

SECOND TIME'S THE HARM: THE SIXTH CIRCUIT'S DELIBERATELY INDIFFERENT APPROACH TO SEXUAL HARASSMENT

Abstract: On December 12, 2019, in *Kollaritsch v. Michigan State University*, the U.S. Court of Appeals for the Sixth Circuit held that plaintiffs must experience post-notice sexual harassment to sustain a Title IX deliberate indifference claim against a university. With this decision, the Sixth Circuit joined the Eighth and Ninth Circuits in reading *Davis v. Monroe County Board of Education*'s causation statement as requiring post-notice harassment. In contrast, the First, Tenth, and Eleventh Circuits only require plaintiffs to prove that the school's clearly unreasonable response left them vulnerable to further harassment to sustain a deliberate indifference claim; plaintiffs need not show that further harassment actually occurred. This Comment argues that the Sixth Circuit's approach is incorrect because it needlessly narrows the holding of *Davis* to dispose of the vulnerability component and opposes the legislative goals of Title IX.

INTRODUCTION

One in five women in the United States enter college with the dream of receiving an academic degree and leave with the trauma of suffering a sexual assault.¹ It is estimated that only 20% of student victims report their incident to the university and only 1% of those reports will actually lead to a university taking disciplinary action against the alleged perpetrator.² Perhaps most shocking, a 2014 report from the Senate Subcommittee on Financial and Contracting Oversight found that 40% of universities had not investigated a single report of sexual assault over the past five years, a statistical anomaly given the number of students known to have been assaulted at colleges each year.³ Given these

¹ See Claude A. Mellins et al., *Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risk*, PLOS ONE, Nov. 8, 2017, at 1, 9 (finding in a comprehensive study of college campuses that 28% of women and 12% of men experience sexual assault while in college). In this study, sexual assault is defined as “sexualized touching, attempted penetration [oral, anal, vaginal, other], or completed penetration” of the victim. *Id.* at 1.

² See David DeMatteo, Meghann Galloway, Shelby Arnold & Unnati Patel, *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCH. PUB. POL’Y & L. 227, 228–29 (2015) (reporting statistics on the prevalence of sexual assault at universities and how student reports are handled by these institutions).

³ See Brief of Amicus Curiae National Center for Victims of Crime in Support of Petitioner at 5, *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 141 S. Ct. 554 (2020) (No. 20-10) (citing *Campus Sexual Assault*, NAT’L SEXUAL VIOLENCE RES. CTR. (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_campus-sexual-assault.pdf [<https://perma.cc/6756-W8EE>]); see also U.S. S. SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS:

troubling statistics, courts have grappled with how much responsibility universities bear for their minimal response to known cases of sexual assault on their campuses under Title IX.⁴ In 2019, in *Kollaritsch v. Michigan State University Board of Trustees*, the Sixth Circuit contended with this issue when four Michigan State University students were assaulted on the university's campus.⁵

Part I of this Comment discusses how landmark Supreme Court cases have interpreted Title IX over time, as well as the factual and procedural history of *Kollaritsch v. Michigan State University*.⁶ Part II compares the conflicting approaches of the U.S. Court of Appeals for the Sixth, Eighth, and Ninth Circuits with those of the First, Tenth, and Eleventh Circuits.⁷ Part III argues that the Sixth Circuit's approach in *Kollaritsch* ignores the legislative goals of Title IX and that lower courts should adopt the First Circuit's approach in *Fitzgerald v. Barnstable School Committee* when evaluating deliberate indifference claims.⁸

I. FROM TITLE IX TO *KOLLARITSCH*: THE ART OF PROVING DELIBERATE INDIFFERENCE

In 2019, in *Kollaritsch v. Michigan State University*, the Sixth Circuit Court of Appeals joined the Eighth and Ninth Circuit courts in deciding that a victim of peer-on-peer sexual harassment must experience further actionable harassment to sustain a Title IX claim against a university for deliberate indifference.⁹ Section A of this part highlights landmark Supreme Court decisions that developed the relevant pleading standards for deliberate indifference

HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS 2 (2014) (detailing statistics on how many universities completed a Title IX investigation in the past five years).

⁴ See 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, 13–21 (2017) (discussing the circuit split over whether post-notice harassment is required to sustain a deliberate indifference claim under Title IX).

⁵ See *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 624–25 (6th Cir. 2019) (discussing the facts of the plaintiffs' alleged sexual assaults), *cert. denied*, 141 S. Ct. 554 (2020).

⁶ See *infra* notes 9–43 and accompanying text.

⁷ See *infra* notes 44–61 and accompanying text.

⁸ See *infra* notes 62–78 and accompanying text.

