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# **Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations**

**Jared P. Cole**

Legislative Attorney

**Christine J. Back**

Legislative Attorney

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**Jared P. Cole**

Legislative Attorney  
-re-acte--@crs.loc.gov

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-re-acte--@crs.loc.gov

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Title IX of the Education Amendments of 1972 (Title IX) provides an avenue of legal relief for victims of sexual abuse and harassment at educational institutions. It bars discrimination “on the basis of sex” in an educational program or activity receiving federal funding. Although Title IX makes no explicit reference to sexual harassment or abuse, the Supreme Court and federal agencies have determined that such conduct can sometimes constitute discrimination in violation of the statute; educational institutions in some circumstances can be held responsible when a teacher sexually harasses a student or when one student harasses another. Title IX is mainly enforced (1) through private rights of action brought directly against schools by or on behalf of students subjected to sexual misconduct; and (2) by federal agencies that provide funding to educational programs.

To establish liability in a private right of action, a party seeking damages for a Title IX violation must satisfy the standards set forth by the Supreme Court in *Gebser v. Lago Vista Independent School District*, decided in 1998, and *Davis Next Friend LaShonda D. v. Monroe County Board of Education*, decided the next year. *Gebser* provides that when a teacher commits harassment against a student, a school district is liable only when it has actual knowledge of allegations by an “appropriate person,” and so deficiently responds to those allegations that its response amounts to deliberate indifference to the discrimination. *Davis* instructs that, besides showing actual knowledge by an appropriate person and deliberate indifference, a plaintiff suing for damages for sexual harassment committed by a student must show that the conduct was “so severe, pervasive, and objectively offensive” that it denied the victim equal access to educational opportunities or benefits. Taken together, the Supreme Court’s decisions set forth a high threshold for a private party seeking damages against an educational institution based on its response to sexual harassment. In turn, federal appellate courts have differed in how to apply the standards set in *Gebser* and *Davis*, diverging on the nature and amount of evidence sufficient to support a claim.

In each of the last several presidential administrations, the Department of Education (ED) issued a number of guidance documents that instruct schools on their responsibilities under Title IX when addressing allegations of sexual harassment. These documents—while sometimes subject to change—generally reflected a different standard than the Supreme Court case law addressing private rights of action for damages for sexual abuse or harassment (the Court in *Davis* acknowledged that the threshold for liability in a private right of action could be higher than the standard imposed in the administrative enforcement context). Those guidance documents had, among other things, established that sometimes a school could be held responsible for instances of sexual harassment by a teacher, irrespective of actual notice; and schools could be held responsible for student-on-student harassment if a “responsible employee” knew or should have known of the harassment (constructive notice). ED’s previous guidance also instructed educational institutions that they sometimes could be responsible for responding to incidents of sexual harassment occurring off campus. ED also cautioned schools on the use of mediation to resolve allegations of sexual harassment. With regard to the procedures used by schools to resolve sexual harassment allegations, ED informed schools that they must use the preponderance of the evidence standard to establish culpability, and the agency strongly discouraged schools from allowing parties in a hearing to personally cross-examine one another. In response to guidance from ED, as well as increased oversight from the department’s Office for Civil Rights (OCR) between 2011 and 2016, schools developed several procedures to ensure that their responses to allegations of sexual harassment and assault complied with Title IX. A number of students faced with disciplinary action by public universities raised constitutional challenges to the Title IX procedures used to find them responsible for sexual misconduct, arguing that universities violated the Due Process Clause in handling their case.

ED issued a notice of proposed rulemaking in late 2018, after revoking some of its previous guidance to schools in 2017. The proposed regulations would, in several ways, tether the administrative requirements for schools to the standard set by the Supreme Court in *Gebser* and *Davis*. In doing so, the proposed regulations would depart from the standards set by ED in previous guidance documents (some of which have since been rescinded). The new regulations would require “actual notice,” rather than constructive notice, of harassment by an education institution to trigger a school’s Title IX responsibilities, and provide that a school’s response to allegations of sexual harassment will violate Title IX only if it amounts to deliberate indifference. In addition, the new regulations would more narrowly define what conduct qualifies as sexual harassment under Title IX, and also impose new procedural requirements, which appear to reflect due process concerns, when schools investigate sexual harassment or assault allegations and make determinations of culpability.

## Contents

Background .....	1
A Private Right of Action to Enforce Title IX .....	3
<i>Gebser</i> and <i>Davis</i> : The Supreme Court’s Title IX Liability Standard .....	4
Deliberate Indifference .....	6
“Actual” Notice of Discrimination by “An Appropriate Person” .....	7
Student-to-Student Harassment: “Substantial Control,” “Severe, Pervasive, and Objectively Offensive” Harassment, Denial of Educational Access .....	8
Federal Courts’ Application of <i>Gebser</i> and <i>Davis</i> to Title IX Claims for Sexual Harassment or Abuse .....	9
What Knowledge Gives Rise to “Actual” Notice? .....	10
Who Constitutes an “Appropriate Person”? .....	12
Deliberate Indifference: A “Clearly Unreasonable” Response .....	15
Administrative Enforcement of Title IX .....	19
1997 ED Guidance and Subsequent Supreme Court Decisions Regarding Sexual Harassment .....	21
ED’s Guidance Documents Regarding Sexual Harassment Subsequent to <i>Gebser</i> and <i>Davis</i> .....	23
2001 Sexual Harassment Guidance .....	23
2011 Dear Colleague Letter Regarding Sexual Violence Between Peers .....	27
2014 Q&A Document: Investigating Allegations of Sexual Violence .....	28
Legal Challenges to University Title IX Procedures .....	30
Due Process Clause: Background Principles .....	30
Due Process Rights for Students at Public Universities .....	32
Due Process Challenges to Procedures Used by Public Universities in Sexual Assault Investigations .....	34
Claims Alleging Inadequate Notice of the Charges .....	35
Claims Relating to Cross-Examination of Witnesses and Exculpatory Evidence .....	36
Claims Alleging Biased Decisionmakers in Disciplinary Proceedings .....	39
Claims Alleging Unfair Rehearing or Appeal Processes .....	40
ED’s Proposed Title IX Regulations Regarding Sexual Harassment .....	41
Conduct That Constitutes Sexual Harassment Under Title IX .....	42
Adopting “Actual Notice” Requirement .....	43
Adopting the “Deliberate Indifference” Standard to Evaluate a School’s Response .....	44
Protocols for Fact-Finding and Determining Culpability .....	45
Procedures for Handling Formal Complaints .....	46
Determinations of Responsibility .....	47
Considerations for Congress .....	48

