# DELIBERATE INDIFFERENCE: ANALYSIS OF THE CIRCUIT SPLIT REGARDING AN EDUCATIONAL INSTITUTION'S TITLE IX LIABILITY

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In 1999, the United States Supreme Court issued its seminal decision in the case of *Davis as Next Friend of LaShonda D. v. Monroe Cty. Bd. Of Educ.*[1] In *Davis*, the Court faced the question of whether a federally-funded educational institution may be liable in a private cause of action for damages if the funding recipient (i.e., the school) is deliberately indifferent to known acts of sexual harassment between its students. Following the Court's lengthy analysis—which has since been subject to significant debate in Title IX[2] practice and academia, as discussed below—the Court held that "in certain limited circumstances," it may.[3]

Twenty-three years after the Court's decision in *Davis*, the precise circumstantial limitations referred to by the Court remain a topic of heated debate.[4] This Article first addresses the Court's holdings and rationales in *Davis* and *Gebser v. Lago Vista Indep. Sch. Dist.*,[5] the predicate case establishing the contours of funding recipient liability under Title IX by announcing the "deliberate indifference" standard. This Article next examines the current split amongst the U.S. Circuit Courts with regard to the "deliberate indifference" standard, specifically focusing on whether further, post-actual-notice harassment must occur to support an action for private damages in student-on-student harassment cases. Finally, this Article addresses the availability of damages in Title IX litigation.

## I. *GEBSER* AND *DAVIS:* WHEN IS A FUNDING RECIPIENT "DELIBERATELY INDIFFERENT"?

### A. *Gebser:* The Deliberate Indifference Standard

In *Gebser v. Lago Vista Indep. Sch. Dist.*,[6] the United States Supreme Court addressed the novel question of whether a school district

1. 526 U.S. 629 (1999).
2. Title IX of the Education Amendments Act of 1972, as amended, 20 U.S.C. §§ 1681-1689.
3. Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999).
4. James A. Johnson & Julie A. Gafkay, *Title IX's 'Deliberate Indifference' Hurdle*, N.Y. State Bar Ass'n (Mar. 28, 2022), https://nysba.org/title-ixs-deliberate-indifference-hurdle/ ("Following *Davis*, the Circuits have been divided on what is necessary to find a school subjected a student to discrimination under the deliberate indifference standard.").
5. 524 U.S. 274 (1998).
6. 524 U.S. 274 (1998).

may be held liable to a private plaintiff for damages under Title IX "for the sexual harassment of a student by one of the district's teachers."[7]

As an initial matter, nine years prior to deciding *Gebser,* the Court recognized that the statutory language of Title IX implied a right of private action to persons who experienced discrimination on the basis of sex by a federally funded educational institution.[8] Three years later (and six years prior to *Gebser*), the Court held that an individual could recover monetary damages for a school's intentional violations of Title IX.[9] Thus, the central focus of the Court in *Gebser* honed in on *what circumstances* must be present to hold a funding recipient liable in damages for an intentional violation of Title IX.[10]

In *Gebser*, petitioner Alida Star Gebser, a high school student in the Lago Vista Independent School District ("Lago Vista"), filed suit with her mother against Lago Vista under Title IX, seeking compensatory and punitive damages.[11] Lago Vista teacher Frank Waldrop had engaged in a sexual relationship with Gebser, his student, for nearly two years.[12] During that time, Gebser never reported the relationship to any school administrators.[13] In the fall of Gebser's sophomore year, the parents of two other Lago Vista high school students complained to the principal about Waldrop making sexually suggestive comments in his class with Gebser.[14]

In response, the principal set a meeting with Waldrop and the complaining parents, at which Waldrop claimed ignorance of any inappropriate statements but also apologized and stated it would not happen again.[15] The principal warned Waldrop to be careful regarding his classroom comments, and he informed the school guidance

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

8. Cannon v. Univ. of Chicago, 441 U.S. 677, 709 (1979) ("Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.").

9. Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 74–75 (1992) ("The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. . . . This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.").

10. *Gebser*, 524 U.S. at 281 ("*Franklin* thereby establishes that a school district can be held liable in damages in cases involving a teacher's sexual harassment of a student; the decision, however, does not purport to define the contours of that liability. We face that issue squarely in this case." (citing *Franklin*, 503 U.S. 60, 74-75)).

11. *See id.* at 277-79. Gebser also filed suit against the school district for a 42 U.S.C. § 1983 claim and a state law negligence claim, and against Waldrop individually for other claims under state law. *Id.*

12. *Id.* at 277-78.

13. *Id.* at 278. In explanation, Gebser testified "that while she realized Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher." *Id.*

14. *Id.*

15. *Id.*

counselor of the meeting.[16] However, the principal did not report the parents' complaint to Lago Vista's Title IX coordinator.[17] Months later, in the early spring of Gebser's sophomore year, law enforcement arrested Waldrop after discovering Gebser and Waldrop engaging in sexual intercourse off school property.[18] Lago Vista promptly terminated Waldrop's employment, and the Texas Education Agency revoked his teaching license.[19]

Lago Vista moved for summary judgment on Gebser's Title IX claim. The United States District Court for the Western District of Texas granted summary judgment for the school. Gebser appealed that decision to the United States Court of Appeals for the Fifth Circuit, requesting monetary damages under alternative theories of strict liability, vicarious liability, and constructive notice.[20] The Fifth Circuit rejected all of those theories and affirmed the district court's ruling, holding that "school districts are not liable in tort for teacher-student [sexual] harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so."[21]

On certiorari, the Supreme Court opened its analysis by clarifying that, while it had established in *Franklin v. Gwinett County Public Schools*[22] that the judicially implied private action under Title IX *could* bring liability for monetary damages, it had yet to "delimit the circumstances."[23] Absent express legislative guidance from Congress, the Court sought to limit plaintiffs' entitlement to the damages remedy under Title IX in accordance with the purpose and structure of the statute.[24]

The Court noted that, structurally, Title IX conditions an educational program's receipt of federal funds on the program's promise not to discriminate.[25] Thus, the Court voiced concern over recipient programs lacking sufficient notice that accepting federal funding would render them vulnerable to suit for monetary damages.[26] In particular, the Court did not believe Congress intended for a recipient program to be held liable in damages without actual notice that the program was

