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I. INTRODUCTION

Sexual harassment and assault on college campuses has been and remains a prevalent problem. In a recent large survey of a select group of top universities by the Association of American Universities, more than 181,000 students submitted responses to a wide range of questions regarding sexual assault and harassment on campus.[1] A disturbing 41.8% of those students reported experiencing at least one sexually harassing behavior since beginning college, and 18.9% reported "sexually harassing behavior that either 'interfered with their academic or professional performance,' 'limited their ability to participate in an academic program,' or 'created an intimidating, hostile or offensive social, academic or work environment.'"[2] Further compounding the severity of this problem is the tendency of survivors of sexual violence to under-report these incidents.[3] One way the federal government and courts have tried to address incidents of sexual harassment and sexual assault at educational institutions is through Title IX of the Education Amendments of 1972 ("Title IX").[4]

Title IX was enacted to eliminate discrimination on the basis of sex by any school or university that receives federal funds.[5] A discrimination on the basis of sex claim can arise in a variety of ways under Title IX, including as a result of sex-based harassment or assault.[6] The Office for Civil Rights ("OCR") enforces Title IX by evaluating, investigating, and resolving complaints regarding sex discrimination.[7] The OCR also routinely issues guidance documents to assist schools and universities

1. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ASS'N. OF AM. UNIVS (January 17, 2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf.

2. *Id*. at xlll.

3. *Id*. at A7-92. In this survey, only 14.1 % of female survivors reported their experience of sexually harassing behavior to an available program or resource. The reporting rates were even lower for men (8.3%) and were slightly higher for LGBTQ students (21%).

4. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., *Title IX and Sex Discrimination* (Aug. 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [hereinafter *Title IX and Sex Discrimination*].

5. *Id*.

6. *Id*.

7. *Id*.

who receive federal funds in complying with Title IX regulations.[8] In addition, Title IX provides a private right of action against schools that can be brought by students (or by parents on behalf of students) who are victims of sexual misconduct that occurs at school.

Despite mechanisms by both the OCR and the courts, enforcement remains erratic, and school liability for Title IX infractions is not guaranteed. Part of the problem lies in the pendulum swing of enforcement as various Presidents' administrations have expanded and contracted Title IX, changing the various harms for which students can recover and the rules governing how the Title IX regulations should be applied. Another contributing factor is the lower courts' inconsistent application of both the Title IX regulations themselves and the Supreme Court's Title IX precedents. The main reason for this inconsistency is the variation in guidance documents issued by the OCR under different administrations. While these guidance documents are not considered binding, courts do consider them when interpreting and applying the law.[9] Thus, when a new administration significantly expands or contracts survivors' rights via new guidance, courts react accordingly. As the OCR guidance changes, it falls in and out of alignment with Supreme Court Title IX precedents and further complicates the lower courts' task of interpreting and applying Title IX fairly and equitably.[10]

In 2018, the Trump Administration announced its intention to promulgate an updated version of the Title IX regulations governing sexual conduct in accordance with rules set forth in the Administrative Procedure Act; the resulting regulations went into effect in August of 2019 and, unlike the OCR's guidance documents, are legally binding.[11] However, the Biden Administration quickly ensured another pendulum swing, issuing an Executive Order in March of 2021 calling for a 100-day review of any Trump administration rules—including the new Title IX regulations— that may be inconsistent with Biden's policy that "all students should be guaranteed an educational environment free from . . . discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual

8. *Id*.

9. JARED P. COLE & CHRISTINE J. BLACK, CONG. RSCH. SERV., R45685, TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 24 n.206 (April 12, 2019), https://www.everycrsreport.com/files/20190412_R45685_28b03082805d893c209321e8cc208b7c72bd2d31.pdf.

10. *Id*. at Summary.

11. R. Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS INST. (June 11, 2020), https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/.

orientation or gender identity."[12]

Part II of this Article reviews the legislative and judicial history of Title IX, including the key Supreme Court decisions that established the doctrinal framework as well as lower court decisions that further contributed to Title IX's interpretation and application. Part II then illustrates how these compounding factors worked together to deny a student survivor recovery in a recent Sixth Circuit case, setting up a circuit split that turns on how broadly courts interpret the sweep of Title IX itself. Part III discusses shortcomings of the Sixth Circuit opinion that renders the narrow standard inapposite and calls for the courts to interpret Title IX's reach broadly, especially in light of the next seemingly inevitable pendulum swing.

II. BACKGROUND

This Part reviews the legislative and judicial history of Title IX, including the Obama Administration's guidance documents that expanded Title IX coverage in an effort to curb rampant sexual harassment and assault on college campuses and the Trump Administration's subsequent withdrawal of those same documents. Next, this Part summarizes the new regulations enacted by the Trump Administration and briefly considers arguments for and against them as well as litigation challenging them. Last, this Part explains the circuit split that arose as a result of the courts' different interpretations of Title IX Supreme Court precedent.

A. Title IX

1. History

Title IX of the Education Amendments of 1972 ensures that education programs or activities that receive federal funding protect participants in those programs from discrimination on the basis of sex.[13] Title IX covers both discrimination itself and retaliation against people who object to discriminatory practices or report incidents of actual discrimination.[14] Since its enactment, Title IX has been interpreted by both the courts and by ongoing guidance documents published over the years by the Department of Education ("DOE" or "Department").

Guidance published by the DOE during the Obama Administration

12. Exec. Order No. 14021, 86 Fed. Reg. 13803 (March 8, 2021), https://www.federalregister.gov/d/2021-05200/p-2.

13. *Title IX and Sex Discrimination*, *supra* note 4.

14. *Id.*

expanded the coverage of Title IX in several ways. In April of 2011, the DOE Office of Civil Rights ("OCR") issued the *Dear Colleague Letter Regarding Sexual Violence*, which expressly stated that Title IX's provisions covering sexual harassment extended to sexual violence and addressed the issue of consent in the context of Title IX claims of student-on-student sexual harassment.[15] That document provided information on schools' obligation to investigate and address sexual violence claims under Title IX.[16]

In April of 2014, OCR published a follow-up document entitled *Questions and Answers About Title IX and Sexual Violence* ("Q & A Document").[17] The Q & A Document clarified prior guidance documents and included examples of ways for schools to proactively address and prevent sexual violence.[18] It also affirmed that Title IX's coverage extended to discrimination related to "gender identity or failure to conform to stereotypical notions of masculinity or femininity" and stated that a school was obligated to respond to sexual violence involving LGBT students using the "same procedures and standards" applied to claims by non-LGBT students.[19] Finally, the Q & A Document stated that transgender students are protected under Title IX.[20]

In January of 2017, the OCR further clarified its Title IX guidance regarding transgender students in its *Letter to Emily Prince*.[21] The letter reiterated the protections included in the Q & A Document and specifically stated that "[w]hen a school elects to separate or treat students differently on the basis of sex…a school generally must treat transgender students consistent with their gender identity."[22] In 2016, the OCR's *Dear Colleague Letter on Transgender Students* further explained schools' obligations to extend Title IX's protections for transgender students.[23] Taken collectively, these more inclusive Obama-era guidance documents were widely understood to have held schools to a higher standard and

15. OFF. FOR CIV. RTS. , U.S. DEP'T OF EDUC., *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts*, (April 4, 2011), https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html.