⁹ *Kollaritsch*, 944 F.3d at 624–25. With this decision, the Sixth Circuit joined the Eighth and Ninth Circuits in requiring post-notice actionable harassment to sustain a claim, creating a 3–3 circuit split. See, e.g., *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1055, 1058 (8th Cir. 2017) (holding that, among other things, a plaintiff cannot sustain a claim against a school district without demonstrating that the school's deliberately indifferent response subjected the victim to further harassment); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 737, 739–40 (9th Cir. 2000) (same). But see, e.g., *Farmer v. Kan. State Univ.*, 918 F.3d 1096, 1097 (10th Cir. 2019) (holding that victims can sustain a claim when their schools' deliberate indifference left them vulnerable to further sexual harassment, even if no further harassment has actually occurred); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 168, 172 (1st Cir. 2007) (same), *rev'd on other grounds*, 555 U.S. 246 (2009); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297–98 (11th Cir. 2007) (same), *superseded on other grounds by* FED. R. CIV. P. 15(a)(b).

claims and led to the circuit split on the issue of whether further actionable harassment is required to sustain a claim.¹⁰ Section B discusses the factual and procedural history of *Kollaritsch v. Michigan State*.¹¹

A. The Broader History of Title IX & Davis

In 1972, President Nixon signed Title IX of the Education Amendments into law, paving the way for women to secure equal educational opportunities in the United States.¹² Title IX expanded on the Civil Rights Act of 1964 to prohibit subjecting any person to sex discrimination at an educational institution that receives federal funds.¹³ Similar to Title VI of the Civil Rights Act of 1964, which bans workplace discrimination on the basis of race, sex, and national origin, Title IX was passed without an explicit private right of action for the injured party.¹⁴

In 1979, in *Cannon v. University of Chicago*, the Supreme Court first recognized a judicially implied private right of action for victims of sex discrimi-

¹⁰ See *infra* notes 12–30 and accompanying text.

¹¹ See *infra* notes 31–43 and accompanying text.

¹² See *The 14th Amendment and the Evolution of Title IX*, U.S. COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix> [<https://perma.cc/GT44-TQ2V>] (explaining the legislative history of Title IX). Title IX was written and proposed by Patsy Mink, the first woman of color elected to serve in Congress. Representative Mink served twelve terms, from 1965 to 1977, and from 1990 until her death in 2002. See Judy Tzu-Chun Wu & Gwendolyn Mink, *How Patsy Takemoto Mink, the First Woman of Color in Congress, Helped Craft Title IX*, TIME (June 1, 2022), <https://time.com/6174298/patsy-takemoto-mink-title-ix/> [<https://perma.cc/599P-586N>] (detailing the life and accomplishments of Patsy Mink).

¹³ See *The 14th Amendment and the Evolution of Title IX*, *supra* note 12 (explaining the meaning and purpose of Title IX); 20 U.S.C. § 1681(a) (mandating that no person in the United States be excluded, denied benefits, or be “subjected to discrimination” based on sex at any educational institution accepting federal financial assistance). Title IX was passed pursuant to the Fourteenth Amendment’s Equal Protection Clause, which is the basis for modern civil rights legislation. U.S. CONST. amend. XIV, § 1; Civil Rights Act of 1964, 42 U.S.C. § 2000d; *The 14th Amendment and the Evolution of Title IX*, *supra* note 12.

¹⁴ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–96 (1979). A private right of action permits a private litigant to sue for a violation of the Constitution, a statute, or federal common law. Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. U. CHI. L.J. 117, 120 (2017). In *Cannon*, the Supreme Court applied the *Cort v. Ash* factors to decide whether to recognize an implied right of action: (i) “whether the statute was enacted for the benefit of a special class” that the plaintiff belongs to; (ii) whether the legislative history shows that Congress intended to permit or deny a private right of action; (iii) whether recognizing a private right of action would bolster or frustrate the underlying purpose of the statute; and (iv) whether the subject matter of the statute is an area of federal or primarily state concern. *Cannon*, 441 U.S. at 688–709; see also *Cort v. Ash*, 422 U.S. 66, 78 (1975) (listing factors). In *Cannon*, the Court held that Title IX satisfied all four of the *Cort* factors. *Cannon*, 441 U.S. at 709. Today, however, the Court is less likely to recognize implied rights of action—in 2001, in *Alexander v. Sandoval*, it “effectively pulled the plug” on the former approach. Note, *Interpreting Congress’s Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1516–17 (2021) (discussing *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001)).

nation under Title IX.¹⁵ In determining that an implied right of action exists, the Supreme Court looked to Congress's main objectives for passing the legislation.¹⁶ The Court reasoned that Title IX's first objective was to prevent educational institutions that engage in discriminatory practices from receiving federal funds.¹⁷ The second purpose was to protect students from sex discrimination that hampers their receipt of an education.¹⁸ Considering both of these factors, the Court determined that creating a private right of action was necessary to enforce Title IX's objectives.¹⁹

Later in 1992, in *Franklin v. Gwinnett County Public Schools*, the Court ruled that monetary damages are a permitted remedy for violations of the statute.²⁰ The *Franklin* Court, however, did not establish any standards to determine when school districts are held monetarily liable for harassment of their students, leaving the lower courts to create their own tests.²¹ Eventually in 1998, in *Gebser v. Lago Vista Independent School District*, the Supreme Court created standards to govern when an educational institution is liable for harassment, but only for cases of teacher-on-student harassment.²² The Court held that, in these cases, an institution violates Title IX when it has actual knowledge of

¹⁵ *Cannon*, 441 U.S. at 717. The Court previously interpreted Title VI of the Civil Rights Act of 1964 to establish an implied private right of action to combat racial discrimination. *Id.* at 694–96. The *Cannon* Court explained that the drafters of Title IX, who modeled the statute explicitly after Title VI, would expect the act to be similarly interpreted and applied, thereby creating an implied private right of action to combat sex discrimination. *Id.* at 696.