## Contacts

Author Contact Information .....	49
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## Background

Title IX of the Education Amendments of 1972 (Title IX) provides an avenue of legal relief for victims of sexual abuse and harassment committed by professors, teachers, coaches, and others at educational institutions.<sup>1</sup> The statute prohibits discrimination “on the basis of sex” of any person in an educational program or activity receiving federal funding.<sup>2</sup> Though Title IX makes no explicit reference to sexual abuse or harassment,<sup>3</sup> the Supreme Court has held that a school district can violate the statute, and be held liable for damages, based on a deliberately indifferent response to a teacher’s sexual abuse or harassment of a student.<sup>4</sup> The Court has also held that a school board may be liable under Title IX for a deliberately indifferent response to student-on-student sexual harassment.<sup>5</sup> Meanwhile, federal agencies that administratively enforce the statute, such as the Department of Education (ED), have also determined that educational institutions can be held responsible for instances of sexual harassment under Title IX in certain circumstances.

Title IX is thus primarily enforced in two ways: (1) through private rights of action directly against schools by or on behalf of students subject to such harassment in certain circumstances;<sup>6</sup> and (2) by federal agencies that provide funding to educational programs.<sup>7</sup>

With respect to the latter enforcement prong, like several other federal civil rights statutes,<sup>8</sup> Title IX makes compliance with its antidiscrimination mandate a condition for receiving federal funding in any education program or activity.<sup>9</sup> Title IX applies to federal-funded schools at all

<sup>1</sup> Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified at 20 U.S.C. § 1681). *See generally* Office for Civil Rights, Dep’t of Educ., *Sex-based Harassment*, <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html> (last visited Apr. 9, 2019) (“Title IX protects all students from sex-based harassment, regardless of the sex of the parties, including when they are members of the same sex.”).

<sup>2</sup> 20 U.S.C. § 1681(a) (“No 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”). The statute defines “educational institution” as “any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.” 20 U.S.C. § 1681(c). *See also* 34 C.F.R. § 106.2(h), (i). For ease of reference, this report uses the terms educational institution and school interchangeably.

<sup>3</sup> *See id.*

<sup>4</sup> *See Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (reading Title IX to “[u]nquestionably” place on the school district the duty not to discriminate based on sex, including in the form of a teacher’s sexual harassment of a student) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

<sup>5</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

<sup>6</sup> The Supreme Court has interpreted Title IX to contain an implied right of action allowing aggrieved individuals to bring suit in federal court for money damages and injunctive relief. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691 (1979); *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 73 (1992). Accepting federal funds in this context waives the Eleventh Amendment immunity of states against suits from private individuals. Therefore, both state actors, such as public universities, as well as private actors, such as a private college, who do not enjoy Eleventh Amendment immunity, are subject to suits for damages for violations of Title IX if they receive federal education funds. *See, e.g., Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016); *Pederson v. La. State Univ.*, 213 F.3d 858, 875 (5th Cir. 2000) (“We find that LSU waived its Eleventh Amendment sovereign immunity by accepting federal funds under Title IX.”).

<sup>7</sup> It bears mention that Title IX is not the exclusive legal remedy for victims of sexual harassment in schools. 42 U.S.C. § 1983 provides an avenue of legal relief against state actors who deprive individuals of a constitutional right. The Supreme Court has held that Title IX does not displace the availability of § 1983 claims based on the Equal Protection Clause for plaintiffs alleging gender discrimination in schools. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 248 (2009). However, the subject of liability under § 1983 is beyond the scope of this report.

<sup>8</sup> *See, e.g.,* 29 U.S.C. §§ 791, 794; 42 U.S.C. §§ 2000d, 6101.

<sup>9</sup> 20 U.S.C. § 1681(a). Title IX contains a number of exceptions, such as exemptions for educational institutions

levels of education.<sup>10</sup> For instance, all public school districts receive some federal financial assistance, as do most institutions of higher education through participation in federal student aid programs.<sup>11</sup> Notably, when any part of a school district or institution of higher education receives federal funds, all of the recipient’s operations are covered by Title IX.<sup>12</sup>

The text of Title IX does not expressly mention sexual abuse or harassment, while current regulations implementing the statute also do not explicitly address sexual harassment (although the regulations do require schools to designate at least one employee to function as a Title IX Coordinator).<sup>13</sup> In each of the last several presidential administrations, however, the Department of Education (ED) has issued guidance documents that instruct schools regarding their responsibilities under Title IX when addressing allegations of sexual harassment.<sup>14</sup> In response, educational institutions have developed procedures and practices to investigate and respond to allegations of sexual harassment and assault.<sup>15</sup> And ED recently issued another notice of proposed rulemaking, after having revoked some of its prior guidance to schools in 2017.<sup>16</sup> As discussed in this report, if adopted, the regulations would significantly change educational institutions’ responsibilities for responding to sexual harassment allegations.

To place the proposed Title IX regulations in context, this report provides background on the legal landscape that informs the proposal. First, the report examines how federal courts have understood Title IX’s requirements in the context of private rights of actions brought by students directly against educational institutions seeking damages for sexual abuse or harassment. The report continues by examining how federal agencies have enforced Title IX, with particular focus on ED’s guidance documents that direct schools on how to respond to sexual harassment and assault allegations. The report then considers various constitutional challenges brought by students against public universities, which claim that some universities’ responses to allegations

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controlled by a religious organization and those whose primary purpose is training for military service or the merchant marine. *Id.* §§ 1681(a) (1)–(9). Employees of educational institutions are protected from sexual harassment by Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e–3. Employees may also be protected by Title IX as well. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 1 n.1 (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter 2001 GUIDANCE].