16. *Id.*
17. *Id.* Lago Vista's Title IX coordinator was the district superintendent. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 278-80.
21. *Id.* at 280 (alteration in original).
22. 503 U.S. 60 (1992).
23. *Gebser*, 524 U.S. at 281-84.
24. *See id.* at 284-85.
25. *Id.* at 286.
26. *Id.* at 287.

in violation of the statute or the opportunity to institute corrective measures.[27] Moreover, Title IX's only express statutory means of enforcement specifically requires agencies disbursing federal funds to "advise[ ] the appropriate person or persons of the failure to comply with the requirement and . . . determine[ ] that compliance cannot be secured by voluntary means," prior to initiating proceedings to withhold a program's funding.[28]

The Court posited that the legislative purpose of notice "to the appropriate person," coupled with the opportunity to bring the program into compliance prior to any enforcement proceedings, presumably operates "to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures."[29] Thus, the Court sided with the Fifth Circuit and rejected Gebser's theory that a funding recipient may be found liable in damages for failure to comply with Title IX under theories such as strict liability, vicarious liability, or even constructive notice.[30] Those theories of liability would place a higher burden on an institution facing a *judicially implied* private action than the burden Congress had deemed appropriate in its *express* administrative enforcement scheme. Accordingly, the Court concluded that the damages remedy for implied private actions should be limited by the same prerequisites as the express enforcement method.[31]

At a minimum, the Court held that a school cannot be liable in damages unless an "appropriate person" (defined as a school official with authority to initiate corrective action on behalf of the recipient to stop the discrimination[32]) receives actual notice of discrimination occurring under the funding recipient's control.[33] Further, the appropriate person must have had an opportunity to institute corrective action to halt further discrimination.[34] And finally, the appropriate person's "response must amount to *deliberate indifference* to discrimination."[35]

In defining the contours of a "deliberately indifferent" response to discrimination, the Court again looked to the language of Title IX's express administrative enforcement method. Therein, the statute requires the agency distributing federal funds to determine that the appropriate person with actual notice of discrimination refused to take

27. *Id.* at 287-88.
28. *Id.* at 288-89 (quoting 20 U.S.C. § 1682).
29. *Id.* at 289.
30. *Id.*
31. *Id.* at 290.
32. *Id.*
33. *See id.* (holding an appropriate person must have actual notice "of discrimination *in the recipient's programs*" (emphasis added)).
34. *Id.*
35. *Id.* (emphasis added).

corrective measures to voluntarily comply with Title IX.[36] Thus, according to the Court, a "deliberately indifferent" response from a funding recipient in a Title IX private action for damages "is an official decision by the recipient not to remedy the violation."[37] Foreseeing pushback to this heightened standard for liability, the Court cautioned that "[u]nder a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions."[38]

Applying its newly minted framework to the facts of Gebser's claim, the Court quickly affirmed the judgment of the Fifth Circuit. Because Gebser's school principal clearly had insufficient information to alert him to the possibility that Waldrop had a sexual relationship with Gebser prior to Waldrop's arrest, Lago Vista did not have "actual notice" of the discrimination until that arrest.[39] After receiving actual notice, Lago Vista immediately terminated Waldrop's employment, constituting a corrective measure that halted further discrimination against Gebser.[40] Thus, Lago Vista could not be held liable in damages because the district itself did not respond with deliberate indifference to actual notice of violations of Gebser's rights under Title IX.[41]

### B. *Davis:* Applying the Deliberate Indifference Standard to Student-on-Student Sexual Harassment

One year after the Supreme Court's holding in *Gebser*, the Court again examined the parameters of private causes of action under Title IX in *Davis as Next Friend of LaShonda D. v. Monroe Cty. Bd. Of Educ.*[42] However, in contrast with *Franklin* and *Gebser*, the petitioner in *Davis* filed suit based on an elementary school's response to student-on-student sexual harassment.[43]

In *Davis*, the petitioner's daughter, LaShonda, claimed her fifth-grade classmate, G.F., subjected her to verbal and physical sexual harassment on numerous occasions over the span of five months, from

36. *See supra* note 27 and accompanying text.

37. *Gebser*, 524 U.S. at 290.

38. *Id.* at 290-91.

39. *Id.* at 291 ("The only official alleged to have had information about Waldrop's misconduct is the high school principal. That information, however, consisted of a complaint from parents of other students charging only that Waldrop had made inappropriate comments during class, which was plainly insufficient . . . .").

40. *See id.*

41. *Id.* at 291-93.

42. 526 U.S. 629 (1999).

43. Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 637 (1999).

December of 1992 to May of 1993.[44] Within the first two months, LaShonda and her mother both reported each instance of harassment that occurred to LaShonda's teacher, who then notified the school principal.[45] Nonetheless, G.F. continued to harass LaShonda for another three months.[46] Despite LaShonda repeatedly reporting the harassment, the school took no corrective action in response.[47] The harassment only ended after G.F. pled guilty to a charge of sexual battery for his behavior in May of 1993.[48]

In the United States District Court for the Middle District of Georgia, the petitioner asserted a claim for monetary damages against the Monroe County Board of Education ("the Board") under Title IX.[49] The complaint asserted, "[t]he deliberate indifference by [the Board] to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX."[50] Granting the Board's 12(b)(6) motion, the district court held that Title IX did not provide a cause of action in claims where the Board or a Board employee did not play a role in the sexual harassment.[51] The petitioner appealed to the United States Court of Appeals for the Eleventh Circuit, and ultimately, the en banc court affirmed.[52] The Eleventh Circuit reasoned that Title IX failed to provide funding recipients with adequate notice that they could be liable for failing to prevent student-on-student sexual harassment.[53]

Confronted again on certiorari with a familiar insufficient notice objection to a Title IX claim for private damages, the Supreme Court sought to resolve a circuit split on the issue.[54] The Court began its analysis with the concession that, under Title IX, a funding recipient may only be liable in damages for its own conduct, and not for that of third parties.[55] However, the Court quickly clarified that it interpreted the petitioner's complaint as seeking "to hold the Board liable