¹⁶ *Id.* at 704.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 706–08 (finding that creating an individual remedy for Title IX violations will provide “effective assistance” to achieve the statute’s goals).

²⁰ *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992).

²¹ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (acknowledging that *Franklin*’s limited holding did not establish a test for lower courts to follow). Compare *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1126 (5th Cir. 1997) (holding that a school district was not liable for teacher-on-student harassment unless an employee with supervisory power had actual notice of the harassment and failed to act), *aff’d sub nom.* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), with *Kracunas v. Iona Coll.*, 119 F.3d 80, 86–87 (2d Cir. 1997) (holding that Title IX claims should be evaluated under the same standards of Title VII hostile work environment claims), *abrogated by Gebser*, 524 U.S. at 277. Under Title VII, employers are responsible for their employee’s harassment if the harasser is a supervisor and uses his or her authority to further harass the victim, or when the employee is a victim’s co-worker and the employer “provided no reasonable avenue of complaint” or was aware of the harassment but took no steps to remedy it. *Kracunas*, 119 F.3d at 86–87 (quoting *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994)).

²² 524 U.S. at 281. Any public educational institution receiving federal funds can be liable for Title IX violations, whether the institution is a primary school or a university. *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC. (Aug. 20, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html#:~:text=Title%20IX%20applies%20to%20schools,financial%20assistance%20from%20the%20Department [<https://perma.cc/EY4R-AHS7>].

the teacher-on-student harassment and is deliberately indifferent in response to the harassment.²³

Then, in 1999, in *Davis v. Monroe County Board of Education*, the Supreme Court expanded on the holding in *Gebser* to establish a private right of action for peer-on-peer harassment.²⁴ In doing so, the Court interpreted Title IX to allow victims of peer-on-peer sexual harassment to sue a school board only in situations where the institution is deliberately indifferent to the student's harassment.²⁵ Concerned about exposing school districts to an excessive amount of litigation,²⁶ however, the Supreme Court established several safeguards to limit a school's potential liability, including that: (i) the school must have actual notice of the harassment; and (ii) the harassment must be actionable, meaning it is "so severe, pervasive, and objectively offensive that it [deprives] victims of access to the educational opportunities or benefits provided by the school."²⁷ Furthermore, the Court held that a school board is only responsible for its own misconduct, not for the conduct of its agents or students.²⁸ Therefore, a school board is only liable when its members engage in discrimination themselves or when its deliberate indifference *subjects* a student to harassment.²⁹ If either of those causation elements are met, deliberate indifference to peer-on-peer sexual harassment by a school board can give rise to a sex discrimination claim under Title IX.³⁰

²³ *Gebser*, 524 U.S. at 290 (defining deliberate indifference as "an official decision by the [educational institution] not to remedy the violation"). Although *Gebser* set the standard for Title IX deliberate indifference claims for teacher-on-student harassment, the plaintiff in this case could not meet this standard because the school district did not have adequate notice of her teacher's harassment. *Id.* at 277.

²⁴ *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

²⁵ *Id.* at 648. The Court defined deliberate indifference as responding to harassment in a "clearly unreasonable" manner. *Id.* at 648–49. The Court was careful to differentiate this from the lower reasonableness standard of negligence to avoid creating a burden on school districts through high litigation expenses. *Id.* at 649.

²⁶ *See id.* at 649 (acknowledging that administrators of educational institutions "shoulder substantial burdens" because of "legal constraints" on their authority to choose how students are disciplined).

²⁷ *Id.* at 650. At minimum, actual knowledge requires a school official who has the authority to investigate and take remedial measures to combat the alleged discrimination to be notified. *Gebser*, 524 U.S. at 290.

²⁸ *See Davis*, 526 U.S. at 642 (citing *Gebser*, 524 U.S. at 283) (declining to impose agency principles to hold school districts strictly liable for the misconduct of their teachers).

²⁹ *See id.* at 644–45 ("defining 'subject' as 'to cause to undergo the action of something specified; expose' or 'to make liable or vulnerable; lay open; expose'") (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)). Using this definition in the context of sexual harassment, the *Davis* Court interpreted "subject" to mean causing students "to undergo harassment" or making students "liable or vulnerable to it." *Id.* The term "subject" is also found in the statutory language of Title IX itself: "No person in the United States shall . . . be *subjected* to discrimination" 20 U.S.C. § 1681(a) (emphasis added).

³⁰ *See Davis*, 526 U.S. at 650 (explaining that the Court is constrained by its previous decisions characterizing sexual harassment as a type of discrimination in a school setting under Title IX).