<sup>10</sup> OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUC., TITLE IX RESOURCE GUIDE (Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>; 34 C.F.R. §§ 106.2(h), (i).

<sup>11</sup> *See* Office for Civil Rights, Dep’t of Educ., *Sex Discrimination: Frequently Asked Questions*, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html> (last visited Mar. 5, 2019). Title IX applies to schools that benefit indirectly from federal funds due to student receipt of federal financial aid, meaning that most public and private universities are subject to Title IX’s requirements. 34 C.F.R. §§ 106.2(i), 106.4. *Grove City Coll. v. Bell*, 687 F.2d 684, 693 (3d Cir. 1982). *See* Dep’t of Justice, Civil Rights Div., *Title IX Legal Manual* (updated Aug. 6, 2015), <https://www.justice.gov/crt/title-ix> (explaining that “this document is not intended to be a guide for Title IX enforcement with respect to traditional educational institutions such as colleges, universities, and elementary and secondary schools, which have been subject to the Department of Education’s Title IX regulations and guidance for 25 years. Rather, this Manual is intended to provide guidance to federal agencies concerning the wide variety of other education programs and activities operated by recipients of federal financial assistance”).

<sup>12</sup> 20 U.S.C. § 1687; OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUC., TITLE IX RESOURCE GUIDE (Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>; 34 C.F.R. § 106.2(h), (i).

<sup>13</sup> 34 C.F.R. § 106.8(a).

<sup>14</sup> *See infra* “Administrative Enforcement of Title IX.”

<sup>15</sup> *See* Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 176 (2017).

<sup>16</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018).

of sexual harassment have violated the due process rights of the accused.<sup>17</sup> With this backdrop set, the report examines ED’s proposed regulations with an emphasis on how they would alter the responsibilities of schools in complying with Title IX.

## A Private Right of Action to Enforce Title IX

Title IX of the Education Amendments of 1972 states that “No 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,”<sup>18</sup> subject to certain exemptions.<sup>19</sup> In other words, recipients of federal funding, which administer an educational program or activity, are prohibited from discriminating on the basis of sex.<sup>20</sup>

The statute, however, does not expressly provide for a private right of action by which victims of sex discrimination may recover for a Title IX violation.<sup>21</sup> Nor does the statute expressly prohibit sexual harassment, abuse, or molestation as forms of unlawful sex discrimination, or otherwise define unlawful sexual abuse or harassment.<sup>22</sup> Title IX also does not delineate the circumstances in which a school or educational program may be liable for such conduct.<sup>23</sup>

Given the absence of statutory text “to shed light on Congress’ intent,”<sup>24</sup> federal courts have played a primary, if not exclusive, role in establishing the remedial scheme by which victims of sexual harassment or abuse may seek relief under Title IX through a private right of action. The Supreme Court first interpreted Title IX to provide for a judicially implied private right of action against a federal-funded educational institution for sexual harassment,<sup>25</sup> and later, an implied damages remedy in such actions.<sup>26</sup> Since then, and in the absence of legislative amendments to Title IX on those issues,<sup>27</sup> the Court has also created the legal standard for establishing liability

<sup>17</sup> Although private colleges are not subject to the requirements of the Due Process Clause of the Fourteenth Amendment, they may, nonetheless, sometimes be subject to similar restrictions under applicable state laws. *See, e.g., Doe v. Univ. of S. Cal.*, 29 Cal. App. 5th 1212, 1232 (Ct. App. 2018) (describing the principle of fundamental fairness that must attend disciplinary decisions for college students and concluding that the university did not accord the plaintiff a fair hearing when it expelled him for sexual misconduct).

<sup>18</sup> 20 U.S.C. § 1681(a).

<sup>19</sup> *Id.* § 1681(a)(1)–(9). Exceptions include, for example, educational institutions controlled by a religious organization “if the application of this subsection would not be consistent with the religious tenets of such organization,” and membership practices of certain social fraternities or sororities.

<sup>20</sup> *See id.*

<sup>21</sup> *See* 20 U.S.C. §§ 1681–88.

<sup>22</sup> *See id.*

<sup>23</sup> *See id.*

<sup>24</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998).

<sup>25</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709, 717 (1979) (concluding that the text, history, and purpose of Title IX “counsel implication of a cause of action in favor of private victims of discrimination”; and holding that the private plaintiff in that case could maintain her Title IX lawsuit).

<sup>26</sup> *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (concluding that “a damages remedy is available for an action brought to enforce Title IX”).

<sup>27</sup> *See, e.g., Gebser*, 524 U.S. at 290 (creating legal standard for establishing liability under Title IX for teacher-student harassment or abuse “in the absence of further direction from Congress”).

under Title IX for sexual abuse or harassment committed by a teacher,<sup>28</sup> and other students.<sup>29</sup> The Court, and numerous federal courts of appeals, have described this judicially created liability standard—which draws upon the “deliberate indifference” standard as applied under 42 U.S.C. § 1983<sup>30</sup>—as a “high bar for plaintiffs to recover under Title IX.”<sup>31</sup>

Critically, in a Title IX private right of action for damages, an educational institution (or other federally funded program or activity) is *not* strictly liable for a principal’s or teacher’s sexual harassment or abuse of a student.<sup>32</sup> In other words, the fact that sexual harassment or abuse occurred and was committed by these individuals is not the basis for a funding recipient’s liability under the Supreme Court’s remedial scheme.<sup>33</sup> Rather, Title IX liability turns on the recipient’s *response* to its actual knowledge of that conduct. A recipient will be liable only when its response was so deficient as to amount to “deliberate indifference” to the alleged harassment or abuse.<sup>34</sup>

### ***Gebser* and *Davis*: The Supreme Court’s Title IX Liability Standard**

The private right of action currently available under Title IX is one of judicial implication—that is, the Court has interpreted the statute to imply such a right, in the absence of express statutory language providing for it.<sup>35</sup> A private right of action provides a personal legal remedy for victims of sex discrimination in the form of specific relief or damages.<sup>36</sup> In contrast, and as discussed in a

<sup>28</sup> *Id.* at 290–93 (setting out legal standard and analysis for determining liability under Title IX against an educational recipient of federal funds, for harassment by a teacher of a student, in a private right of action brought by the alleged victim).