44. *Davis*, 526 U.S. at 633-34.
45. *See id.* ("LaShonda reported each of these incidents to her mother and to her classroom teacher, Diane Fort. . . . Petitioner, in turn, also contacted Fort, who allegedly assured petitioner that the school principal, Bill Querry, had been informed of the incidents.").
46. *Id.* at 635.
47. *Id.* at 633-35. From LaShonda's first report to Fort, to the time G.F.'s harassment of LaShonda finally ended, LaShonda had personally reported G.F.'s behavior to three of her classroom teachers in addition to petitioner, and petitioner had contacted the principal and two of the three teachers to follow up on LaShonda's reports. *Id.*
48. *Id.* at 634.
49. *Id.* at 636-37.
50. *Id.* at 636.
51. *Id.*
52. *Id.* at 636-37.
53. *Id.* at 637.
54. *See id.* at 637-38.
55. *See id.* at 640-41.

for its *own* decision to remain idle in the face of known student-on-student harassment in its schools."[56]

In response to the Board's insufficient notice objection, the Court referred back to its opinion in *Gebser*. There, the Court determined that the notice limitation on implied private actions for damages against funding recipients under Title IX does not apply to claims of a funding recipient "engag[ing] in intentional conduct that violates the clear terms of the statute."[57] This is why, in *Gebser*, the Court concluded that funding recipients could only be liable in damages "where their own deliberate indifference effectively 'cause[d]' the discrimination."[58] Thus, the Court determined that the same exception and rule, "in certain limited circumstances," may be applied to support claim for private damages under Title IX in cases of student-on-student sexual harassment.[59]

After determining the theoretical existence of a student-on-student private action for damages, the Court clarified a significant number of limitations on its scope. The limitations identified came from three sources: the deliberate indifference standard, the language of Title IX, and the practicalities of applying this standard to colleges as opposed to primary education institutions. First, the Court noted that the deliberate indifference standard could only reasonably be applied to a situation where the funding recipient has control over the harassment—meaning the recipient must have the authority to take corrective action.[60]

Second, the Court determined that the language of Title IX limited the scope of actionable misconduct under the statute. The statutory language limits a funding recipient's liability for student-on-student harassment, first, because it bars a recipient from "subject[ing]" any student to harassment.[61] Using dictionary definitions of "subject," the Court thus reasoned that a recipient's deliberate indifference in response to known harassment must at least, "cause [its students] to undergo," or "make [its students] liable or vulnerable" to the known harassment.[62] Thus, a funding recipient must have "substantial control over" the perpetrator of the harassment.[63]

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56. *Id.* at 641 (emphasis in original).

57. *Id.* at 641-42 (citing *Gebser*, 524 U.S. at 291; *Franklin*, 503 U.S. at 74-75; Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

58. *Id.* at 642-43 (quoting *Gebser*, 524 U.S. at 291).

59. *Id.* at 643.

60. *Id.* at 644.

61. *Id.*

62. *Id.* at 645 (quoting Random House Dictionary of the English Language 1415 (1966); Webster's Third New International Dictionary 2275 (1961)).

63. *Id.*

Statutory language also limits a recipient's liability by stating that "the harassment must occur 'under' 'the operations of' a funding recipient."[64] Thus, the Court determined that a funding recipient must also have substantial control over "the context in which the known harassment occurs."[65]

The final statutory limitations were based on Title IX's language protecting students "from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving federal funding assistance.'"[66] According to the Court, this language implies two limitations, both relating to the magnitude of the sexual harassment that must be alleged to state a claim for damages. First, the Court stated that the statute clearly prohibits gender discrimination in the denial of access to educational opportunities.[67] Thus, the sexual harassment alleged must be to a level "that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to" the educational resources, opportunities, or benefits provided by the recipient.[68] Second, the Court found that the "program or activity" language suggests that the sexual harassment must be pervasive enough to have "a systemic effect on educational programs or activities."[69] Thus, the Court determined that Congress likely did not intend "claims of official indifference to a single instance of one-on-one peer harassment" to be sufficient to have a systemic effect and result in a viable claim for damages.[70]

Finally, the Court noted the practical limitations on applying this standard to colleges and universities, as opposed to elementary and high schools. The Court acknowledged that placing legal constraints on funding recipients' disciplinary authority is substantially burdensome for the recipients.[71] However, by limiting the circumstances in which a funding recipient may be liable in damages to situations in which the recipient has actual knowledge and *substantial* authority and control over the harasser and the environment in which the sex-

64. *Id.* (quoting 20 U.S.C. §§ 1681(a), 1687).

65. *Id.*

66. *Id.* at 650 (quoting § 1681(a)).

67. *Id.*

68. *Id.* at 651.

69. *Id.* at 652-53.

70. *See id.* ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an 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.").

71. *Id.* at 649.

ual harassment occurs, the Court intended to relax that burden.[72] Consequently, universities with adult students may fairly be expected to exercise less control and authority over its students than high schools.[73] Thus, if a university is considering a particular disciplinary action that would expose it to liability for statutory or constitutional claims from an alleged harasser, "it would be entirely reasonable for a school to refrain from" taking such action.[74]

Considering the intricacy of the rule and limitations announced, the Court clarified as to what its holding did *not* mean. In response to a report of student-on-student sexual harassment, funding recipients are not required to engage in any one specific disciplinary action, and victims do not have a right to make particular demands as to how the recipient should respond.[75] In fact, the Court warned that in most cases, lower courts should not second-guess a recipient's corrective or disciplinary decisions with regard to its students.[76] Further, funding recipients are not duty-bound to "purg[e] their schools of actionable peer harassment," "to 'remedy' peer harassment," or to ensure that their "students conform their conduct to certain rules."[77] Rather, the Court declared that a recipient is merely required to "respond to known peer harassment in a manner that is not *clearly* unreasonable"—which is to say, essentially, there must be no rational doubt that the recipient knew its response was objectively unreasonable.[78]

Although the Court did not compile its rule into a single statement at any point in its opinion, if it would have, the entirety of the Court's ultimate rule on the issue in *Davis* would likely read as follows: Under Title IX, a recipient of federal funding may not be held liable in damages for intentionally subjecting its students to gender discrimination in the form of student-on-student sexual harassment, unless: (1) the recipient had actual knowledge of the student-on-student sexual harassment at issue;[79] (2) the recipient exercised substan-

72. *See id.* at 641, 645, 649 ("We believe, however, that the standard set out here is sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action.").

73. *Id.* at 649.

74. *Id.*

75. *Id.* at 648. In particular, the Court disagreed with the Board's "contention that, if Title IX provides a cause of action for student-on-student harassment, 'nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages.'" *Id.*

76. *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 342-43 n.9 (1985)).

77. *Id.* at 648-49.

78. *See id.* at 648-49 (emphasis added) ("This is not a mere 'reasonableness' standard, . . . In 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.").