16. *Id.*

17. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., *Questions & Answers About Title IX and Sexual Violence*, (April 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter *Questions & Answers*].

18. *Id.* at ii.

19. *Id.* at 5.

20. *Id.*

21. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., *Letter to Emily Prince*, (Jan. 7, 2015), https://www2.ed.gov/about/offices/list/ocr/letters/20150107-title-ix-prince-letter.pdf.

22. *Id.* at 2; *see also Questions & Answers*, *supra* note 17 at 5.

23. *See* OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., *Dear Colleague Letter on Transgender Students*, (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

were "tremendously effective" at making schools more attentive to sexual misconduct on their campuses.[24] However, in 2017, the Trump Administration began withdrawing the Obama Administration guidance documents, as well as others, in preparation for new Title IX regulations regarding sexual misconduct promulgated according to the Administrative Procedures Act.[25] In the wake of these withdrawals, many colleges announced they plan to continue to abide by the Obama documents.[26]

In May of 2020, the Department of Education published new regulations intended to provide additional clarity to the Department's current and past guidance, and to elucidate precise, legally binding requirements to ensure recipients of federal funding remain in compliance with Title IX's regulatory mandates.[27] The new regulations were issued after an extensive comment period that yielded over 124,000 comments from various stakeholders and went into effect in August of 2020.[28]

2. Gebser/Davis Framework

The regulations adopt and adapt existing Supreme Court Title IX jurisprudence into what the Department calls the Gebser/Davis framework,[29] which is used to determine when a school's response to sexual harassment is discriminatory such that Title IX is implicated.[30] The Department identified three relevant parts to the Gebser/Davis framework: "a definition of actionable sexual harassment, the school's actual knowledge, and the school's deliberate indifference."[31] Using its statutory authority to promulgate the rule necessary to effectuate Title IX, the Department expanded and adapted the framework to suit the purposes of administrative enforcement.

Under the adapted Gebser/Davis framework, the new regulations define "sexual harassment" as "severe, pervasive, and objectively

24. Sarah Brown, *What Does the End of Obama's Title IX Guidance Mean for Colleges?*, CHRONICLE OF HIGHER EDUC. (Sep. 22, 2017), https://www.chronicle.com/article/what-does-the-end-of-obamas-title-ix-guidance-mean-for-colleges.

25. Melnick, *supra* note 11. For a complete list of Title IX guidance documents rescinded by Trump, *see* OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., *Rescinded Policy Guidance* (Aug. 16, 2021), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/respolicy.html.

26. Brown, *supra* note 24.

27. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30029 (May 19, 2020) (codified at 34 C.F.R. Part 106). Although issued on May 19, 2020, the Department of Education stated that the new regulations have an effective date of August 14, 2020, due to the COVID-19 pandemic.

28. *Id*. at 30044.

29. *Id.* at 30032.

30. *Id.*

31. *Id.* at 30033.

offensive conduct" and also incorporate quid pro quo harassment and the Clery Act/VAWA offenses of sexual assault, dating violence, domestic violence, and stalking under the umbrella of sexual harassment.[32] In doing so, the Department explicitly recognized that a single act of sexual harassment may be sufficiently severe enough to effectively deny the survivor[33] "equal access to an education program or activity," thus implicating Title IX.[34]

Next, the final regulations adopted the Gebser/Davis "actual knowledge" standard because, under Title IX, it is the funding recipient's discriminatory conduct that triggers liability, and "the recipient cannot commit its own misconduct unless the recipient first knows of sexual harassment that needs to be addressed."[35] Departing from the concepts of vicarious liability (respondeat superior), constructive notice, and the "knows or should have known" standard upon which previous guidance documents relied, the Department expressly describes the categories of employees to whom notice will constitute actual knowledge, thus triggering the recipient's response under Title IX.[36] For elementary and secondary schools, notice to any employee serves as actual knowledge under the Gebser/Davis framework, while for postsecondary institutions, actual knowledge is only triggered by notice to the Title IX Coordinator or any official with authority "to institute corrective measures on behalf of the recipient."[37] The Department differentiates between elementary and secondary schools and postsecondary schools in order to accommodate younger students' inability to determine which employees would have a duty to report and which would not, and respects older students' rights to choose to confide in an employee who would have the option of keeping the disclosure confidential.[38] Finally, under the new regulations, a recipient's response is triggered whenever an appropriate employee receives actual notice, regardless of whether it is the complainant or a third party reporting the alleged sexual harassment.[39]

The final part of the Gebser/Davis framework addresses the adequacy of a recipient's response once actual notice has been received. According to the Supreme Court, a school acts with deliberate indifference "only when it responds to sexual harassment in a manner that is 'clearly

32. *Id.* at 30036.

33. The Title IX statute and court cases interpreting it generally use the term "victim" when referring to individuals who have experienced sexual harassment. The author prefers the empowering language of "survivor" and will use that word in place of "victim" throughout this Casenote.

34. *Id.*

35. *Id.* at 30038.

36. *Id*.

37. *Id.* at 30039-40.

38. *Id.*

39. *Id.*

unreasonable in light of the known circumstances.'"[40] The Department sets out specific requirements that recipients must satisfy to avoid running afoul of Title IX by acting with deliberate indifference; a recipient's response:

> must be prompt; must consist of offering supportive measures to a complainant; must ensure that the Title IX Coordinator contacts each complainant to discuss supportive measures, consider the complainant's wishes regarding supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.[41]

Additionally, the regulations compel recipients to treat complainants and respondents equitably, including providing due process protections to each party and refraining from restricting respondent's access to educational programs or activities until a fair investigation and adjudication process is completed.[42] The regulations allow a recipient to remove a respondent from classes or other school activities on an emergency basis, with the caveat that an emergency removal will be subject to the deliberate indifference standard (in order to ascertain whether the recipient discriminated against the respondent by restricting access to educational programs or activities).[43]

Other due process protections are also expressly included in the new regulations. For example, recipients must provide written notice of the allegations to both parties, provide both the complainant and respondent equal opportunities to present facts, expert witnesses, and other inculpatory and exculpatory evidence, and allow for cross examination according to specific procedures delineated in the regulations.[44] Specifically, at the postsecondary level "a live hearing with cross-examination conducted by the parties' advisors" is required, while at the elementary and secondary school level, parties must have an equal opportunity "to submit written questions for the other parties and witnesses to answer" before reaching a final conclusion as to responsibility.[45] In order to avoid survivors having to come face-to-face with respondents, the new regulations allow the required cross examination process at the postsecondary level to occur with the parties in separate rooms facilitated by technology.[46]

40. *Id.* at 30043-44.
41. *Id.* at 3044.
42. *Id.* at 30044-45.
43. *Id.* at 30046.
44. *Id.* at 30053-54.
45. *Id.*
46. *Id.* at 30270.