<sup>29</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>30</sup> *Gebser*, 524 U.S. at 290–91 (holding that a Title IX violation for damages requires a showing of “deliberate indifference,” and stating that “[c]omparable considerations” had also led to its “adoption of a deliberate indifference standard for claims under § 1983 alleging that a municipality’s actions in failing to prevent a deprivation of federal rights was the cause of the violation”) (citing its § 1983 precedent). As general context, 42 U.S.C. § 1983 provides for a private right of action against “those acting under color of state law for violations of federal constitutional and statutory provisions.” *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1299 (11th Cir. 2007) (discussing 42 U.S.C. § 1983). To prevail on a § 1983 claim, a plaintiff, among other evidence, “must demonstrate that the municipal action was taken with ‘deliberate indifference’ as to its known or obvious consequences.” *Bd. of Cty. Com’rs of Bryan Cty., Ok. v. Brown*, 520 U.S. 397, 407 (1997). Neither “simple [n]or even heightened negligence” will suffice. *Id.* As noted earlier, a victim of sexual harassment or abuse may bring both a Title IX claim and § 1983 claim seeking relief for that misconduct. *See supra* note 7.

<sup>31</sup> *Davis*, 526 U.S. at 643 (characterizing the “deliberate indifference” standard it had adopted in *Gebser* as a “high standard” that was intended to “to eliminate any ‘risk that the recipient would be liable in damages not for its own official decision but instead for its employees’ independent actions” (quoting *Gebser*, 524 U.S. at 290–91)); *Stiles ex rel. D.S. v. Grainger Cty., Tenn.*, 819 F.3d 834, 848 (6th Cir. 2016) (“The deliberate indifference standard set forth in *Davis* sets a high bar for plaintiffs to recover under Title IX.”); *see also, e.g., I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 368 (5th Cir. 2019) (“Deliberate indifference is an extremely high standard to meet.” (quoting *Domino v. Tex. Dep’t of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001))); *Doe v. Galster*, 768 F.3d 611, 619 (7th Cir. 2014) (“The standard of deliberate indifference sets a high bar for plaintiffs under Title VI and Title IX.”); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 (2012) (“The deliberate indifference standard outlined by the Supreme Court in *Davis v. Monroe County Board of Education* is a narrow one.”); *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1259 (11th Cir. 2010) (stating that in the context of a private right of action under Title IX, “[d]eliberate indifference is an exacting standard”).

<sup>32</sup> *See Gebser*, 524 U.S. at 290–93.

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

<sup>35</sup> *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979) (creating private right of action for damages under Title IX, “despite the absence of any express authorization for it in the statute”). *Cf.* 20 U.S.C. §§ 1681–88.

<sup>36</sup> *See Cannon*, 441 U.S. at 704–05 (in analyzing whether Title IX could be interpreted to provide for an implied private cause of action, observing that termination of funds to an agency “often may not provide an appropriate means of

later section, administrative enforcement of the statute makes its general focus the institutional policies and practices of the recipient educational institution.<sup>37</sup>

Two Supreme Court decisions, together, set out the requirements for establishing an educational funding recipient's liability under Title IX for damages for sexual abuse or harassment: *Gebser v. Lago Vista Independent School District*<sup>38</sup> and *Davis Next Friend LaShonda D. v. Monroe County Board of Education*.<sup>39</sup> The Court's liability standard premises an institution's Title IX liability for sexual harassment or abuse based on the institution's "deliberate indifference" in responding to knowledge of that conduct.<sup>40</sup> Thus—and critical to understanding a Title IX private right of action for damages—an educational institution (or other federally funded program or activity) is not strictly liable for a principal's or teacher's sexual harassment or abuse of a student. Indeed, the Supreme Court in *Gebser* expressly rejected such arguments urging it to apply agency principles to Title IX such that a school would be vicariously liable for such harassment.<sup>41</sup>

Instead, liability attaches only if a plaintiff establishes that the funding recipient's response to its "actual" knowledge of the discrimination was deliberately indifferent.<sup>42</sup> Put another way, under the Court's remedial scheme, liability under Title IX is based on the funding recipient's "own failure to act" adequately in response to known misconduct,<sup>43</sup> not the misconduct itself. Thus, an institution will *not* be liable absent a showing of deliberate indifference, regardless of whether the conduct committed by a principal or teacher could be characterized as egregious.<sup>44</sup>

In creating this standard in *Gebser*, the Court had attempted to "infer how the [1972] Congress would have addressed the issue had the . . . action been included as an express provision in the statute."<sup>45</sup> That task, the Court observed, "inherently entail[ed] a degree of speculation."<sup>46</sup> To

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accomplishing the statute's purpose and describing a private cause of action as one that awards "individual relief to a private litigant who has prosecuted her own suit").

<sup>37</sup> See *id.*; see also *supra* section "Administrative Enforcement of Title IX," p. 18. A school's response under Title IX to an allegation of sexual harassment, however, may at times include accommodations that are personal to a student. ED's Office of Civil Rights (OCR), which has primary responsibility for administratively enforcing Title IX has sometimes reached resolution agreements with schools that require compensatory payment of university expenses to a complainant. See, e.g., *Voluntary Resolution Agreement*, Southern Methodist University, OCR Case Nos. 06112126, 06132081, and 06132088, at 15 (Nov. 16, 2014), <https://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf>.