79. *Id.* at 642-43.

tial control over the known harasser;[80] (3) the recipient exercised substantial control over the context in which the known harassment occurred;[81] (4) the recipient had the authority to take corrective action;[82] (5) the recipient responded to the known harassment with deliberate indifference;[83] (6) the recipient's deliberate indifference in response to the known harassment caused the victim to undergo, or caused the victim to be liable to, harassment from the known harasser;[84] and (7) the known harassment that the recipient caused the victim to undergo, or caused the victim to be vulnerable to, was so severe, pervasive, and objectively offensive,[85] that (8) it produced the systemic effect of denying the victim equal access to the educational resources, opportunities, or benefits provided by the recipient.[86]

In applying this standard to the allegations at issue, the Court reversed the Eleventh Circuit's dismissal of petitioner's complaint and remanded the case.[87] The Court found that the Board had authority and exercised substantial control over both G.F. and "the context in which the sexual harassment occur[ed]," as the sexual harassment took place during school hours and in the classroom.[88] Because G.F. sexually harassed LaShonda, both verbally and physically for five months, the harassment was also sufficiently "severe, pervasive, and objectively offensive."[89] Further, LaShonda satisfied the requirement that the denial of her equal access to education be linked to the harassment, as she alleged that the harassment had a tangible, negative effect on LaShonda's access to education.[90] Lastly, the Court found that the LaShonda "may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort

80. *Id.* at 645.

81. *Id.*

82. *Id.* at 644.

83. *Id.* at 643.

84. *Id.* at 645.

85. *Id.* at 651.

86. *Id.* at 651-53.

87. *Id.* at 653-54.

88. *Id.* at 646 ("We have observed, for example, 'that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'" (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 655 (1995))).

89. *Id.* at 653.

90. *Id.* at 654. However, the Court clarified that its determination does not stand for the proposition that "a mere 'decline in grades is enough to survive' a motion to dismiss"; rather, "[t]he drop-off in LaShonda's grades provide[d] necessary evidence of a potential link between her education and G.F.'s misconduct, but petitioner's ability to state a cognizable claim . . . depend[ed] equally on the alleged persistence and severity of G.F.'s actions, not to mention the Board's alleged knowledge and deliberate indifference." *Id.* at 652.

whatsoever either to investigate or to put an end to the harassment."[91]

## II. CIRCUIT SPLIT: IS FURTHER, POST-ACTUAL-KNOWLEDGE HARASSMENT REQUIRED FOR A FUNDING RECIPIENT'S RESPONSE TO CONSTITUTE "DELIBERATE INDIFFERENCE" AS A MATTER OF LAW?

The Supreme Court in *Davis* addressed a clear-cut case of a public school district's deliberately indifferent response to known, student-on-student sexual harassment. However, since the Court's ruling in 1999, the lower courts have struggled with many of its finer points. One particular point of significant debate is the question of whether a damages action under Title IX requires a plaintiff in a student-on-student sexual harassment case to show that some *further* act of harassment occurred after the funding recipient received actual notice of the *initial* act of harassment. As discussed herein, the lower courts have reached conflicting conclusions regarding this requirement, leading to confusion for educational institutions.

### A. Circuit Courts Holding Further, Post-Actual-Knowledge Harassment IS Required to Reach the Deliberate Indifference Element Under Title IX[92]

#### *1. The Ninth Circuit:* Reese v. Jefferson School District No. 14J[93]

In *Reese*, the United States Court of Appeals for the Ninth Circuit held that a school district could not be held liable for its female students' allegation of pre-notice harassment by male students, because the female students had no evidence of further harassment after the district learned of the allegations.[94] There, a group of female high school seniors were banned from their graduation ceremony after they were caught ambushing a group of male seniors with water-balloons in a men's bathroom.[95] In their defense before the school board, the group of female students reported they were simply getting revenge against the males for alleged harassment perpetrated by the males earlier in the school year.[96] Such harassment had not been alleged

91. *Id.*

92. The First, Third, Fifth, and Eleventh Circuits have reached the same conclusion, but are not expressly discussed herein. *See* Doe v. Pawtucket Sch. Dep't, 969 F.3d 1, 9 (1st Cir. 2020); Hall v. Millersville Univ., 22 F.4th 397, 405 (3d Cir. 2022); I. L. v. Houston Independent School District, 776 Fed. Appx. 839, 843 (5th Cir. 2019) (unpublished); Hill v. Cundiff, 797 F.3d 948, 971-73 (11th Cir. 2015).

93. 208 F.3d 736 (9th Cir. 2000).

94. Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 737-38 (9th Cir. 2000).

95. *Reese*, 208 F.3d at 738.

96. *Id.*

prior to the female students' appearance before the school board, the male students denied such harassment ever occurred, and the school district concluded its investigation.[97]

In response, the female students filed claims against the school district under Title IX, seeking to hold the district liable for the alleged harassment committed by the males and for banning the female students from the graduation ceremony.[98] The United States District Court for the District of Oregon granted summary judgment for the school district.[99] On appeal, the Ninth Circuit noted that by the time the school district received actual notice of the female students' allegations, the school year had ended.[100] No *further* harassment occurred following the school district's receipt of actual notice of the allegations.[101] Thus, the Ninth Circuit concluded that, "under *Davis*, the school district cannot be deemed to have 'subjected' the plaintiffs to the harassment."[102]

### *2. The Eighth Circuit:* K.T. v. Culver-Stockton College[103]

The United States Court of Appeals for the Eighth Circuit came to the same conclusion as the Ninth Circuit in *Reese*. In *Culver-Stockton*, the Eight Circuit determined that a college's response to a single instance of pre-notice student-on-(visiting-)student sexual assault could not support a claim under Title IX.[104] There, K.T. was sexually assaulted at an on-campus party by a Culver-Stockton student while visiting the college on an invite from the women's soccer team.[105] K.T. promptly reported the incident to Culver-Stockton authorities that same weekend.[106] In response, Culver-Stockton did virtually nothing.[107] K.T. subsequently sued Culver-Stockton for damages under Title IX.[108] In her complaint, K.T. claimed Culver-Stockton was deliberately indifferent to her sexual assault by neglecting to take preventative measures to supervise her during the visit and failing to in-