In issuing these final regulations and standardizing the legal processes, the Department of Education intended to "better align the Department's Title IX regulations with the text and purpose of Title IX, the U.S. Constitution, Supreme Court precedent and other case law and address the practical challenges facing students, employees, and recipients with respect to sexual harassment allegations in education programs and activities."[47] The new regulations went into effect on August 14, 2020 and were ushered in by wide-ranging criticisms and a series of lawsuits.

3. Litigation

As of July 2020, four lawsuits had been filed in response to the new Title IX regulations, and twenty-five major higher education associations had asked the Department of Education to extend the deadline for compliance.[48] Colleges and universities cited the length and complexity of the new regulations as reasons for a more lenient deadline, and eighteen state attorneys general filed a motion to block the regulations entirely, arguing that the August 14th deadline causes "immediate and irreparable harm" to these institutions.[49]

Collectively, the lawsuits challenged the regulations on multiple grounds. The American Civil Liberties Union ("ACLU") filed suit on behalf of several organizations that advocate for survivors of sexual assault and for gender equity, arguing that the new regulations are discriminatory on their face, and "collectively create a separate standard for sex discrimination [compared to the standard for discrimination on the basis of race and national origin]."[50] Specifically, the ACLU suit addressed a change in the wording in the new definition of sexual harassment, which had previously been defined, in relevant part, as conduct that is "severe, pervasive, *or* objectively offensive."[51] According to the ACLU, the change from "or" to "and" in the new definition means that single occurrences of sexual harassment are less likely to trigger an investigation by the school.[52] The ACLU suit also pointed out that the standard for determining discriminatory conduct on the basis of race or national origin remains severe, pervasive, *or* objectively offensive, thus creating a more stringent standard for victims of sexual harassment than

47. *Id.* at 30030.

48. Greta Anderson, *Legal Challenges on Many Fronts*, INSIDE HIGHER EDUC. (July 13, 2020), https://www.insidehighered.com/news/2020/07/13/understanding-lawsuits-against-new-title-ix-regulations.

49. *Id.*; Pennsylvania v. DeVos, 480 F. Supp. 3d 47 (D.D.C. Aug. 12, 2020).

50. Anderson, *supra* note 48.

51. *Id.* (emphasis added).

52. *Id*. (emphasis added).

for other types of discrimination.[53] The State of New York echoed this concern in its lawsuit, citing the procedural incongruity created by the separate standard.[54]

The National Women's Law Center ("NWLC") took aim at what it calls "increased protections" for alleged sex offenders.[55] In a suit filed in Massachusetts on behalf of advocacy groups and survivors of sexual assault, the NWLC argued that the added requirements of live hearings and mandatory cross examinations unfairly favors respondents, as does giving colleges the option to use a "clear and convincing" standard of evidence.[56] The NWLC's concerns echo those of other advocates for survivors who fear the new requirements will have a chilling effect on reporting because of the potential that the process will be retraumatizing for survivors.[57]

All of the lawsuits also challenged the new regulations on procedural grounds, claiming that the new regulations are "arbitrary and capricious" and thus run afoul of the Administrative Procedure Act.[58] A similar procedural fault raised by the suits is that some parts of the regulations were changed *after* the public comment period; thus these regulations violate the Administrative Procedure Act's requirement that proposed regulations are made available for public comment.[59] Had the courts ruled in favor of the plaintiffs on this issue, the DOE would have been required to justify why changes were necessary in the first place, and, importantly, why the new regulations are superior to ones previously enforced under Title IX.[60] However, as of October 2020, the district courts had denied all of the plaintiffs' motions for preliminary injunctions or stays, finding that the plaintiffs were not likely to succeed on the merits of their APA claims.[61]

Despite these criticisms, some proponents of the new regulations applaud what they claim are enhanced free speech and due process protections. Supporters of the new regulations claim that the revised definition of sexual harassment and the new hearing procedures are

53. *Id.*; *see also* Know Your IX v. DeVos, No. RDB-20-01224, 2020 WL6150935 (D. Md. Oct. 20, 2020) (dismissed without prejudice for lack of standing).

54. Anderson, *supra* note 48.

55. *Id.*

56. *Id.*

57. Brett A. Sokolow, *OCR is About to Rock Our Worlds*, INSIDE HIGHER ED. (Jan. 15, 2020), https://www.insidehighered.com/views/2020/01/15/how-respond-new-federal-title-ix-regulations-being-published-soon-opinion.

58. Anderson, *supra* note 48.

59. *Id.* (emphasis added).

60. *Id.*

61. Pennsylvania v. DeVos, 480 F. Supp. 3d 47, 69; New York v. U.S. Dep't. of Educ., 477 F. Supp. 3d 279, 288 (S.D.N.Y. 2020).

necessary in order to preserve First Amendment rights, arguing that "a huge amount of speech [has been] silenced in the name of preventing sexual violence."[62] These organizations argue that the *Davis* standard articulated in the new regulations is not only the right one, but that it is "constitutionally required."[63] Three organizations that support free speech on campus, Foundation for Individual Rights in Education, Speech First, and Independent Women's Law Center, have petitioned to intervene in the ACLU's lawsuit, stating that colleges have a long history of using "bogus" definitions of sexual harassment to chill speech that some find offensive but that is necessarily protected by the First Amendment.[64]

Arguments made in favor of the more stringent due process protections afforded by the new regulations point to the fact that Title IX is intended to protect all students, not just complainants.[65] Supporters believe the enhanced due process requirements will ensure equitable treatment of both complainant and respondent and eliminate alleged "institutional bias" in favor of survivors.[66]

Despite the ongoing controversies and legal challenges—as well as the pending review by the Biden Administration—the new Title IX regulations are in effect and applicable to discrimination and harassment claims currently pending before the courts. The next Section explores the development of pre- and post-harassment claims under Title IX.

B. Developing the Doctrine: Post-Assault/Harassment Claims

One of the primary cases relied on in the promulgation of the new Title IX regulations also grounds the development of the pre- and post-harassment claims doctrine. The 1999 *Davis* decision was the source of the "severe, pervasive, and objectively offensive" standard codified in the new regulations and also marked the first time the Supreme Court interpreted the scope of deliberate indifference.[67] The case arose as a post-assault claim alleging ongoing incidents of sexual harassment suffered by the plaintiff, Davis, at the hands of a fellow student and the failure of the school board to remedy the situation.[68] The issue before the Court was

62. Anderson, *supra* note 48.

63. FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *Campus free speech orgs seek to intervene in lawsuit to defend new Title IX regulations* (June 24, 2020), https://www.thefire.org/campus-free-speech-orgs-seek-to-intervene-in-lawsuit-to-defend-new-title-ix-regulations/.

64. *Id.*

65. Joe Cohn, *New Title IX Regulations Carefully Balance the Rights of All Students*, FIRE NEWSDESK (May 8, 2020), https://thefire.org/new-title-ix-regulations-carefully-balance-the-rights-of-all-students/.