B. Factual History of Kollaritsch v. Michigan State

Over the span of several years, four female Michigan State University (MSU) students alleged that they were sexually assaulted by male peers at the university.³¹ In 2012, Emily Kollaritsch reported to the university that she was sexually assaulted twice by a male student, John Doe, who lived in her dormitory.³² Two years later, Shayna Gross informed MSU that she was sexually assaulted by that same student, John Doe, while she was intoxicated at a fraternity party.³³ Also in 2014, Roe 1 reported to the university that she had been sexually assaulted by a different male student.³⁴ In each case, the university investigated the incident over the span of many months and eventually took a range of disciplinary actions against the male perpetrators.³⁵ None of the alleged perpetrators were permanently barred from the campus, however, and several remained enrolled at MSU at the conclusion of the school's investigations.³⁶ The plaintiffs then brought suit against the university alleging that they were left vulnerable to further harassment due to the male students' continued presence on campus.³⁷ They alleged that the university was deliberately indifferent to their sexual assaults and violated their rights to equal protection under 42 U.S.C. § 1983 by depriving them of educational opportunities.³⁸

³¹ *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 624–25 (6th Cir. 2019). For a thorough overview of how campus sexual assault investigations interact with criminal investigations, see Emma B. Bolla, Note, *The Assault on Campus Assault: The Conflicts Between Local Law Enforcement, FERPA, and Title IX*, 60 B.C. L. REV. 1379, 1382–96 (2019).

³² *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 298 F. Supp. 3d 1089, 1098–99 (W.D. Mich. 2017), *rev'd*, 944 F.3d 613.

³³ *Id.* at 1099. Roe 2 is also a plaintiff in this case, although the facts of her harassment claim against the school district are not presented in this appeal. *Id.*

³⁴ *Kollaritsch*, 944 F.3d at 625.

³⁵ *See id.* at 624–25 (detailing the university's investigations and disciplinary actions against the perpetrators). MSU investigated Kollaritsch's assault over a seven-month period and took disciplinary action two months later by placing John Doe on probation and prohibiting him from contacting her. *Id.* at 624. In Gross's case, MSU similarly investigated the incident over an eleven-month period and took disciplinary action by expelling John Doe, as this was his second time being accused of sexual assault on campus. *Id.* at 625. John Doe appealed the decision twice and the second appeal led to a new investigation in which Gross's allegations could not be substantiated and the university reinstated Doe. *Id.* MSU investigated the incident involving Roe 1 and did not discipline the male student because it found insufficient evidence to conclude that he had sexually assaulted Roe 1. *Id.*

³⁶ *Id.* at 624–25. Even though MSU issued a no-contact order against Kollaritsch's perpetrator, he was allowed to continue living in their shared dormitory. *Id.* Kollaritsch proceeded to run into John Doe nine times around their dormitory and in the on-campus cafeteria throughout the school year, and she filed a retaliation complaint against him in 2013. *Id.* at 624. The university investigated this complaint and found John Doe was not retaliating against the victim by being present on the school campus. *Id.* None of the other perpetrators had any contact with their victims after the original alleged assaults. *Id.* at 625.

³⁷ *See id.* at 624–25 (detailing the basis of the plaintiffs' claims against the university).

³⁸ *See id.* at 618, 624–25 (listing the plaintiffs' claims against MSU). More specifically, the plaintiffs sued the Michigan State University Board of Trustees and the Vice President for Student Affairs,

The district court dismissed the majority of the claims, except several claims against MSU for violating Title IX and a single § 1983 claim for violating the plaintiff's right to equal protection.³⁹ For the remaining claims, the court found that the plaintiffs pleaded sufficient facts to show the university was deliberately indifferent to their assaults because the university took an unreasonable amount of time to investigate the complaints and did not prevent the male students from having contact with the plaintiffs during that time.⁴⁰

MSU motioned the district court to decide whether *Davis* should be interpreted to require victims to prove that the university's deliberate indifference to their initial complaint led to further harassment, or if it is sufficient for victims to show that the university's deliberate indifference left them vulnerable to further acts of harassment.⁴¹ In 2019, the Sixth Circuit granted MSU's interlocutory appeal and reversed the district court's decision, holding that the students must prove that the university's deliberately indifference led to further actionable harassment, which none of the plaintiffs could do.⁴² Lastly, in 2020, the Supreme Court denied Kollaritsch's petition for certiorari.⁴³

II. ONE HARM OR TWO: CONFLICTING APPROACHES TO INTERPRETING *DAVIS*

In 2019, in *Kollaritsch v. Michigan State*, the Sixth Circuit interpreted the previous Supreme Court decision, *Davis v. Monroe County Board of Education*, to require post-notice actionable harassment to sustain a deliberate indifference claim against a university.⁴⁴ Section A of this Part analyzes the *Kollaritsch* inter-

Denise Maybank, for Title IX, Due Process, and Equal Protection violations under 42 U.S.C. § 1983 and under state law. *Id.* at 618.

³⁹ See *id.* at 618–19 (citing *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 298 F. Supp. 3d 1089, 1096 (W.D. Mich. 2017), *rev'd*, 944 F.3d 613) (detailing the case's procedural history). The majority of the plaintiffs' claims were dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Id.* at 618.

⁴⁰ See *Kollaritsch*, 298 F. Supp. 3d at 1102–04 (finding that MSU's investigations, which spanned from seven months to a year, took an unreasonably long amount of time to be completed).

⁴¹ *Kollaritsch*, 944 F.3d at 619. MSU motioned the court to resolve this question through an interlocutory appeal. Interlocutory appeals only answer pure questions of law and do not determine any facts. *Id.* at 624 (citing *Foster Wheeler Energy Corp. v. Metro. Knox Solid Waste Auth., Inc.*, 970 F.2d 199, 202 (6th Cir. 1992)).

⁴² *Id.* at 618–19.