97. *Id.*
98. *Id.*
99. *Id.* The district court based its ruling on the findings and recommendations of the magistrate judge, who noted "the plaintiffs had raised no genuine issue of material fact." *Id.*
100. *Id.* at 740.
101. *Id.*
102. *Id.*
103. 865 F.3d 1054 (8th Cir. 2017).
104. K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1059 (8th Cir. 2017).
105. *Culver-Stockton*, 865 F.3d at 1056.
106. *Id.*
107. *See id.* ("According to K.T., . . . the College did nothing other than cancel a scheduled conference with K.T. and her parents.").
108. *Id.*

vestigate her allegation or provide any treatment upon receiving her report.[109]

The United States District Court for the Eastern District of Missouri granted Culver-Stockton's 12(b)(6) motion.[110] The district court did so, in part, because K.T. failed to claim that Culver-Stockton had actual knowledge of prior instances of similar harassment to put it on notice of the substantial risk that harassment would continue, and because Culver-Stockton's response did not subject K.T. to further harassment.[111] On appeal, the Eight Circuit affirmed because K.T. could not establish deliberate indifference, actual knowledge, or that the discrimination was severe, pervasive, and objectively offensive under Title IX.[112]

With regard to deliberate indifference and actual knowledge, the Eight Circuit's espoused reasoning was similar to that in *Reese*. Essentially, Culver-Stockton could not be liable for the harassment against K.T. without having both actual knowledge of harassment and an opportunity to either put a stop to it or subject her to further harassment.[113] Specifically, the court determined that K.T.'s "complaint identified no *causal nexus* between Culver-Stockton's inaction and K.T.'s experiencing sexual harassment."[114] Thus, because K.T. failed to allege that Culver-Stockton's deliberate indifference caused the assault, she failed to sufficiently plead deliberate indifference.[115] Additionally, the Eighth Circuit noted that actionable discrimination under Title IX requires discrimination that is severe, *pervasive*, and objectively offensive.[116] Consequently, "K.T.'s singular grievance on its own does not plausibly allege pervasive discrimination as required to state a peer harassment claim."[117] The court thus concluded that neither K.T.'s assault nor Culver-Stockton's response could be found to produce the requisite systemic effect of denying K.T. equal access to the educational resources or opportunities provided by Culver-Stockton to state a claim.[118]

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109. *Id.*

110. *Id.* at 1056-57.

111. *Id.* The district court alternatively based its ruling on the premise that "as a non-student K.T. could not bring a Title IX claim against the College," but the Ninth Circuit's analysis on appeal did not reach that issue. *Id.*

112. *Id.* at 1058-59.

113. *See id.* ("The complaint does not, however, allege that Culver-Stockton's purported indifference "subject[ed] [K.T.] to harassment.'" (quoting Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644 (1999))).

114. *Id.* at 1058 (emphasis added).

115. *Id.*

116. *Id.* at 1059.

117. *Id.*

118. *Id.*

### *3. The Sixth Circuit:* Kollaritsch v. Michigan State University Board of Trustees[119]

Finally, the last circuit court to currently and *explicitly* require a further, post-actual-knowledge act of harassment to allege deliberate indifference under Title IX is the United States Court of Appeals for the Sixth Circuit. In *Kollaritsch*, the Sixth Circuit consolidated the appeals of three Michigan State female students, all of which claimed that the University administration's response to their individual reports of sexual assault "was inadequate, caused them physical and emotional harm, and consequently denied them educational opportunities."[120] In each case, the United States District Court for the Western District of Michigan denied Michigan State's 12(b)(6) motions to dismiss, and Michigan State appealed.[121]

The Sixth Circuit reversed the district court's denial on appeal, categorically holding that a victim claiming a single instance of pre-notice, student-on-student sexual harassment fails to plead further actionable harassment and, thus, is incapable of establishing the requisite causation to state a claim of deliberate indifference under Title IX.[122] However, the Sixth Circuit's opinion provided a more thorough analysis of *Davis* to support its holding than its like-minded sister circuits.

The Sixth Circuit began its analysis by identifying the two overarching components of the pleading requirements for deliberate indifference to peer harassment under Title IX announced by the Supreme Court in *Davis*: "(1) 'actionable harassment' by a student, . . . and (2) a deliberate-indifference intentional tort by the school."[123] The court then broke down the requisite elements for "*actionable*" peer sexual harassment under *Davis*, which mandates that alleged peer sexual harassment "must be (a) severe, (b) pervasive, and (c) objectively offensive."[124]

According to the Sixth Circuit, "severe" means behavior beyond mere juvenile behavior between students, such as name-calling or teasing.[125] Although, because the severity of the victims' sexual har-

119. 944 F.3d 613 (6th Cir. 2019).

120. Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 618-19 (6th Cir. 2019).

121. *Kollaritsch*, 944 F.3d at 618-19.

122. *Id.* at 618.

123. *Id.* at 619-20 (quoting *Davis*, 526 U.S. at 643, 651-52).

124. *Id.* at 620 (citing *Davis*, 526 U.S. at 651).

125. *Id.*

assment was not an element of contention, the court did not elaborate further.[126]

As for the "pervasive" element, the Sixth Circuit determined that it required the alleged sexual harassment to be "systemic," which meant *multiple* occurrences of sexual harassment would have to be alleged to support a claim under Title IX.[127] Explicitly, the court stated, "one incident of harassment is not enough."[128] The Sixth Circuit reasoned that while the Supreme Court in *Davis* recognized a single instance of peer harassment could theoretically meet the level of *severity* required, the Court nonetheless ultimately held that a single instance of peer harassment would fall short of being sufficiently systemic, or *pervasive*, to support a claim.[129] The court further supported its position by pointing to Justice Anthony Kennedy's dissenting opinion in *Davis*.[130] There, Justice Kennedy also interpreted the pervasive element stated in the *Davis* majority opinion to exclude the possibility of a viable Title IX claim based on a school's response to a single instance of peer harassment.[131]

Lastly, the Sixth Circuit interpreted "objectively offensive" to mean "behavior that would be offensive to a reasonable person under the circumstances."[132] Specifically, the court clarified that this element stood for the proposition that a victim's subjective perceptions or opinions are not conclusive.[133]

The Sixth Circuit then shifted to the second overarching component to state a claim of deliberate indifference to peer harassment under Title IX: a deliberate-indifference intentional tort. The court determined that, in addition to pleading *actionable* peer sexual harassment, a Title IX plaintiff must also claim and establish a deliberate-indifference intentional tort against the funding recipient.[134] The elements required to do so are: (a) knowledge, (b) an act, (c) injury, and (d) causation.[135] As to the "knowledge" element, the Sixth Circuit determined that a funding recipient must have had actual knowledge of

126. *See id.* at 620 n.2 ("Obviously, verbal harassment can exceed teasing and name-calling, and the severity of harassment on social media is virtually boundless. But we have no such scenario in this case.").