66. *Id.*

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

68. *Id.*

whether a private action for damages was permissible against the school board in cases of student-on-student harassment.[69] The Supreme Court granted cert to resolve a circuit split on this matter and, analogizing these facts to its earlier opinion in *Gebser*,[70] found that schools could be liable for damages in cases of peer-on-peer sexual harassment under Title IX when certain elements were met.[71]

1. Substantial Control

In considering whether the school district could be held liable for damages under Title IX for the ongoing peer harassment Davis suffered, the Court first looked to the amount of control the school had over the situation, noting that Title IX's plain language limits the scope of its coverage to instances where the funding recipient had the requisite degree of control over both the harasser and the context in which the harassment occurred.[72] Here, the harassment occurred during school hours and on school grounds, a situation where the school had "substantial control" over both the situation and the harasser himself.[73]

2. Degree of Harassment

With the element of control satisfied, the Court next considered the degree of harassment suffered by Davis, noting that student-on-student harassment must be "sufficiently severe" in order to be actionable under Title IX.[74] The Court established the standard that is now codified in the 2020 Title IX regulations: the harassment must be "severe, pervasive, and objectively offensive" such that it denies the survivor "equal access to the school's resources and opportunities."[75] In this case, the ongoing harassment and the precipitous decline in Davis's grades satisfied the Court that Davis suffered from such harassment.

3. Actual Knowledge

In addition to these first two elements, the *Davis* Court held that the

69. *Id.*

70. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1989) (holding that recipients of federal funding can be liable in damages for teacher-on-student harassment only if the school's own deliberate indifference caused the discrimination).

71. *Davis*, 526 U.S. at 629.

72. *Id.* at 644.

73. *Id.* at 645.

74. *Id.* at 650.

75. *Id.* at 652.

school must have had actual knowledge of the harassment,[76] and the school's response to it must have been deliberately indifferent such that the response was "clearly unreasonable in light of the known circumstances."[77] The Court stressed the fact that the deliberate indifference standard does not mean that schools can only avoid Title IX liability by completely ridding their schools of peer harassment or that Title IX mandates particular disciplinary action on the part of the school.[78] But in cases where the school's failure to respond to alleged student-on-student harassment within a reasonable amount of time may support a claim that the school's deliberate indifference subjected the survivor to discrimination, the Court held that the claim should survive a motion to dismiss and the finder of fact should determine if the school's response was "clearly unreasonable in light of the known circumstances."[79]

4. Deliberate Indifference

Finally, the Court explained that deliberate indifference only functions to provide direct liability under Title IX when such indifference "subjects" a student to harassment.[80] Relying on the plain meaning of the text, the Court consulted dictionary definitions of the verb "subject" and concluded that "deliberate indifference must, at minimum, cause students to undergo harassment or make them liable or vulnerable to it."[81] In other words, the combination of a recipient's control of the harasser, the context in which the harassment occurs, and the school's deliberate response must "expose its students to harassment" or "cause them to undergo it" for liability to attach.[82] As discussed later, the *Davis* Court's definition of "subject" becomes the pivotal issue in the eventual circuit split regarding the appropriate standard required to state a post-assault harassment claim under Title IX.

C. Developing the Doctrine: Pre-Assault/Harassment Claims

The existence of a pre-assault claim for damages under Title IX is illustrated in *Simpson v. University of Colorado*, a case where the court determined that the University could be held liable for a policy that failed

76. *Id.* at 650; for a discussion of actual knowledge under the Title IX regulations in effect at the time, *see* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1989); *see also* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 74-75 (1992).

77. *Davis*, 526 U.S. at 648.

78. *Id.*

79. *Id.* at 649.

80. *Id.* at 644.

81. *Id.* at 645 (internal quotations omitted).

82. *Id.*

to prevent the likelihood of sexual assault.[83] *Simpson* concerned a University-run athletic recruitment program wherein high school football players were invited to campus and hosted by undergraduate students who were instructed to show them "a good time."[84] The plaintiffs alleged that they were survivors of multiple sexual assaults that occurred as a result of recruits' participation in this University program.[85]

First, the court found that the actual notice standard established by *Gebser* and *Davis* were inapplicable to this case because the University itself, via its recruitment policy, was the wrongdoer.[86] Analyzing the University's culpability for an intentional violation of Title IX under the standards from *Gebser* and *Davis*, the court found that a policy of deliberate indifference that resulted in a failure to "provid[e] adequate training or guidance" for a University program satisfied the necessary elements of "control over the harasser and the environment in which the harassment occurs" as stated in Title IX; it thus constituted a violation of the statute.[87] The court took note of its earlier decisions in two cases relating to failure-to-train and noted that the court had explicitly preserved the possibility that evidence of a single violation of federal rights, combined with a failure-to-train for the possibility of such a violation, was sufficient to trigger liability.[88] Ultimately, the court held that the school's policy of showing football recruits a "good time" combined with its failure to train hosting students amounted to an ongoing policy of deliberate indifference that made its female students vulnerable to harassment when they attended the parties that were part of the University recruitment process.[89]

In 2020, the Ninth Circuit issued a decision, relying on *Gebser*, *Davis*, and *Simpson*, that further refined what elements were necessary for Title IX claims to survive a motion to dismiss.[90] The *Karasek* case involved both pre- and post-assault Title IX claims by three students at the University of California ("UC"). The court held that the following five elements from *Davis* were necessary to establish a post-assault claim: (1) the school must have "exercise[d] substantial control over both the

83. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).

84. *Id*. at 1173.

85. *Id.*

86. *Id.* at 1178-9.

87. *Id*. at 1178.

88. *Id*. at 1179, *see* Bd. of the Cty. Comm. v. Brown, 520 U.S. 397 (1997) (holding that a sheriff's isolated failure to adequately screen a potential employee did not establish deliberate indifference to the risk that the employee would use excessive force in the line of duty, but preserving the possibility that failure-to-train for recurring situations could trigger municipal liability in the event of a single violation of federal rights).

89. *Simpson*, 500 F.3d at 1184.

90. Karasek v. Regents of Univ. of Cal., 956 F.3d 1093 (9th Cir. 2020).

harasser and the context in which the known harassment occur[red];" (2) the alleged harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the [plaintiff] of access to the educational opportunities or benefits provided by the school;" (3) the school must have had actual knowledge of the harassment; (4) the school's response to the harassment was deliberately indifferent, meaning it was "clearly unreasonable in light of the known circumstances;" and (5) that indifferent response must have "cause[d the plaintiff] to undergo harassment or ma[d]e [the plaintiff] liable or vulnerable to it."[91] The Ninth Circuit affirmed the trial court's dismissal of two of the post-assault claims and the grant of summary judgment in favor of UC on the third, finding in all three instances that the University's response was not deliberately indifferent. The court vacated the lower court's dismissal of the pre-assault claim and remanded the case for further proceedings.[92]

The students alleged that UC "maintained a policy of deliberate indifference to sexual misconduct," the result of which was a campus environment that was hostile to women and an elevated risk that they would be subject to sexual assault.[93] Finding the pre-assault claim to be a matter of first impression, the court clarified the standard to be applied and listed the elements necessary to successfully state such a claim under Title IX:

> [A] pre-assault claim should survive a motion to dismiss if the plaintiff plausibly alleges that (1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment that was "so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the school."[94]

The court went on to clarify that plaintiffs alleging a pre-assault claim need not prove that a recipient had actual knowledge or acted with deliberate indifference for the claim to survive a motion to dismiss—alleging facts that demonstrate each of the elements above will be sufficient for the claim to survive.[95] The court then looked to the complaint and found that the facts alleged in this case adequately supported the plaintiffs' position. The court rejected UC's argument that the students' allegations must fail because the facts they provided were significantly more attenuated than those set forth by the plaintiffs in

91. *Id.* at 1105 (quoting *Davis*, 526 U.S. at 645-50).
92. *Id.* at 1099.
93. *Id*. at 1111-12.
94. *Id*. at 1112 (quoting *Davis*, 526 U.S. at 650).
95. *Id.* at 1113.