<sup>38</sup> 524 U.S. 274 (1998).

<sup>39</sup> 526 U.S. 629 (1999).

<sup>40</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (requiring a showing that the school district acted with "deliberate indifference" in responding to such discrimination to establish liability for damages).

<sup>41</sup> *Id.* at 281–83, 285, 287–88 (discussing two arguments raised by the United States as amicus curiae, regarding the application of common law agency principles or constructive notice as possible bases for holding a school district liable under Title IX for sexual harassment committed by one of its teachers, and rejecting both arguments). Cf. *id.* at 300–01 (Stevens, J., dissenting) (with respect to agency principles, describing the majority's refusal to apply that common law doctrine as "a rather dramatic departure from settled law," which the Court failed to justify).

<sup>42</sup> See *id.* at 290.

<sup>43</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999).

<sup>44</sup> See, e.g., *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 381–82, 384, 388 (5th Cir. 2000) (finding no Title IX liability on the part of the school district for third grade teacher's sexual molestation of numerous male students over a four-year period; explaining that under the Supreme Court's "high" standard for liability, a school district is liable for damages under Title IX only when a plaintiff can show the school district acted with deliberate indifference in response to its knowledge of the alleged abuse).

<sup>45</sup> *Gebser*, 524 U.S. at 285 (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 178 (1994)).

<sup>46</sup> *Id.* at 284.



inform its analysis, the Court relied significantly on the statute’s administrative enforcement provision because, in its view, the provision “contain[ed] important clues” from which to infer legislative intent regarding Title IX liability.<sup>47</sup> The Court observed that, pursuant to that provision, agencies that disburse federal funds may suspend or cut funds to a funding recipient for violating Title IX, but only after they “ha[ve] advised the appropriate person or persons of the failure to comply with the requirement and ha[ve] determined that compliance cannot be secured by voluntary means.”<sup>48</sup> Because the statute’s administrative procedure “require[s] notice to the recipient and an opportunity to come into voluntary compliance,”<sup>49</sup> the Court reasoned that it too would similarly require “actual notice” to an “appropriate person” to establish liability for damages in a private right of action under Title IX.<sup>50</sup>

The Court also concluded that a recipient would be liable under Title IX only where a school official responds to that “actual” notice so deficiently that its response amounts to “deliberate indifference.”<sup>51</sup> In so holding, the Court again looked to Title IX’s administrative enforcement scheme and observed that it “presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance.”<sup>52</sup> The Court found “a rough parallel in the standard of deliberate indifference,” from case law arising under 42 U.S.C. § 1983 addressing claims “alleging that a municipality’s actions in failing to prevent a deprivation of federal rights” caused a violation.<sup>53</sup>

The Court thus held that “[u]ntil Congress speaks directly on the subject . . . we will not hold a school district liable in damages under Title IX for a teacher’s sexual harassment of a student absent actual notice and deliberate indifference”<sup>54</sup>—a conclusion that elicited a strong dissent.<sup>55</sup>

## Deliberate Indifference

Deliberate indifference is a “high standard,” as described by the Supreme Court in *Davis*,<sup>56</sup> and must “at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or

<sup>47</sup> *Id.* at 288–90 (discussing 20 U.S.C. 1682). *Cf. id.* at 303–04 (Stevens, J., dissenting) (contending that the fact that Congress specified an agency enforcement process “does not illuminate the question” of the proof a victim of harassment or abuse must establish in an implied private right of action under Title IX).

<sup>48</sup> *Id.* at 288 (quoting 20 U.S.C. § 1682).

<sup>49</sup> *Id.* at 289.

<sup>50</sup> *Id.* at 290–91 (“Because the express remedial scheme under Title IX is predicated upon notice to an ‘appropriate person’ and an opportunity to rectify any violation, 20 U.S.C. § 1682, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines.”). *See also id.* at 287 (also stating that because Title IX was enacted pursuant to Congress’s spending power, its “central concern” in such contexts is the funding recipient’s awareness of the unlawful condition for which it is liable for monetary damages).

<sup>51</sup> *Id.* at 290 (discussing its earlier adoption of the “deliberate indifference” standard to § 1983 claims challenging a locality’s failure to prevent a deprivation of federal rights) (citing *Bd. of Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397 (1997); *Canton v. Harris*, 489 U.S. 378, 388–92 (1989); *Collins v. Harker Heights*, 503 U.S. 115, 123–24 (1992)).

<sup>52</sup> *Gebser*, 524 U.S. at 290.

<sup>53</sup> *Id.* at 290–91 (also stating its view that “[u]nder a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees’ independent actions.”).

<sup>54</sup> *Id.* at 292–93.

<sup>55</sup> *See id.* at 293, 304 (Stevens, J., dissenting, joined by Justices Souter, Ginsburg, and Breyer) (stating that the majority’s “assertion of lawmaking authority is not faithful either to our precedents or to our duty to interpret, rather than to revise, congressional commands” and characterizing the legal standard created by the majority as “an exceedingly high standard” few victims of intentional discrimination will be able to meet).

<sup>56</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999).

vulnerable' to it."<sup>57</sup> Notably, the “deliberate indifference” standard does *not* require funding recipients to “remedy” the harassment.<sup>58</sup> Rather, under *Davis*, a recipient’s response to harassment will amount to deliberate indifference only if it is “*clearly unreasonable* in light of the known circumstances.”<sup>59</sup> Because this standard is not “a mere ‘reasonableness’ standard,”<sup>60</sup> a plaintiff must show *more* than the unreasonableness of a funding recipient’s response to sexual abuse or harassment. The plaintiff must show that the recipient was *clearly* unreasonable in its response.<sup>61</sup> Accordingly, a funding recipient is not liable under Title IX if it responds to sexual abuse or harassment “in a manner that is not clearly unreasonable.”<sup>62</sup>

In addition to the requisite showing of “deliberate indifference,” the Court’s standard also requires a plaintiff to establish other threshold showings to prevail in a Title IX suit for damages—both before reaching the question of “deliberate indifference” and after establishing “deliberate indifference” on the part of the school or entity.