127. *Id.* at 620 (quoting *Davis*, 526 U.S. at 652-53).

128. *Id.* (citing *Davis*, 526 U.S. at 652-53).

129. *Id.*

130. *Id.* at 620-21 (quoting *Davis*, 526 U.S. at 677 (Kennedy, J., dissenting)).

131. *Davis*, 526 U.S. at 677 (Kennedy, J., dissenting).

132. *Kollaritsch*, 944 F.3d at 621.

133. *Id.*

134. *Id.*

135. *Id.*

actionable sexual harassment, which incited or should have incited a response from the funding recipient.[136]

Again relying on *Davis*, the Sixth Circuit interpreted an "act" as a funding recipient's response (or lack thereof) that was "clearly unreasonable in light of known circumstances," insofar as it demonstrates the recipient's "deliberate indifference to the foreseeable possibility of *further* actionable harassment of the victim."[137] The court interpreted a redressable Title IX "injury" as the denial of "access to the educational opportunities or benefits provided by the school."[138] Finally, the court found that the "causation" element requires that the injury be "attributable to the post-actual-knowledge *further* harassment, which would not have happened but for the clear unreasonableness of the school's response."[139]

Focusing on causation, the Sixth Circuit noted that, significantly, the Supreme Court in *Davis* did not mandate that the funding recipient's deliberate indifference be causally connected to the student's injury.[140] Instead, the Court required evidence that the funding recipient's "deliberate indifference 'subject[ed]' its students to *harassment*," which necessarily means further actionable harassment.[141] However, the Sixth Circuit clarified that just because further actionable harassment occurs, that does not necessarily mean the causation element will be met.[142] Rather, the causation element is only met when the clear unreasonableness of the funding recipient's response was the but-for cause of the victim's further harassment.[143] The court supported this causation standard by noting that the Court in *Davis* stated, "[t]he deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."[144]

Having fully fleshed out its standard for the pleading requirements to state a claim of deliberate indifference to peer harassment under Title IX, the Sixth Circuit addressed a conflicting argument presented by the female students. The students argued that the language in *Davis* ("make them liable or vulnerable to") negates the re-

136. *Id.* ("Ordinarily, 'deliberate indifference' means that the defendant both knew and consciously disregarded the known risk to the victim." (citing Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997))).

137. *Id.* (emphasis in original) (quoting *Davis*, 526 U.S. at 648).

138. *Id.* at 622 (quoting *Davis*, 526 U.S. at 650).

139. *Id.* (citing *Davis*, 526 U.S. at 644) ("'Causation' means the 'Act' caused the 'Injury,' . . .").

140. *Id.* (stating that *Davis* "does *not* speak of subjecting students to *injury*").

141. *Id.* (emphasis in original) (quoting *Davis*, 526 U.S. at 644).

142. *Id.*

143. *Id.*

144. *Id.* (quoting *Davis*, 526 U.S. at 645).

quirement for post-actual-knowledge further harassment.[145] They reasoned that, if causation of further harassment is required, the additional vulnerability language would be surplusage.[146] However, the court stated that the defective premise in the students' argument is that the two alternatives presented by the language in *Davis* (i.e., cause to undergo *or* make vulnerable to) are not between further harassment and no further harassment.[147] Instead, the two alternatives are the two possible ways by which a school's response to harassment may result in further harassment of the victim.[148] The court explained that the first alternative ("cause to undergo") would cover a situation in which a funding recipient's response to sexual harassment constitutes a detrimental action that causes further harassment by directly encouraging or provoking the further harassment.[149] The second alternative ("make vulnerable to") would cover a situation in which a funding recipient's response to sexual harassment constitutes an insufficient action (or a refusal to act at all) that causes further harassment by leaving the victim unprotected from the further harassment.[150] Regardless, the court held that vulnerability alone—without any instance of further, post-actual-knowledge sexual harassment that is directly or indirectly caused by the clear unreasonableness of the funding recipient's response—is "not a freestanding alternative ground for liability."[151]

Armed with the foregoing legal principles, the Sixth Circuit applied the facts of the female students' claims. In each case, the female student suffered a single instance of pre-notice sexual assault, each student reported it to Michigan State, and Michigan State responded with an investigation.[152] Also in each case, none of the student-perpetrators were ultimately expelled.[153] Thus, the basis of the female students' claims stemmed from the proposition that they were denied equal access to educational opportunities because they were made to

145. *Id.*
146. *Id.* at 622-23.
147. *Id.*
148. *Id.* at 623 (citing *Davis*, 526 U.S. at 645).
149. *Id.*
150. *Id.*
151. *See id.* (quoting Zachary Cormier, *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1, 23-24 (2017)) ("[T]he vulnerability component of the . . . 'subjected' definition was not an attempt at creating broad liability for damages for the *possibility* of harassment, but rather an effort to ensure that a student who experiences post-notice harassment may obtain damages regardless of whether the harassment resulted from the institution *placing* the student in a position to experience that harassment or *leaving* the student vulnerable to it." (emphasis in original)).
152. *Id.* at 618.
153. *See id.* at 624-25.

live and go to class on campus in constant fear that they could have been sexually harassed further by their respective assaulters at any time.[154] However, none of the three female students claimed any further sexual harassment actually occurred following their initial reports to Michigan State.[155] Thus, the Sixth Circuit concluded that each of the female students failed to plead and could not establish the causation element required to state a claim of deliberate indifference under Title IX.[156]

### B. Circuit Courts Holding Further, Post-Actual-Knowledge Harassment is NOT Required to Reach the Deliberate Indifference Element Under Title IX

#### *1. The Tenth Circuit:* Farmer v. Kansas State University[157]

*Farmer* involves an interlocutory appeal of the District of Kansas' denial of Kansas State University's ("KSU") motion to dismiss the Title IX claim brought by two former students. Because of the procedural posture of the case, the Tenth Circuit assumed without deciding that KSU acted with deliberate indifference.[158] The narrow question presented to the Tenth Circuit on appeal was: "what harm must Plaintiffs allege that KSU's deliberate indifference caused them?"[159]