Simpson. The court found it dispositive that *Simpson* involved a motion for summary judgment rather than a motion to dismiss and held that the decision as to whether there was the necessary causal link between the school's policy of deliberate indifference and the plaintiffs' harassment was ultimately one for the district court.[96] The court stated that the statute itself provided adequate protection for recipients because the required element of causation "ensures that Title IX liability remains within proper bounds."[97] In other words, the court should afford broad deference to plaintiff's allegations when considering motions to dismiss pre-assault Title IX claims.

Although the *Karasek* opinion ultimately dismissed the plaintiffs' post-assault claims, the Ninth Circuit's articulation of the specific elements of post-and pre-assault claims, as well as their sound analysis of the differing burdens of proof required depending on the procedural posture of the case, are useful in analyzing the circuit split that arises in the context of motions to dismiss post-assault claims.

D. The Current Circuit Split Regarding Post-Assault/Harassment Claims

The requirements for pleading a post-assault claim sufficient to survive a motion to dismiss are the subject of a circuit split. The central question is whether a plaintiff may satisfy the fifth element of a post-assault claim as stated in *Karasek* by pleading that the school's deliberate indifference made him or her *vulnerable* to further harassment or assault, even if no additional incident of misconduct has occurred, or whether a post-assault claim only survives a motion to dismiss where an *actionable incident* of sexual misconduct has occurred and the Title IX injury is attributable to that post-actual-knowledge incident. Recent opinions from the Sixth and Tenth Circuits illustrate the circuit split.

1. The Tenth Circuit

The Tenth Circuit Court of Appeals considered the appropriate standard in *Farmer v. Kansas State University*, a 2019 case that reached the court on an interlocutory appeal from the denial of the university's motion to dismiss for failure to state a claim.[98] The court held that a plaintiff satisfies the pleading requirements for a post-harassment claim when she/he alleges that a school's deliberate indifference caused her/him

96. *Id*. at 1114.

97. *Id.*

98. Farmer v. Kan. State Univ., 918 F.3d 1094 (10th Cir. 2019).

to be—at a minimum— vulnerable to further harassment.[99] According to the Tenth Circuit, the *Davis* Court settled the matter when it answered the same legal question presented in this case by holding that the school's deliberately indifferent response triggered Title IX liability when it "cause[d] students to undergo harassment *or ma[de] them liable or vulnerable to it*."[100]

The court pointed out that because the procedural posture of the case was an interlocutory appeal of the denial of Kansas State University's ("KSU") motion to dismiss, all of the plaintiffs' factual allegations must be accepted as true and construed in the light most favorable to the plaintiffs.[101] Therefore, the question before the court was: what harm was caused by KSU's alleged deliberate indifference?[102] The plaintiffs' claim that KSU's deliberately indifferent response to their separate reports of rape committed by other students effectively caused them to be denied the benefits of the educational programs or activities. According to the plaintiffs, the ongoing possibility of encountering their respective rapists or other students who knew of the rapes and the school's indifferent response caused them to withdraw from, or decline to participate in, programs and activities at the university, thus resulting in actionable discrimination by KSU under Title IX.[103]

Ruling in favor of the plaintiffs, the court considered both the language of Title IX and the Supreme Court's opinion in *Davis*, as well as Title IX's objective and purpose. The court found that relevant statutory language provided that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or *be subjected to discrimination* under any education program or activity receiving Federal financial assistance."[104]

The Tenth Circuit then considered the *Davis* Court's application of the statute to the student-on-student harassment which resulted in the holding that "deliberate indifference must, at a minimum, cause [students] to undergo harassment or make them liable or vulnerable to it."[105] Recognizing the Supreme Court's disjunctive use of "or" in the final phrase, the Tenth Circuit insisted that courts must give effect to the entire sentence, finding the school responsible for *either* causing a student to "undergo harassment" *or* making a student "liable or vulnerable" to it.[106]

99. *Id.* at 1109.
100. *Id.*at 1097 (quoting *Davis*, 526 U.S. at 644-45).
101. *Id.* at 1097, 1099.
102. *Id.* at 1097.
103. *Id.* at 1098-99.
104. *Id.* at 1103 (quoting 20 U.S.C. §1681(a)) (emphasis added).
105. *Id.* (quoting *Davis*, 526 U.S. at 644-45) (internal quotations deleted).
106. *Id.* at 1104.

The Court looked to the object and purpose of Title IX and found that this interpretation of the *Davis* standard aligned with the objective of "protecting individual students against discriminatory practices."[107]

The Tenth Circuit also carefully considered the implications of its holding; it rejected KSU's argument that by finding the university liable for making students vulnerable to sexual harassment, the court was requiring KSU to provide a remedy for the harm caused by the perpetrators rather than the university.[108] This is especially important because the *Davis* Court held that a school was not required to "purg[e] their schools of actionable peer harassment . . . or engage in particular disciplinary action."[109] The Tenth Circuit insisted that KSU's liability stemmed from the university's deliberate indifference, which caused its students to be vulnerable to further harassment.[110] That vulnerability, in turn, amounted to actionable discrimination under Title IX because it ultimately denied those students the benefits of KSU's education.[111]

Finally, the *Farmer* court explicitly rejected KSU's attempt to increase the pleading burden on survivors of student-on-student sexual violence, finding that requiring a survivor to allege a subsequent act of actionable harassment was inconsistent with the language of the statute, the Supreme Court's articulation of the standard in *Davis*, and subsequent in- and out-of-circuit case law.[112] The Tenth Circuit's interpretation of the *Davis* standard stands in stark contrast to a Sixth Circuit opinion issued the same year.

2. The Sixth Circuit

In *Kollaritsch v. Michigan State University*, the Sixth Circuit Court of Appeals held that the pleading standard for a post-harassment Title IX claim required that a student survivor allege an additional incident of actionable sexual harassment before a school could be found liable under the deliberate indifference standard.[113] The case arose as an interlocutory appeal from a partial denial of Michigan State's motion to dismiss for failure to state a claim on facts similar to those in *Farmer*.[114] Despite the similarities, the Sixth Circuit arrived at a very different conclusion, both procedurally and substantively.

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107. *Id.* (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979)).

108. *Id.*

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

110. *Farmer*, 918 F.3d at 1105.

111. *Id.* at 1106.