⁴³ *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 141 S. Ct. 554 (2020) (mem.) (denying certiorari). The Court's denial of certiorari deepened the circuit split over whether a plaintiff must prove further actionable harassment to succeed on a deliberate indifference claim under Title IX against an educational institution. See generally Cormier, *supra* note 4, at 13–21 (providing a general overview of the circuit split).

⁴⁴ *Kollaritsch*, 944 F.3d at 623–24. The view of the Sixth Circuit is also held by the Eighth and Ninth Circuits. See *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1055, 1058 (8th Cir. 2017) (holding that, among other things, a plaintiff cannot sustain a claim against a school district without demonstrating

pretation of *Davis*'s two-part causation statement.⁴⁵ Section B analyzes the opposing view endorsed by the First, Tenth, and Eleventh Circuit courts.⁴⁶

A. The Sixth Circuit's Approach in *Kollaritsch*

In *Kollaritsch*, the Sixth Circuit interpreted *Davis*'s two-part causation statement as two different ways a university could be held liable for the further sexual harassment of a student.⁴⁷ According to the Sixth Circuit, the first way a university can incur liability for peer-on-peer harassment is if its response instigates further harassment or directly makes harassment against the student worse.⁴⁸ The court held such a response causes the student to "undergo harassment" in violation of Title IX.⁴⁹ The second way an educational institution can be held liable is if its response is clearly unreasonable such that it fails to address the harassment and leaves the student "vulnerable to" further harassment.⁵⁰ The court made clear that each pathway assumes that the post-notice harassment has actually occurred.⁵¹

Overall, the *Kollaritsch* court held that a plaintiff must show all the following elements to sustain a deliberate indifference claim against an educational institution including: (i) an instance of actionable harassment; (ii) actual notice by the university; (iii) a further instance of actionable harassment *after* the school district had notice of prior instance(s); and (iv) that the university's deliberately indifferent response to the first instance(s) caused the post-notice instance of harassment in either of the two pathways laid out above.⁵² The court explained that this strict elemental interpretation conforms to the legislative goals of Title IX and *Davis*, holding universities liable only when their actions subject students to further harassment.⁵³ Although the *Kollaritsch* court did not define

that the school's deliberately indifferent response subjected the victim to further harassment); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 737, 739–40 (9th Cir. 2000) (same).

⁴⁵ See *infra* notes 47–53 and accompanying text.

⁴⁶ See *infra* notes 55–61 and accompanying text.

⁴⁷ See *Kollaritsch*, 944 F.3d at 622–23 (“[D]eliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.”) (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999)).

⁴⁸ *Kollaritsch*, 944 F.3d at 623.

⁴⁹ *Id.* at 622–23.

⁵⁰ *Id.* A slightly different way to categorize this view of *Davis*'s two-part causation statement is that a school is liable when: (i) its clearly unreasonable *commissive* response causes a student to directly “undergo” further harassment or; (ii) its clearly unreasonable *omissive* response leaves the student “vulnerable to” further harassment, which then actually occurs. *Id.* (citing *Cormier*, *supra* note 4, at 23–24).

⁵¹ *Id.* at 623–24 (citing *Cormier*, *supra* note 4, at 23–24).

⁵² *Id.*

⁵³ See *id.* at 623 (citing *Cormier*, *supra* note 4, at 23–24) (explaining that it was not a goal of the *Davis* Court to create broad liability against school districts for the possibility of harassment under Title IX); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289 (1998) (explaining that the legislative history and text of Title IX shows that Congress intentionally chose to disallow recovery in

the scope of its holding, the Sixth Circuit recently clarified that it only applies to cases of peer-on-peer harassment at higher education institutions.⁵⁴

B. The First, Tenth, and Eleventh Circuits Approach

The First, Tenth, and Eleventh Circuits all examined the same issue as *Kollaritsch* and came to the opposite conclusion, holding that post-notice harassment is not necessary to sustain a claim.⁵⁵ First, in 2007, in *Williams v. Board of Regents of University System of Georgia*, the Eleventh Circuit ruled that by not taking any precautions to keep its students safe, a university can be liable for subjecting its students to further discrimination, even without any post-notice sexual harassment actually occurring.⁵⁶

Next, also in 2007, in *Fitzgerald v. Barnstable School Committee*, the First Circuit parsed through the language of *Davis*'s two-part causation statement and concluded that plaintiffs can sustain a deliberate indifference claim in two distinct circumstances: when a school's deliberately indifferent response causes a student to "undergo harassment" or when a school's deliberately in-

situations where liability "rests solely on principles of vicarious liability or constructive notice"). This view is also in line with the Eighth Circuit, which in 2017, found that a university was not liable for its deliberate indifference to a sixteen-year-old girl's rape at a fraternity party. *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1055, 1056–57 (8th Cir. 2017). Even though the university's only response to her assault was to cancel the rest of the planned soccer recruitment visit, the court reasoned that the victim could not show that the university's inaction is what caused her sexual assault. *See id.* at 1056, 1058 (holding that the victim's complaint did not show a "causal nexus" between the university's inaction and her sexual assault).