### “Actual” Notice of Discrimination by “An Appropriate Person”

Before reaching the issue of whether a funding recipient acted with “deliberate indifference,” *Gebser* requires that a plaintiff establish that “an appropriate person” at the funding recipient had “actual knowledge of discrimination.”<sup>63</sup> Failure to show either “actual” notice or that such notice was provided to “an appropriate person” of the funding recipient may constitute the sole basis for a court’s dismissal of a Title IX claim seeking damages for sexual harassment or abuse.<sup>64</sup> An “appropriate person,” under *Gebser*, is “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf.”<sup>65</sup> As

<sup>57</sup> *Id.* at 645 (quoting definitions of “subject” from the RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966) and WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2275 (1961)). *See also, e.g.*, *Hill v. Cundiff*, 797 F.3d 948, 973 (11th Cir. 2015) (“A clearly unreasonable response causes students to undergo harassment or makes them more vulnerable to it.”).

<sup>58</sup> *See Davis*, 526 U.S. at 648 (rejecting the dissent’s “mischaracterize[ation]” that the standard requires funding recipients to remedy peer harassment). *See, e.g.*, *Gabrielle M. v. Park Forest-Chicago Heights, IL. Sch. Dist.* 163, 315 F.3d 817, 824 (7th Cir. 2003) (“According to *Davis*, this is not a mere reasonableness standard, nor does it require funding recipients to remedy peer harassment.”); *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) (“The recipient is not required to ‘remedy’ sexual harassment nor ensure that students conform their conduct to certain rules . . . .”) (citing *Davis*, 526 U.S. at 648–49).

<sup>59</sup> *Davis*, 526 U.S. at 648 (emphasis added).

<sup>60</sup> *Id.* at 649.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See, e.g.*, *J.F.K. v. Troup Cty. Sch. Dist.*, 678 F.3d 1254, 1260 (11th Cir. 2012) (“The first step for the Appellants to defeat summary judgment as to their Title IX claim is to identify a person with the authority to take corrective measures in response to actual notice of sexual harassment.”).

<sup>64</sup> *See, e.g.*, *P.H. v. Sch. Dist. of Kansas City, Mo.*, 265 F.3d 653, 659–60 (8th Cir. 2001) (though it was undisputed that the teacher had engaged in “persistent and ongoing” sexual abuse of his student for two years, dismissing Title IX claim in the absence of evidence creating a triable issue that the school district had actual notice of the conduct); *Baynard v. Malone*, 268 F.3d 228, 239 (4th Cir. 2001) (dismissing Title IX claim seeking damages for sexual molestation committed by a sixth grade teacher, because plaintiff failed to show “actual notice” by an “appropriate person”).

<sup>65</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). *Cf. id.* at 300–01, 303–04 (Stevens, J., dissenting) (contending that the requirement of “actual” notice by an appropriate person incentivizes behavior by school districts to “insulate themselves from knowledge” concerning sexual harassment or abuse and would preclude liability even if all teachers knew about harassment but lacked the authority to constitute “an appropriate person”).

discussed later in this report, what constitutes “actual” notice, and who may constitute an “appropriate person,” have caused substantive splits among the circuits.<sup>66</sup>

### **Student-to-Student Harassment: “Substantial Control,” “Severe, Pervasive, and Objectively Offensive” Harassment, Denial of Educational Access**

Even where “deliberate indifference” is established, the Supreme Court’s liability standard further requires a plaintiff alleging *student-to-student* or peer harassment to make several additional showings: (1) that a funding recipient exercised “substantial control” over the harasser and the context in which the harassment occurred;<sup>67</sup> (2) that the harassment itself was “severe, pervasive, and objectively offensive”;<sup>68</sup> and (3) the denial of educational access resulting from the harassment.<sup>69</sup>

With respect to “substantial control,” *Davis* limits a school’s liability for damages to circumstances in which the funding recipient exercised “substantial control” over the harasser and in which the harassment took place in a context subject to the recipient’s control.<sup>70</sup> If “the harasser is under the school’s disciplinary authority,” a recipient of federal funding may be liable for its deliberate indifference to the harassment,<sup>71</sup> as the Court in *Davis* particularly emphasized the recipient’s authority to take “remedial action” against the harassment.<sup>72</sup> As for “substantial control” over the environment, “the harassment must take place in a *context* subject to the school district’s control.”<sup>73</sup>

As to the nature of the sexual harassment itself, *Davis* requires that the plaintiff show that the conduct “is so severe, pervasive, and objectively offensive, and [] so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>74</sup> Whether the conduct rises to this level depends, as the Court stated in *Davis*, “on a constellation of surrounding circumstances, expectations, and relationships,”<sup>75</sup> “including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.”<sup>76</sup>

<sup>66</sup> See *supra* section “Federal Courts’ Application of *Gebser* and *Davis* to Title IX Claims for Sexual Harassment or Abuse,” pp. 9–18.

<sup>67</sup> *Davis*, 526 U.S. at 645–46.

<sup>68</sup> *Id.* at 650–51.

<sup>69</sup> *Id.* at 652–53.

<sup>70</sup> *Id.* at 644–47 (discussing the limitation of a recipient’s liability based on whether it exercises “substantial control over both the harasser and the context in which the known harassment occurs”).

<sup>71</sup> *Id.* at 646–47.

<sup>72</sup> *Id.* at 644 (“A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.”).

<sup>73</sup> *Id.* at 645 (emphasis added). The Court pointed to the allegations in *Davis* as one example of misconduct occurring in a context in which the school district exercised substantial control: the harassment “occur[ed] during school hours and on school grounds,” with much of the alleged harassment occurring in the classroom. See *id.* at 646.