112. *Id.* at 1108.

113. Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020).

114. *Id.* at 618.

Procedurally, the court noted that because this case arose as an interlocutory appeal from the denial of a motion to dismiss, it was not governed under the standard of review expressed in Federal Rule of Civil Procedure 12(b)(6) and was instead limited to pure questions of law as well as any issue encompassed by the order certifying the appeal.[115] The court then relied on this "any issue" language as permission to consider the facts contained in the plaintiffs' pleading, rather than following Supreme Court and other Circuit precedent that require the facts be taken as true and construed in the plaintiff's favor even in interlocutory appeals.[116] As a result, the *Kollaritsch* court arrived at a different central question than the Tenth Circuit, despite similar facts and procedural posture.

The Sixth Circuit found that the relevant question of law turned not on what harm was caused by the school's alleged deliberate indifference but rather on "whether a plaintiff must plead further acts of discrimination" to state a claim for deliberate indifference to student-on-student harassment under Title IX in the first place.[117] To answer this question, the court began with the premise that the *Davis* standard encompassed two separate tortious acts: an act of student-on-student harassment sufficient to trigger Title IX and a separate tort of deliberate indifference to that act by the school—*which caused the student survivor to experience an additional act of sexual harassment*.[118] In order to arrive at this conclusion, the Sixth Circuit painstakingly parsed each element of each tort.[119] Relevant for this Casenote are the court's interpretation of the pervasive element of the student-on-student harassment and the causation and injury elements of the tort of deliberate indifference.

In considering how to apply pervasive in the context of student-on-student harassment, the Sixth Circuit relied on dicta from the *Davis* Court that indicated the Court thought it "unlikely" that Congress would have thought that a single act of harassment could have a systemic effect, even though the Court simultaneously conceded that a single instance, if sufficiently severe "*could be said to have such an effect*."[120] Dismissing the latter statement, the Sixth Circuit used the former to support its theory that an additional incident of harassment, beyond the initial harassment that triggered Title IX, was necessary to sufficiently state a claim for deliberate indifference, because a single assault "does not state a claim

115. *Id.*

116. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009); In re Text Messaging Antitrust Litig., 630 F.3d 622 (7th Cir. 2010).

117. *Kollaritsch*, 944 F.3d at 620.

118. *Id.*

119. *Id*. at 620-23.

120. *Id.* at 620 (quoting *Davis*, 526 U.S. at 652).

under *Davis*."[121]

In regard to deliberate indifference, the court identified the requisite injury as some sort of denial or abridgement of the educational opportunities or programs provided by the school.[122] The harm suffered by the student in *Davis* who reported declining grades, trouble concentrating, and fear of attending school, as well as similar harms suffered by a student in a Sixth Circuit case were cited as examples by the court.[123] The court also stated, without accompanying authority, that emotional harm on its own is not sufficient to trigger Title IX liability.[124]

Moving on to causation, the Sixth Circuit found that the "critical point" in *Davis* is that deliberate indifference is only actionable when it either "brings about" or "fails to protect against" further harassment.[125] However, rather than relying on the plain-meaning and ordinary rules of grammar to interpret "deliberate indifference must, at a minimum, cause [students] to undergo harassment or make them liable or vulnerable to it,"[126] the court found that the standard merely listed two ways a school's deliberate indifference *could cause* further harassment.[127] The first way would be by some sort of detrimental action such as encouraging or prompting further harassment and the second would be by not acting and thus leaving the student survivor unprotected from further harassment.[128] The Sixth Circuit explicitly stated that "vulnerable to" sexual harassment had the same meaning as "unprotected from" it and thus the only student survivors who could state a deliberate indifference claim sufficient to withstand a motion to dismiss were those who suffered an initial act of student-on-student harassment *and an additional act*.[129]

Finally, the *Kollaritsch* court differed procedurally from the Tenth Circuit decision in *Farmer* because the Sixth Circuit did not accept the plaintiffs' allegations as true. Instead, the court found that, despite one student survivor's claims of nine separate incidents of "stalking, harassing, and intimidating" by the perpetrator, she failed to plead an additional incident of sexual harassment and therefore could not satisfy the causation element of her deliberate indifference claim.[130] Ultimately, the *Kollaritsch* decision articulates a broader standard than the one in *Davis.* According to the Sixth Circuit:

121. *Id*. at 621, 623.
122. *Id*. at 622.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Davis*, 526 U.S. 629, 644-45 (1999).
127. *Kollaritsch*, 944 F.3d at 623.
128. *Id.*
129. *Id.*
130. *Id*. at 625.

> The plaintiff must plead . . . 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 harassment.[131]

The Eighth and Ninth Circuits join the Sixth Circuit in setting a high bar for deliberate indifference pleadings,[132] while the First and Eleventh Circuits join the Tenth in holding that a showing of subsequent vulnerability to harassment is sufficient to state a claim that a school's deliberately indifferent response violated the student's rights by denying the student the benefits of the school's education or programs.[133]

III. DISCUSSION

This Part will present several arguments for why courts should adopt the broader standard set forth by the Tenth Circuit and discuss shortcomings of the Sixth Circuit opinion that render the application of such a narrow standard legally incorrect and in contradiction to remedial purpose of Title IX. First, the procedural rules and case law regarding motions to dismiss support a more inclusive standard. In addition, the rules of statutory interpretation lend support to the Tenth Circuit opinion and expose flaws in the Sixth Circuit's result. Finally, the combination of the new Title IX rules and a strict pleading standard would set the bar too high for student survivors at the pleading stage, effectively denying them an equitable opportunity for legal remedy.

A. The Procedural Rules and Case Law Support the More Inclusive Standard

In order to survive a motion to dismiss, a court must accept a plaintiff's

131. *Id.*

132. KT v. Culver-Stockton College, 865 F.3d 1054, 1058 (8th Cir. 2017) (finding that the plaintiff failed to prove that the school's response caused her assault and therefore she failed to state a claim); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000) (holding that a lack of evidence that any harassment occurred after the school district learned of the plaintiffs' allegations meant that, under Davis, the school district cannot be deemed to have "subjected" the plaintiffs to the harassment).

133. 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 "a single instance of peer-on-peer harassment could sustain a claim for liability under Title IX if the incident was severe and the institution's deliberately indifferent response resulted in the student being denied access to a scholastic program or activity); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1297 (11th Cir. 2007) (finding the university's deliberately indifferent response to plaintiff's report of sexual assault rendered her decision to withdraw from university reasonable and expected and thus the deliberate indifference denied her the opportunity to continue to attend UGA, subjecting her to discrimination under Title IX).

allegations as true, and construe all facts in the plaintiff's favor.[134] Importantly, this standard is based on *plausibility*, not *probability*, and is applied to interlocutory appeals as well as appeals from final judgments.[135] As the Seventh Circuit stated when applying the pleading standard to an interlocutory appeal in an antitrust case, "the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's plausibility."[136] Appropriate deference to this pleading standard and to the Federal Rules of Civil Procedure validates the Tenth Circuit opinion and casts doubt upon the Sixth Circuit's.