⁵⁴ *See Wamer v. Univ. of Toledo*, 27 F.4th 461, 470 (6th Cir. 2022) (holding that *Kollaritsch* does not apply to teacher-on-student harassment because a university subjects its students to harassment when an employee harasses a student and the university responds in a deliberately indifferent manner, negating the need to show post-notice harassment); *Doe ex rel. Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty.*, 35 F.4th 459, 467–68 (6th Cir. 2022) (holding that *Kollaritsch*'s same-victim requirement is inapplicable in non-collegiate settings because lower education administrators have more control and oversight over their student body, and therefore, should be on notice of harassment in a wider range of circumstances than university administrators).

⁵⁵ *See, e.g., Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297–98 (11th Cir. 2007) (holding that victims can sustain claims when their schools' deliberate indifference leaves them vulnerable to further sexual harassment, even when no further harassment actually occurs), *superseded on other grounds by* FED. R. CIV. P. 15(a)(b); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 168, 172–73 (1st Cir. 2007) (same), *rev'd on other grounds*, 555 U.S. 246 (2009); *Farmer v. Kan. State Univ.*, 918 F.3d 1095, 1104 (10th Cir. 2019) (same).

⁵⁶ *See Williams*, 477 F.3d at 1298 (explaining that a school's failure to keep a campus safe amounts to discrimination when it effectively bars a student from receiving an education). In *Williams*, the plaintiff alleged that she was gang-raped by three student-athletes on campus. *Id.* at 1288. Even though the plaintiff voluntarily withdrew from the university one day after her attack, the court still ruled that the university's deliberate indifference subjected her to sex discrimination in violation of Title IX. *Id.* at 1288, 1298. The court came to this conclusion because the plaintiff felt unable to return to the university due to the school's lack of disciplinary action against her perpetrators, effectively barring her from receiving an education. *Id.* at 1298.

different response leaves a student “liable or vulnerable” to harassment.⁵⁷ Unlike in *Kollaritsch*, the First Circuit interpreted the vulnerability prong independently from the causation prong, allowing for liability when a school’s clearly unreasonable response makes a student more likely to experience harassment, even if it has yet to occur.⁵⁸ The First Circuit’s interpretation of *Davis* has become the leading approach in circuits that do not require post-notice harassment to sustain a deliberate indifference claim.⁵⁹ Most recently, in 2019, in *Farmer v. Kansas State University*, the Tenth Circuit adopted the First Circuit’s view in *Fitzgerald*.⁶⁰ The court explained that the clear language of *Davis* shows that plaintiffs can sustain a claim in two alternative situations and that vulnerability does not require a student to experience further harassment; instead, vulnerability only requires that the plaintiff is more likely to experience harassment because of the school’s clearly unreasonable response.⁶¹

III. LOOKING BACK TO LOOK FORWARD: CONFORMING TO THE ORIGINAL GOALS OF TITLE IX

The First Circuit’s approach in *Fitzgerald v. Barnstable School Committee* is faithful to the original legislative goals of Title IX and encourages educational institutions to act immediately when a student is harassed.⁶² This Part argues that the First Circuit’s approach in *Fitzgerald* is preferable to that of the Sixth Circuit in *Kollaritsch v. Michigan State University* because the latter ob-

⁵⁷ See *Fitzgerald*, 504 F.3d at 171 (detailing the pleading standard for deliberate indifference claims).

⁵⁸ Compare *Fitzgerald*, 504 F.3d at 172–73 (noting that liability under Title IX is broader than only encompassing harassment caused by a school district itself), with *supra* note 50 and accompanying text (explaining that the two pathways for a school district to incur Title IX liability both require the school to cause the further instance of actionable harassment), and *Kollaritsch*, 944 F.3d at 623 (holding that “[a] plain and correct reading” of *Davis* shows that the two pathways are two ways for a university’s deliberate indifference to lead to further harassment).

⁵⁹ See Cormier, *supra* note 4, at 13 (stating that the First Circuit’s approach has become leading rationale in circuits that do not require post-notice harassment to sustain a claim); *Farmer*, 918 F.3d at 1103 (following the First Circuit’s approach only requiring the possibility of and not actual post-notice harassment to sustain a claim); *Doe v. Pawtucket Sch. Dep’t*, 969 F.3d 1, 9 (1st Cir. 2020) (same); *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 273–74 (4th Cir. 2021) (same), *cert. denied*, 143 S. Ct. 442 (2022); *M.L. v. Concord Sch. Dist.*, No. 18-CV-327, 2022 WL 4613016, at *6 (D.N.H. Sept. 30, 2022) (same) (quoting *Fitzgerald*, 504 F.3d at 172–73).

⁶⁰ See *Farmer*, 918 F.3d at 1104 (citing *Fitzgerald*, 504 F.3d at 172) (noting that *Davis*’s causation statement has two alternative pathways for a school to incur liability: when a school’s response causes the harassment, in which post-notice harassment is required, and when a school’s response leaves a student vulnerable to harassment, in which post-notice harassment is not required).

⁶¹ See *id.* (explaining that the defendant’s argument that post-notice harassment is necessary to sustain a claim “simply ignores *Davis*’s clear alternative language”).