<sup>74</sup> *Id.* at 651. Cf. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (discussing actionable harassment under Title VII of the Civil Rights Act, which will violate the statute if sufficiently “severe *or* pervasive”) (emphasis added); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

<sup>75</sup> *Davis*, 526 U.S. at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)) (internal quotation marks omitted).

<sup>76</sup> *Id.*

Finally, for harassment to have sufficiently affected the victim’s education, the Court in *Davis* made two additional observations. On the one hand, the Court noted that evidence of a decline in the victim’s grades—as was alleged there—“provides necessary evidence of a potential link between her education” and the alleged harassment.<sup>77</sup> Yet, the Court also concluded that harassment is actionable under Title IX only when it is “serious enough to have the *systemic* effect of denying the victim equal access to an educational program or activity.”<sup>78</sup> Without defining what might constitute a “systemic effect,” the Court offered one example of harassment that does *not* have such effect: “a single instance” of harassment, even when “sufficiently severe.”<sup>79</sup>

## Federal Courts’ Application of *Gebser* and *Davis* to Title IX Claims for Sexual Harassment or Abuse

The Supreme Court’s *Gebser* and *Davis* decisions establish that a school or other educational program that receives federal funding will be liable under Title IX for damages for the sexual abuse or harassment of a student only if it acted with “deliberate indifference” in its response to known discrimination.<sup>80</sup> Deliberate indifference, the Fifth Circuit<sup>81</sup> has recently observed, “is an extremely high standard to meet.”<sup>82</sup>

Applying this and other components of the Supreme Court’s Title IX liability standard, lower federal courts have varied in their formulations of the evidence required to prove a Title IX claim. Some courts, for example, have interpreted *Gebser* and *Davis* to adopt a “hostile environment” analysis of Title IX claims alleging *teacher-to-student* harassment, in light of precedent analyzing harassment claims in the workplace context under Title VII of the Civil Rights Act.<sup>83</sup> Meanwhile,

<sup>77</sup> *Id.* at 652. The Court went on to hold that the complaint had sufficiently alleged “that the harassment had a concrete, negative effect on [the victim]’s ability to receive an education”—at least to survive a motion to dismiss. *Id.* at 654.

<sup>78</sup> *Id.* at 652–53 (emphasis added). *See also id.* at 653 (indicating that it was “limiting private damages actions to cases having a systemic effect on educational programs or activities”).

<sup>79</sup> *Id.* at 652–53. The Court based this conclusion on its view that it was “unlikely that Congress would have thought such behavior sufficient to rise to this level.” *Id.* (citing “the inevitability of student misconduct and the amount of litigation” that would result, as support for its conclusion that Congress would not have intended statutory coverage of a single, sufficiently severe, act of sexual harassment). *See, e.g.,* *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1059 (8th Cir. 2017) (affirming dismissal of a Title IX complaint, including on the basis that because the plaintiff alleged “a single sexual assault,” she did not sufficiently plead actionable peer harassment under Title IX).

<sup>80</sup> *Davis*, 526 U.S. at 633; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

<sup>81</sup> This report refers to a significant number of decisions by federal appellate courts of various circuits. For purposes of brevity, a reference to a particular circuit in the body of this report (*e.g.*, the Fifth Circuit) refers to the U.S. Court of Appeals for that particular circuit.

<sup>82</sup> *I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 368 (5th Cir. 2019) (“Deliberate indifference is an extremely high standard to meet.” (quoting *Domino v. Tex. Dep’t of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001))).

<sup>83</sup> *See generally*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204–06 (3d Cir. 2001) (discussing Title IX liability for sexual harassment in a private right of action and stating that “[t]he concept of ‘hostile environment’ harassment originated in a series of Title VII cases involving sexual harassment in the workplace”). *See, e.g.,* *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 696–700 (4th Cir. 2007) (en banc) (in Title IX claim alleging sexual harassment by college soccer coach of female players, analyzing whether the harassment was “sufficiently severe or pervasive to create a hostile or abusive environment” and whether that “severe and pervasive sexual harassment concretely and negatively affected her ability to participate in the soccer program”); *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 737–38 (2d Cir. 2003) (in Title IX claim alleging sexual harassment by a professor, requiring plaintiff to establish that the professor’s conduct created a hostile “educational environment” that deprived her of access to educational opportunities or benefits, and that one or more of the individual defendants with the “authority to address the alleged discrimination and to institute corrective measures” [on the plaintiff’s] behalf, had “actual knowledge of [the] discrimination . . . and fail[ed] adequately to respond”) (internal citations omitted). *But see* *Sauls v. Pierce Cty. Sch.*

other federal courts have focused their *teacher-to-student* analysis on whether a plaintiff has established the following elements:

- “actual” notice of discrimination;
- by an “appropriate person” authorized to take corrective measures; *and*
- “deliberate indifference” by the funding recipient in response to known discrimination.<sup>84</sup>

Where a Title IX claim alleges sexual harassment or assault committed by a *student against another student*, courts have additionally required the plaintiff to establish that:

- the harassment was “so severe, pervasive, and objectively offensive”;
- the “victim-students [were] effectively denied equal access to an institution’s resources and opportunities”;<sup>85</sup> and
- the recipient exercised “substantial control” over the harasser and the context in which the harassment occurred.<sup>86</sup>

As discussed in further detail below, federal courts of appeals vary—and at times directly conflict—regarding the evidence sufficient to satisfy these elements. Failure to satisfy any one of the elements may be the sole basis for dismissal of a Title IX claim.<sup>87</sup>

### What Knowledge Gives Rise to “Actual” Notice?

Under *Gebser*, a plaintiff must show that the funding recipient had “actual” notice of the discrimination;<sup>88</sup> therefore, it is not enough to present evidence that a funding recipient reasonably *should have known* about the alleged sexual misconduct.<sup>89</sup> Under the standard, then, what type of allegations reported to a school give rise to “actual” notice? Is it enough, for

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Dist., 399 F.3d 1279, 1284 (11th Cir. 2005) (holding that it was error for the district court to additionally require that a plaintiff alleging teacher-student harassment under Title IX establish that the harassment was sufficiently severe).