The Tenth Circuit appropriately acknowledged the procedural posture of the case, recognizing that even in the context of an interlocutory appeal from a motion to dismiss for failure to statute a claim, the plaintiffs were entitled to the standard expressed in *Twombly* and *Iqbal*. Therefore, rather than questioning the facts, the court and the parties accepted them as true and construed them in the light most favorable to the plaintiffs.[137] As a result of a *de facto* finding of plausibility regarding KSU's deliberate indifference, the *Farmer* court focused its legal analysis on the proper legal question: what harm resulted from the school's deliberate indifference?[138] This allowed the court to undertake a straightforward interpretation of the statute and the *Davis* holding, apply the law to the facts, and arrive at a conclusion that is supported by the statute's text and purpose and Supreme Court precedent.

By contrast, the Sixth Circuit's failure to abide by the pleading standard set forth in Federal Rule of Civil Procedure 8 and interpreted by *Twombly* and *Iqbal* led them astray, resulting in a standard that is excessively narrow and an opinion that is ambiguous at best.[139] The key difference between the *Farmer* and *Kollaritsch* decisions is what question the court claimed as the central issue in the case. By ignoring the applicable pleading standard and inferring the facts alleged in the *defendant's* favor, the Sixth Circuit arrived at the wrong question, focusing on whether Michigan State's response was, in fact, deliberately indifferent, rather than inferring from the facts provided that it was. This question stops short

134. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). *See also* Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (extending the Rule 8 pleading standard set forth in *Twombly* to civil actions); Fed. R. Civ. P. 8(a)(2).

135. *See* In re Text Messaging Antitrust Litig., 630 F.3d 622, 625 (7th Cir. 2010) (allowing an interlocutory appeal regarding the sufficiency the Plaintiff's complaint to proceed because Defendant's were asking the court to apply the pleading standard from *Twombly* to a set of factual allegations *taken as true on appeal*).

136. *Id.* at 629 (internal quotation marks omitted).

137. Farmer v. Kan. State Univ., 918 F.3d 1094, 1097, 1099 (10th Cir. 2019)..

138. *Id.* at 1097.

139. HARVARD LAW REVIEW, *Sixth Circuit Requires Further Harassment in Deliberate Indifference Claims*, 133 HARV. L. REV. 2611 (June 10, 2020), https://harvardlawreview.org /2020/06/kollaritsch-v-michigan-state-university-board-of-trustees/.

of considering the *actual* question in cases where parties seek to recover from the school itself in Title IX cases: whether the school's action—or inaction—in response to a known incident of sexual harassment subjected the student survivor to discrimination by ultimately preventing him or her from participating in the school's educational programs or activities.

Following this initial procedural misstep, the court reasoned that discrimination resulting from the school's deliberate indifference could not exist in the absence of an additional discrete act of sexual harassment or assault. In other words, the Sixth Circuit was focused on actions of third parties, rather than the actions of the university itself. However, as the *Farmer* decision clearly illustrates, the discrimination at issue in Title IX student-on-student harassment cases arising under claims of deliberate indifference is whether the school discriminated against the student survivor by effectively denying him or her access to its educational programs, not whether an additional act of harassment by a third party occurred.[140] In order to sustain its opinion to the contrary, the Sixth Circuit resorted to a convoluted reading of the *Davis* decision that defied the rules of statutory interpretation and created an additional element required to sustain a claim of deliberate indifference—an element that neither the statute nor the *Davis* opinion require.

B. The Rules of Statutory Construction Support the Broader Definition of Post-Harassment

Chief Justice John Marshall recognized early in America's judicial history, that "[t]hose who apply the rule [of law] to particular cases must of necessity expound and interpret that rule."[141] The rules of statutory construction aid judges in that process. However, the canons of construction are many, and as a result, are not a panacea to problems of interpretation; one can generally find an opposing canon to refute any point argued.[142] An appropriate resolution of opposing canons involves the courts' exercising discretion over which interpretation of the statute should be afforded more weight.[143]

One of the fundamental principles guiding the interpretation of modern legal instruments is that text should be interpreted in a way that "furthers rather than obstructs the document's purpose."[144] This is particularly relevant for statutes like Title IX that concern protections for civil rights.

140. *Supra*, Section II.

141. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

142. ANTONIN SCALIA & BRYAN GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 68 (2012).

143. *Id.*

144. *Id.* at 70.

According to the Supreme Court, civil rights laws and other remedial statutes "must be liberally construed in conformance with [their] purpose, and in a way which avoids harsh and incongruous results."[145] In *Gebser*, the Supreme Court noted that Congress enacted Title IX to provide individual citizens protection from discrimination by institutions receiving federal funding, creating what the Court characterized as a contract that conditioned federal funding on a promise by the recipient *not to discriminate*.[146] Therefore, Title IX is, at bottom, a remedial statute whose purpose is to prevent discrimination. Any valid interpretation of the statute must conform with this purpose and avoid contrary results.

The canon of imputed common law counsels that words that are undefined (in *Davis*, the phrase "liable or vulnerable to") are to be interpreted and applied as they would be at common law.[147] In an effort to fill the interpretive gap left by the *Davis* decision, the Sixth Circuit tacitly invoked this canon by imputing the elements of the common law torts and the but-for causation standard commonly associated with tort law into Title IX claims.[148] However, this canon is meant to add clarity to single words or phrases and does not support the wholesale import of an entire common law tort with all of its attendant elements and causation standards. Furthermore, importing common-law tort principles into civil rights statutes is problematic for two reasons, both of which are evident here. First, anti-discrimination statutes are not generally element-specific on their face and thus it is incongruent to arbitrarily impose tort law's elements-based analysis.[149] And, second, importing tort principles, as the Sixth Circuit does here, can frustrate the original purpose of the statute.[150] The result in *Kollaritsch* is a post-assault standard that is blatantly contradictory to Title IX's remedial purpose because it conditions a student survivor's ability to access the judicial system on enduring not one, but *two incidents of sexual harassment*.

In seeking to balance conflicting results arrived at by the application of different canons, courts should recall that the judicially sound outcome "seeks to discern literal meaning in context."[151] Here, the Tenth Circuit

145. Voris v. Eikel, 346 U.S. 328, 333 (1953). *See also* Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969) ("A narrow construction of §1982 would be inconsistent with the broad and sweeping nature of the protection meant to be afforded by §1 of the Civil Rights Act of 1866."); Northeast Marine Terminal v. Caputo, 432 U.S. 249, 268 (1977) ("The language of the 1972 Amendments [to the LHWCA] is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation.").

146. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1989) (emphasis added).

147. SCALIA & GARDNER, *supra* note 142, at 246.

148. *Supra* Section II.

149. HARVARD LAW REVIEW, *supra* note 139; *see also* Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107, 1109 (2014).

150. HARVARD LAW REVIEW, *supra* note 139.

151. SCALIA & GARDNER, *supra* note 142, at 53.

decision relies on the plain meaning of the text and ordinary grammatical rules to arrive at an application of the *Davis* decision that is in accord with the stated purpose of the statute and "avoids harsh and incongruous results."[152] By contrast, the Sixth Circuit opinion misapplies a narrow canon of construction, impermissibly imports a conflicting area of the law, and arrives at an unjust result that frustrates Title IX's purpose of protecting individuals who are denied participation in a school's educational programs or activities as a direct result of the school's actions.