⁶² See *Fitzgerald*, 504 F.3d at 172 (declining to define Title IX liability so narrowly that it requires post-notice harassment); *supra* notes 16–19 and accompanying text (listing the legislative goals of Title IX).

scures the goals of Title IX legislation and places undue emphasis on the harassment of a student instead of the school's response to that harassment.⁶³

The Sixth Circuit's conclusion in *Kollaritsch*, that plaintiffs must suffer post-notice sexual harassment to sustain a deliberate indifference claim, ignores the legislative goals of Title IX and is more concerned with narrowly defining the claim to limit a school's potential liability.⁶⁴ In its elemental interpretation of deliberate indifference claims, the court ignores one of Title IX's main purposes: preventing sexual harassment that deprives a student of receiving an education.⁶⁵ Indeed, its interpretation directly opposes this goal and effectively prevents a student from obtaining relief in all but the most egregious of situations.⁶⁶ As the Tenth Circuit correctly observes, the *Kollaritsch* court's approach leads to the counterintuitive conclusion that a student must be severely sexually harassed at least twice by the same perpetrator before the university can be held liable for responding to the harassment in a clearly unreasonable manner.⁶⁷ Such reasoning allows an educational institution to remain idle and

⁶³ See *supra* notes 47–53 and accompanying text (examining the Sixth Circuit's approach to deliberate indifference claims in *Kollaritsch*); see also Jacob R. Goodman, Note, *Deliberately Indifferent: Institutional Liability for Further Harassment in Student-on-Student Title IX Cases*, 75 VAND. L. REV. 1273, 1292 (2022) (asserting that the Sixth Circuit's approach opposes the main objective of Title IX, which is to safeguard students' ability to receive an education no matter their sex).

⁶⁴ See *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 618, 619 (6th Cir. 2019) (holding that the *Davis* Court intentionally made fulfilling the requirements of a deliberate indifference claim a "high standard" that only applies in "limited circumstances"); Parker Bednasek, Comment, *Turning a Blind Eye: The Causation Standard for Title IX Peer Sexual Misconduct Claims*, 70 U. KAN. L. REV. 329, 350 (2021) (arguing that the Sixth Circuit's approach in *Kollaritsch* confused the injury that Title IX was established to prevent by replacing deprivation of educational benefits with the need for further incidents of sexual harassment).

⁶⁵ See *Kollaritsch*, 944 F.3d at 622 (defining causation to require post-notice harassment to be directly attributable to the school's clearly unreasonable response). *But see Farmer*, 918 F.3d at 1106–07 (rejecting the assumption that its previous decision, *Escue*, bound the court to require post-notice harassment as a causation element). In *Escue*, the court used evidence that the plaintiff was not further harassed after notifying school officials as *one* factor in finding that the school was not deliberately indifferent to her assault, yet refrained from addressing whether post-notice harassment was *necessary* to sustain a claim. See *id.* at 1106 (clarifying the holding of *Escue v. N. Okla. Coll.*, 450 F.3d 1146 (10th Cir. 2006)) (concluding that post-notice harassment is not a required element of a deliberate indifference claim).

⁶⁶ See Brief of Amicus Curiae National Center for Victims of Crime in Support of Petitioner, *supra* note 3, at 13–14 (reasoning that under the *Kollaritsch* interpretation, a university would not face repercussions for leaving a victim in the same dormitory as his or her harasser and/or making no adjustments to ensure the student's safety as long as the student was not assaulted a second time after giving the institution notice); Suzette M. Malveaux, *Is it Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2405–06 (2022) (arguing that there is a broader issue of courts interpreting federal procedural law in an increasingly strict manner, which has led to more cases being resolved during the summary judgement phase of litigation and fewer being decided on the merits, resulting in fewer remedies for plaintiffs alleging civil rights violations and discrimination claims).

⁶⁷ See *Farmer*, 918 F.3d at 1104 (citing *Karasek v. Regents of the Univ. of Cal.*, No. 15-cv-03717, 2015 U.S. Dist. LEXIS 166524, at *39 (N.D. Cal. Dec. 11, 2015)) (explaining that requiring a

wait for its students to experience further harm before facing any consequences for that decision.⁶⁸ Ultimately, this approach does not encourage a university to be proactive in keeping its campus a safe environment free from assault.⁶⁹

On the other hand, the First Circuit's approach correctly focuses deliberate indifference claims on the school's response.⁷⁰ Foregoing a requirement of post-notice harassment to sustain a claim encourages a university to take prompt action when its administrators are first notified of harassment.⁷¹ This approach shifts the burden from the student to the university: from needing to prove he or she was further harassed by the same perpetrator to the school needing to prove that it responded to the original allegations in a reasonable manner.⁷²

The *Fitzgerald* approach also aligns with one of the main legislative goals of Title IX, which is to ensure students receive the benefits of an education by protecting them from harassment.⁷³ When a school's deliberately indifferent

student to face at least two instances of harassment before the school district's deliberate indifference to the first instance becomes actionable is "not convincing" because it "runs counter to the goals of Title IX").

⁶⁸ See Brief of Amicus Curiae National Center for Victims of Crime in Support of Petitioner, *supra* note 3, at 15 (arguing that a rule that requires students to report at least two instances of harassment to their university creates perverse incentives for the university to deter reports by making the reporting process difficult and cumbersome); Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 220 (2011) (explaining that universities have reputational and prestige-based incentives to deter reporting and avoid learning the extent of their sexual harassment problem on their campuses).