The case arose because two plaintiffs alleged that KSU failed to adequately investigate and respond to their respective sexual assaults. In March 2015, plaintiff Tessa Farmer accompanied an acquaintance back to his room in a KSU fraternity house, where the two had consensual sex. The male then left the room, and another fraternity member emerged from the closet and raped Farmer.[160] Farmer reported the incident to KSU's Office of Institutional Equality, but the office told her that KSU's sexual misconduct policy did not cover fraternity houses.[161] As a result of KSU's inaction, Farmer claims she missed classes, struggled with grades, secluded herself, and fell into depressive and self-destructive behaviors.[162]

Plaintiff Sara Weckhorst alleged that, in April 2014, she passed out during a fraternity party not far from campus. J.F., another KSU student, took her to his truck and raped her in front of other stu-

154. *See id.*
155. *Id.*
156. *Id.*
157. 918 F.3d 1094 (10th Cir. 2019).
158. Farmer v. Kansas State University, 918 F.3d 1094, 1097 (10th Cir. 2019).
159. *Farmer*, 918 F.3d at 1097.
160. *Id.* at 1099.
161. *Id.*
162. *Id.* at 1099-1100.

dents.[163] J.F. then drove her to the fraternity house, assaulted her on the way there, and raped her again upon arriving at the house.[164] She regained consciousness as another student and fraternity member, J.G., raped her as well.[165] Upon Weckhorst reporting the assaults, KSU informed her that they would not take action because the rapes occurred off-campus.[166] Like Farmer, Weckhorst suffered severe emotional distress, withdrew from school activities, and her grades suffered.

Both women claimed that KSU's failure to investigate their assaults or to take action to respond to the harassment made them "more vulnerable" to further harassment. KSU argued that, even if it acted with deliberate indifference, it did not cause her to suffer actual further harassment.[167]

The Tenth Circuit first stated that "[t]he Supreme Court has already answered [this] legal question" in *Davis* when it held that a funding recipient's "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."[168] Because the fraternity students who assaulted the plaintiffs continued to attend school with no repercussions, the Tenth Circuit found that the plaintiffs had sufficiently alleged that KSU made them vulnerable to harassment.[169]

In holding that a plaintiff need not experience post-notice harassment, the Tenth Circuit held KSU's position "simply ignores *Davis*'s clear alternative language" providing that the "deliberate indifference must . . . 'cause students to undergo' harassment or make them 'liable or vulnerable to' sexual harassment."[170] The Tenth Circuit further opined that Title IX's objective is to protect students against discrimination, and this reading of *Davis* is more consistent with that objective.[171] The Tenth Circuit expressly addressed the Sixth Circuit's holding in *Kollaritsch* that this reading would expose schools to excessive liability, stating that the vulnerability must be "objectively rea-

163. *Id.* at 100. The rape occurred "in front of approximately fifteen other students, some of whom took video and photographs of the rape which they later posted on social media." *Id.*

164. *Id.*

165. *Id.*

166. *Id.* Two associate deans for student life at KSU did, however, encourage Weckhorst "to file a complaint about the presence of alcohol at the fraternity party." *Id.* Upon receiving Weckhorst's anonymous complaint, "KSU's Interfraternity Council ("IFC") suspended the fraternity's charter." *Id.*

167. *Id.* at 1102.

168. *Id.* at 1103.

169. *Id.* at 1104.

170. *Id.*

171. *Id.*

sonable."[172] Finally, the Tenth Circuit opined that "[f]uture cases will undoubtedly be asked to draw lines on when a victim's fear of further sexual harassment is sufficient to deprive that student of educational opportunities," but the plaintiffs' allegations in *Farmer* were more than sufficient to survive a motion to dismiss.[173]

*2. The Fourth Circuit:* Doe v. Fairfax County School Board[174]

In *Fairfax*, Plaintiff "Jane Doe," a former high school student, brought a Title IX action against the Fairfax County School Board (the "Board"), alleging that her school's administrators acted with deliberate indifference to reports that she had been sexually harassed by another student, "Jack Smith."[175] The case progressed to a jury trial, but the jury ultimately ruled that the Board did not have actual knowledge of the alleged sexual harassment. Because that finding ended Doe's claim, the jury did not reach the question of whether the Board had acted with deliberate indifference to the alleged harassment. Doe moved for a new trial, which the district court denied. Doe then appealed to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit first reviewed the undisputed facts. On March 8, 2017, Doe (then, a junior) traveled with the school's band by bus to perform at a nearby music festival.[176] On the bus, Doe sat next to Smith. Smith requested that the two share a blanket.[177] Once the blanket covered them, Doe alleges that Smith fondled her breasts and genitals, penetrated her with his fingers, and repeatedly put her hand on his penis while she attempted to physically block him.[178] Doe reported the incident to her friends upon arrival at their destination, and those friends reported to school administrators that Smith had sexually assaulted Doe.[179]

The assistant principal understood that she was "dealing with the 'possibility' of a 'sexual assault'" based on the students' report. However, the school took no actions during the five-day trip to address the issue and did not inform Doe's parents.[180] Upon return from the trip, the assistant principal interviewed Doe and asked for a statement. Doe relayed what had occurred under the blanket and stated she did

172. *Id.* at 1105.
173. *Id.*
174. 1 F.4th 257 (4th Cir. 2021).
175. Doe v. Fairfax County School Board, 1 F.4th 257, 261 (4th Cir. 2021).
176. *Fairfax*, 1 F.4th at 261.
177. *Id.*
178. *Id.* At trial, Doe testified that "during this incident, she felt so 'confused,' 'shocked,' and 'scared' that she was 'frozen in fear the whole time.'" *Id.*
179. *Id.*
180. *Id.*

not think it was consensual.[181] The school then interviewed Smith, who initially denied that he touched Doe without consent. He later admitted to touching her breasts but continued to deny touching her genitals.[182] The assistant principal interviewed two other band students as well. The school eventually concluded that it had insufficient evidence that the encounter was a sexual assault (rather than consensual) and did not discipline either Doe or Smith.[183] Doe's mental health suffered significantly as a result of the assault, and she refrained from participating in school activities, including band, due to a fear of encountering Smith.[184]