C. The Combination of the Sixth Circuit's Interpretation and the New Title IX Rules Sets the Bar Too High for Survivors

The post-assault standard articulated by the *Kollaritsch* court standing alone makes it extremely difficult for student survivors to find recourse for their school's deliberately indifferent response under Title IX, even at the pleading stage. When combined with the new Title IX regulations, that bar becomes impossibly high and frustrates the purpose for which Title IX was enacted. Recent scholarship, public policy, and even decisions made by the Department of Education in promulgating the new Title IX regulations all support the more inclusive pleading standard.

Ironically, the Sixth Circuit opinion expressly notes the high bar student survivors must meet to prevail on a deliberate indifference claim.[153] And the Ninth Circuit implicitly recognizes that bar when it insists that plaintiffs need not prove sufficient facts to survive a motion to dismiss when the case has only progressed as far as the pleading stage.[154] Recent scholarship published by the advocacy group Know Your IX details additional barriers for survivors caused by simply reporting the assault to their schools.[155] Notably, the very act of reporting substantially disrupted the education of thirty-nine percent of survivors.[156] The types of harm that resulted in discrimination due to the resulting denial of access to their school's education program were the same harms alleged by the

152. Voris v. Eikel, 346 U.S. 328 (1953).

153. Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 619 (6th Cir. 2019) ("[A] Title IX private cause of action against a school for its response to student-on-student sexual harassment is a 'high standard' that applies only 'in certain limited circumstances.'").

154. Karasek v. Regents of Univ. of Cal., 956 F.3d 1093, 1114 (9th Cir. 2020) (distinguishing *Karasek* from *Simpson* because the procedural posture of the latter was an appeal from a motion for summary judgment and thus discovery had been conducted; appellants in a 12(b)(6) motion need only "plausibly allege . . . a policy of deliberate indifference.").

155. Sarah Nesbitt et al., *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout*, KNOW YOUR IX (March 2021), https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf.

156. *Id.* at 1.

plaintiffs in both *Farmer* and *Kollaritsch*.[157]

As discussed above, the codification of the severe, pervasive, *and* objectively offensive standard in the new regulations further increases barriers to recourse for student survivors. Similarly, the actual notice standard for Title IX claims has been officially codified in the new regulations, eliminating the constructive notice standard of "knew or should have known" that informed the now-withdrawn guidance documents from the Obama administration, which arguably set the bar higher for a school's response. Now, a school will only be held liable for a Title IX violation, including a deliberately indifferent response, upon a showing that a school official "with authority to institute corrective measures on the school's behalf" had actual knowledge of the harassment or assault.[158] These compounding barriers, combined with the standard articulated by *Kollaritsch*, arguably discriminate against student survivors by acting as an almost complete bar to remedy, precluding the facts supporting their allegations from even being heard.

Ironically, the new Title IX regulations also lend some support to doing away with the *Kollaritsch* standard. First, the 2020 regulations expressly incorporate the crimes included in the Clery Act and the Violence Against Women Act. Any sexual assault, dating violence, domestic violence, or stalking as defined by either the federal Clery Act[159] or the Violence Against Women Act[160] constitutes actionable sexual harassment. According to the Department of Education, it is unnecessary to show severity, pervasiveness, or objective offensiveness in regard to these acts because sanctioning them does not implicate the First Amendment and they inherently deny victims access to equal education.[161] Thus, the DOE further undermines the Sixth Circuit opinion by expressly acknowledging that a *single* act of sexual harassment can be sufficient to state a claim under Title IX.[162] Notably, the complaint that allegedly failed to state a claim in *Kollaritsch* included nine reports of stalking subsequent to Michigan State's deliberately indifferent response and, under the new rules, would therefore survive a motion to dismiss even if the "severe, pervasive, and objectively offensive" standard was not met.

157. *Id.* at 5. For example, declining grades, panic attacks, leaves of absence, transfers to new schools, and drop outs.

158. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., *Summary of Major Provisions of the Department of Education's Title IX Final Rule*, http://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf.

159. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. § 1092(f) (2018).

160. Violence Against Women Act, 34 U.S.C.A. §12361 (West).

161. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30029, 30033 (May 19, 2020) (codified at 34 C.F.R. Part 106).

162. *Id.* at 30172 ("[F]ailing to provide redress for even a single incident . . . does present unnecessary risk of allowing sex-based violence to escalate").

The new regulations also expressly acknowledge that critical use of the disjunctive "or" in the text and application of Title IX, doing away with it in the definition of what constitutes sexual harassment in the first place by changing the language from "severe, pervasive, *or* objectively offensive" to "severe, pervasive, *and* objectively offensive."[163] Since the new regulations adopt the Supreme Court's conjunctive definition from *Davis*, the DOE is clearly endorsing the Court's use of the conjunctive "and." It stands to reason then, that the DOE must also be supportive of the disjunctive "or" used later in the same opinion in the context of a school's deliberate indifference.

Finally, the new rules provide enhanced due process protections for the alleged perpetrators of sexual assault or harassment, decreasing the likelihood that the rights of students accused, but not yet found guilty of, sexual harassment will be abridged as the result of Title IX actions. These additional protections militate against setting the pleading bar so high for survivors, particularly in deliberate indifference cases which, when properly considered, implicate the school, not the alleged perpetrator.

Should any doubt remain as to whether the Sixth Circuit "got it right," it is worth noting one fact the court left out of its opinion: the perpetrator of the assault on the second plaintiff was the same student the school failed to discipline as a result of Kollaritsch's initial report, and the same student who Kollaritsch alleged stalked her subsequent to the school's response. The application of the higher pleading standard unjustly denied the *Kollaritsch* plaintiffs a remedy afforded to them under Title IX. Equally importantly, it allowed Michigan State University to escape liability for its actions that had a discriminatory effect on students and perpetuated a dangerous environment on campus. The net result is precisely the one Title IX was enacted to prevent: Michigan State suffered no consequence despite the fact it breached its contract with the federal government by continuing to accept federal funding while discriminating against its student survivors.

IV. CONCLUSION

This Casenote demonstrates how student survivors of sexual assault and harassment are at the mercy of the Title IX pendulum swings created by the interplay of legislation, regulation, judicial interpretation, presidential policy, and shifting political landscapes. The Sixth Circuit decision reveals the ugly and unsettling cost of this ride on the pendulum. Meanwhile, the Tenth Circuit decision illustrates how a faithful application of the regulations and Supreme Court precedent in the context

163. *Id.* at 30034.

of Title's IX remedial purpose results in a decision closely aligned with Title IX's text, object, and purpose, provides a more predictable legal outcome for all parties, and ensures that student survivors are afforded all available legal remedies. Absent further Congressional legislation or an additional Supreme Court opinion that mitigates the pendulum's swing, the lower courts should follow the Tenth Circuit's example.