⁶⁹ See Brief of Amicus Curiae National Center for Victims of Crime in Support of Petitioner, *supra* note 3, at 14–15 (citing *S.S. v. Alexander*, 177 P.3d 724, 741 (Wash. App. 2008)) (arguing that the *Kollaritsch* approach allows universities to wait for a second instance of sexual harassment before taking action against a perpetrator and essentially allows "one free rape"); Goodman, *supra* note 63, at 1292 (arguing that burdening the victim with preventing his or her own further harassment is "an absurd practical outcome").

⁷⁰ See *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 168, 172–73 (1st Cir. 2007) (holding that an educational institution's clearly unreasonable response, not a student's further harassment, is the basis for deliberate indifference claims under Title IX), *rev'd on other grounds*, 555 U.S. 246 (2009).

⁷¹ See Brief of Amicus Curiae National Center for Victims of Crime in Support of Petitioner, *supra* note 3, at 12 (citing Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395 (2005)) (explaining that Title IX requires universities to immediately investigate cases of harassment and prevent recurrence, which is in line with the First Circuit's interpretation of vulnerability); Laetitia Krisel, Note, *Where Do We Draw the Line? The Deliberate Indifference Standard and Why Vulnerability to Sexual Harassment Matters in Title IX Liability*, 43 CARDOZO L. REV. 2441, 2459 (2022) (arguing that requiring multiple instances of sexual assault to state a claim encourages the type of sex discrimination that Title IX was enacted to combat).

⁷² See Goodman, *supra* note 63, at 1292 (contending that placing the burden on universities instead of its students to prevent further instances of sexual assault on its campus aligns with the legislative goals of Title IX).

⁷³ See *id.* (arguing that interpreting Title IX to require post-notice harassment ignores the fact that a student can be denied educational benefits without another instance of harassment occurring); Recent Case, *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019), 133 HARV. L. REV. 2611, 2617 (2020) (arguing that the "tortification" of Title IX obscures its deter-

response leaves students feeling extremely unsafe on campus, they are “effectively barred” from receiving an education.⁷⁴ A university should not be able to escape liability if, as in *Williams v. Board of Regents of University System of Georgia*, students drop out of their educational programs and the school takes no action to ensure the campus is safe for other students.⁷⁵

Moreover, satisfying all of the elements of a deliberate indifference claim is still a very high bar that protects universities from litigation in the majority of sexual harassment cases on campus.⁷⁶ Even under the First Circuit approach, a university is not required to rid its campus of all harassment to avoid a claim under Title IX.⁷⁷ Nevertheless, the First Circuit’s approach correctly holds the university liable for its own misconduct and does not permit a school to simply do nothing when its students are harassed.⁷⁸

CONCLUSION

In 2019, in *Kollaritsch v. Michigan State University*, the U.S. Court of Appeals for the Sixth Circuit held that a plaintiff must suffer post-notice further sexual harassment to sustain a claim for deliberate indifference against a university in violation of Title IX. In doing so, the Sixth Circuit interpreted *Davis v. Monroe County Board of Education* in a needlessly narrow manner

rence goals by setting a higher standard for student victims to succeed on their sex discrimination claims than plaintiffs face in other types of discrimination cases).

⁷⁴ See *supra* note 56 and accompanying text (detailing the factual basis of *Williams*); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1298 (11th Cir. 2007) (describing how a student is deprived of an education when the school district’s response to harassment is so insufficient it leaves him or her with no choice but to leave the school), *superseded on other grounds by* FED. R. CIV. P. 15(a)(b); *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1105 (10th Cir. 2019) (explaining that a university’s inadequate response to sexual harassment creates a “pervasive atmosphere of fear” on its campus).

⁷⁵ See Brief for Amici Curiae Public Justice, the California Women’s Law Center, Equal Rights Advocates, Know Your IX, and The Women’s Law Project in Support of Petitioners at 16, *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 141 S. Ct. 554 (2020) (No. 20-10) (detailing the “impossible choice” that sexually harassed students face when universities do not take reasonable steps to separate victims from their attackers: “attend school and risk further harassment, or give up classes, activities, and other opportunities, to stay safe”).

⁷⁶ See *supra* notes 27–30 and accompanying text (listing the elements of a deliberate indifference claim from *Davis*); Anne Lawton, *The Emperor’s New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 77 (1999) (arguing that the deliberate indifference standard set in *Gebser* is already so high and difficult for plaintiffs to meet that it “effectively insulate[s]” universities from liability).

⁷⁷ See *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 168, 171 (1st Cir. 2007) (conceding that Title IX does not make a school or university “the insurer either of a student’s safety or of a parent’s peace of mind”), *rev’d on other grounds*, 555 U.S. 246 (2009); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (emphasizing that educational institutions are not required to purge themselves of all harassment to avoid liability under Title IX).

⁷⁸ See *Davis*, 526 U.S. at 640–41 (holding that educational institutions are only liable for their own misconduct under Title IX); *Farmer*, 918 F.3d at 1098 (same).

that disposes of the vulnerability prong and is contrary to the legislative goals of Title IX. In contrast, the First Circuit in *Fitzgerald v. Barnstable School Committee* interprets the vulnerability prong by its plain meaning and honors Title IX's ultimate goal to protect students from experiencing harassment that prevents them from receiving an education. Absent guidance from the Supreme Court to rectify this circuit split, lower courts should adopt the *Fitzgerald* approach when examining future deliberate indifference claims.

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