Doe appealed the jury's verdict, arguing that the district court applied the incorrect standard for determining whether a school has actual notice or knowledge of the alleged harassment.[185] The Fourth Circuit agreed, and reversed and remanded the case for a new trial.[186] Relying on *Gebser* and *Davis*, the Fourth Circuit first set forth the prima facie elements of a Title IX deliberate indifference claim: (1) the plaintiff was a student at an educational institution receiving federal funds; (2) they suffered sexual harassment that was so severe, pervasive, and objectively offensive that it deprived them of equal access to the educational opportunities or benefits provided by their school; (3) the school, through an official who has authority to address the alleged harassment and to institute corrective measures, had actual notice or knowledge of the alleged harassment; and (4) the school acted with deliberate indifference to the alleged harassment.[187]

The Fourth Circuit then focused on the issue of "actual notice." Doe argued that the actual notice element was objective, meaning a school has actual notice if they receive a report that can objectively be understood as alleging sexual harassment. The Board, in contrast, argued that "actual notice" only exists when the school subjectively believes or becomes aware that sexual harassment occurred. The Fourth Circuit agreed with Doe.

The Fourth Circuit examined its own precedent, noting that it had never before required a plaintiff to demonstrate subjective belief that sexual harassment had occurred.[188] The court next provided a

181. *Id.* at 261-62.
182. *Id.*
183. *Id.* Ostensibly, the school considered disciplining Doe and Smith "for engaging in sexual activity while on a school trip," but decided against it. *Id.*
184. *Id.*
185. *Id.* at 263.
186. *Id.*
187. *Id.* at 263-264 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-92 (1998); Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. Of Educ., 526 U.S. 629, 646-52 (1999)).
188. *Id.* at 265.

detailed analysis of the standards articulated in *Gebser* and *Davis*. It noted that the Supreme Court uses "actual notice" and "actual knowledge" interchangeably. Notice is defined as an "objective 'condition of being warned or notified' of, or having 'received information about,' a fact or circumstance.[189] The Fourth Circuit further notes that *Gebser* holds that to be liable under Title IX, an appropriate school official must be "*advised of*" the alleged misconduct. Finally, the Fourth Circuit considered that common sense dictates that a school cannot willfully ignore facts and escape liability under Title IX. Therefore, a school's receipt of a report or complaint alleging sexual harassment is sufficient to establish actual notice under Title IX. "This is an objective inquiry which asks whether an appropriate official in fact received such a report or complaint and whether a reasonable official would construe it as alleging misconduct prohibited by Title IX."[190]

Because the jury could not have reasonably found that the Board lacked "actual notice" under the proper standard, the Fourth Circuit held that Doe was entitled to a new trial.[191] Importantly, the Board argued that the court need not remand for a new trial because it could affirm the jury's verdict on alternate grounds. In relevant part, the Board argued that it was not deliberately indifferent to the report. The court, however, found sufficient evidence that the Board's response to the report was insufficient as a matter of law.[192]

The Fourth Circuit's dissenting justice argued that the Board could not be deliberately indifferent as a matter of law because Doe could not show that the school's conduct, or lack thereof, caused any further or continued sexual harassment.[193] The majority noted that the circuit courts are split on this issue, but ultimately determined that Title IX liability based on student-on-student harassment is not limited to cases where such harassment occurs after the school receives notice" and is "caused" by the school's own post-notice conduct. The court relied on the language in *Davis* that liability can arise if the school's conduct makes a student "vulnerable" to harassment.[194] Thus, the Fourth Circuit rejected the Board's argument that it was not deliberately indifferent and remanded for a new trial.

189. *Id.* at 266.
190. *Id.* at 268.
191. *Id.* at 270.
192. *Id.* at 273.
193. *Id.*
194. *Id.*

## III. A NOTE ON DAMAGES

Regardless of which side of the post-notice harassment debate a court falls, parties to Title IX litigation should consider the matter of damages. If a student continues attending school after experiencing harassment, graduates on time, and does not incur any out-of-pocket costs related to the harassment, the student may have little recourse against a school even if it did act with deliberate indifference. That is because the measure of damages in a private Title IX cause of action is limited.

As noted above, the Title IX statute and regulations do not explicitly create a private cause of action. The primary enforcement mechanism contemplated by Congress lies within the Executive Branch. The Department of Education's Office of Civil Rights ("OCR") is tasked with investigating and remedying sex discrimination under Title IX.[195] If OCR determines that school is not in compliance with Title IX, it may require costly corrective actions, such as additional discrimination training, multi-year reporting requirements, policy revisions, staffing changes, and—in the most extreme examples—loss of federal funding for its education programs.

For private plaintiffs, money damages are limited to compensatory damages and attorneys' fees. In 2022, the Supreme Court expressly held that plaintiffs cannot recover emotional distress damages under statutes promulgated pursuant to the U.S. Constitution's spending clause, including Title IX.[196] In *Cummings*, the Supreme Court reasoned that the receipt of funds under the spending clause is essentially a contract, and entities that accept federal funds did not receive constitutionally sufficient notice that accepting those funds would expose them to such damages.[197] Further, the Supreme Court previously held that Title IX does not allow for the recovery of punitive damages against funding recipients because punitive damages (like emotional distress damages) are not traditionally available in breach-of-contract actions.[198] In other words, not only is the threshold for establishing deliberate indifference difficult to meet—and may be impossible to meet for plaintiffs who have not experienced subsequent harassment—but the potential reward for bringing a Title IX suit is limited due to the nature of the Spending Clause. Cases like those discussed herein, particularly cases in which the student relies on

195. 45 C.F.R. § 86.71.

196. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1576 (2022).

197. *Cummings*, 142 S. Ct. at 1576 (finding "no ground, under our cases, to conclude that federal funding recipients have clear notice that they would face such a remedy in private actions brought to enforce the statutes at issue").

198. Barnes v. Gorman, 536 U.S. 181, 187 (2002).

emotional distress and fear of encountering their assailant as a basis for their claim, may be decided differently in a post-*Cummings* legal landscape.

## IV. CONCLUSION

Given the clear split amongst the circuit courts, it is likely that the Supreme Court will eventually be called to definitively state whether post-notice harassment is required under the standard articulated in *Gebser* and *Davis* before a school may be liable to a private plaintiff under Title IX. Until the Supreme Court provides such guidance, schools receiving federal funds should carefully consider their response to actual notice of sexual harassment and, to the best of their ability, limit the student victim's "vulnerability" to further, post-notice harassment.