument," holding that "no Court in the country, let alone in this Circuit, has suggested that the #MeToo Movement alters the scope of Title VII."[455] While that may technically be true—that the #MeToo movement does not alter the scope of Title VII or Title IX—it is also true that the #MeToo movement has had radiating effects on not only public opinion, but the legal landscape itself. For example, states have passed laws banning the use of non-disclosure agreements in sexual misconduct cases,[456] and have expanded sexual harassment to cover independent contractors.[457] When it comes to children and sexual harassment in schools, in the #MeToo world, there is no justification for lower courts interpreting *Davis*' already high standard to be even more difficult to satisfy and simultaneously misapplying what should be a favorable standard at the motion to dismiss and summary judgment stage to dispose of victims' cases before they even reach a jury. Because of the lower courts' overly strict interpretation of *Davis*, students are being forced to "accept [sexual harassment] as part of everyday life" in schools,[458] and if the Supreme Court were to resolve the circuit split by requiring further actionable harassment, more than ever children would have to "run a gauntlet of sexual abuse in return for the privilege of being allowed

---

[453] Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172–73 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009) (citing *Davis*, 526 U.S. at 652–53) ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such [a systemic] effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.").

[454] Hardwick v. Ind. Bell Tel. Co., Inc., No. 1:15-cv-01161-JMS-DML, 2018 WL 4620252, at *15 (S.D. Ind. Sept. 26, 2018).

[455] *Id.*

[456] *See, e.g.*, Cal. Civ. Proc. Code § 1001.

[457] S.B. 6577, 2019-2020 Legis. Sess. (N.Y. 2019).

[458] *See* LIPSON, *supra* note 37, at 13.

to" have an education.[459] The time for change is well-past due, but now is better than never; otherwise, we will risk having a whole new generation saying #MeToo.

[459] *See* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir.1982) ("[A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.").