<sup>84</sup> *Gebser*, 524 U.S. at 277 (in instances of teacher-student harassment, holding that a Title IX claim will not prevail “unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.”). *See, e.g., Doe v. St. Francis Sch. Dist.*, 694 F.3d 869, 871 (7th Cir. 2012) (“The plaintiff must prove that ‘an official of the school district who at a minimum has authority to institute corrective measures . . . has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.’”) (citing *Gebser*, 524 U.S. at 277).

<sup>85</sup> *Davis*, 526 U.S. at 651 (holding that “a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities”). *See, e.g., Gabrielle M.*, 315 F.3d at 823 (stating that a Title IX action requires a showing that “the behavior at issue denies a victim equal access to education” and listing as examples “dropping grades,” “becoming homebound or hospitalized due to harassment” or physical violence) (citing cases).

<sup>86</sup> *Davis*, 526 U.S. at 645 (liability for damages is limited to circumstances “wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs”). *See, e.g., Feminist Majority Found. v. Hurley*, 911 F.3d 674, 687–88 (4th Cir. 2018) (discussing requisite “substantial control” and explaining that the analysis, among other features, “requires us to consider the educational institution’s control over the harasser, especially its ‘disciplinary authority’”).

<sup>87</sup> *See, e.g., Salazar v. S. San Antonio Indep. Sch. Dist.*, 690 F. App’x 853, 854–56 (5th Cir. 2017) (dismissing Title IX claim on the basis that the actual notice element had not been satisfied).

<sup>88</sup> *See Gebser*, 524 U.S. at 277.

<sup>89</sup> *See, e.g., P.H. v. Sch. Dist. of Kansas City, Mo.*, 265 F.3d 653, 663 (8th Cir. 2001) (“The Supreme Court has refused to impose Title IX liability in situations where the school district failed to react to teacher-student harassment of which it *should have known*.”) (citing *Davis*, 526 U.S. at 642).

example, if a funding recipient has actual knowledge of a “*substantial risk* of abuse”?<sup>90</sup> Does it require knowledge of specific allegations of harassment or abuse<sup>91</sup> or—perhaps most narrowly—require knowledge of “severe, pervasive, and objectively offensive” conduct?<sup>92</sup> Meanwhile, if a school is notified of a perpetrator’s previous acts of sexual harassment or abuse, may that constitute actual notice of that individual’s conduct as to *others*?

Federal courts differ<sup>93</sup> on these questions of actual notice, with some courts further differentiating between evidence that establishes actual notice of a teacher’s sexual abuse versus actual notice of sexual violence or harassment committed by a student.<sup>94</sup> As reflected below, which standard a court applies to evaluate “actual notice” is determinative—the claim may either proceed to the next phase of the analysis or be foreclosed altogether.

In *Doe v. School Board of Broward County*,<sup>95</sup> the Eleventh Circuit addressed the question of whether complaints of two separate students about the same teacher were “sufficient in substance to alert [the principal] to the possibility” of that teacher’s sexual assault of a *third* student.<sup>96</sup> The court held in the affirmative, emphasizing the similarity between the two preceding reports, which alleged multiple occasions of the teacher’s propositions for sex and dates, sexual touching, and sexual comments about their bodies.<sup>97</sup> These reports, the court held, raised a triable issue that the principal had actual notice “of a pattern of harassment.”<sup>98</sup> And where the analysis of “actual

<sup>90</sup> See, e.g., *K.T. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017) (describing its precedent as requiring a plaintiff to show that the funding recipient had actual knowledge of a “substantial risk” of harassment). Cf. *Doe v. St. Francis Sch. Dist.*, 694 F.3d 869, 871 (7th Cir. 2012) (discussing earlier precedent stating that actual notice requires “actual knowledge of misconduct, not just actual knowledge of the *risk* of misconduct”) (emphasis added). See also, e.g., *I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 372–73 (5th Cir. 2019) (concluding that the school district had actual notice of the alleged sexual assaults and cyberbullying, where the evidence reflected that the principal and assistant principal had actual knowledge of those particular *allegations*). But see *Kelly v. Allen Indep. Sch. Dist.*, 602 F. App’x 949, 953 (5th Cir. 2015) (describing requisite showing as the funding recipient’s knowledge of facts that would permit the inference that the student faced a “substantial risk” of serious harm or harassment).

<sup>91</sup> See, e.g., *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89–90 (2d Cir. 2011) (holding that evidence created triable issue that college had actual notice of a professor’s alleged sexual advances and harassment; in its analysis, citing among other evidence, that the plaintiff had provided “detailed” information regarding the conduct). Cf. *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 457 (8th Cir. 2009) (holding that complaints of teacher’s prior conduct were too “vague” to support a finding of actual knowledge of teacher’s sexual harassment of plaintiff).

<sup>92</sup> See *Hill v. Cundiff*, 797 F.3d 948, 963, 969–70 (11th Cir. 2015) (rejecting the argument that knowledge of a substantial risk of harassment is sufficient; rather, holding that “a Title IX plaintiff must prove the funding recipient had actual knowledge that the student-on-student sexual harassment was severe, pervasive, and objectively offensive” and concluding that a reasonable jury could find in favor of the plaintiff on the school board’s actual notice in that case).

<sup>93</sup> See *supra* notes 86–88. See also, e.g., *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1154 (10th Cir. 2006) (“Lower courts differ on whether notice sufficient to trigger liability may consist of prior complaints or must consist of notice regarding current harassment in the recipient’s programs.”) (citing and discussing cases).

<sup>94</sup> Cf., e.g., *Hill*, 797 F.3d at 969 (in a case involving student-to-student assault, requiring evidence showing a recipient’s actual knowledge that the harassment was “severe, pervasive, and objectively offensive”); *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1258–59 (11th Cir. 2010) (in a case involving teacher-to-student sexual assault, approvingly discussing cases in which actual notice was established by the funding recipient’s knowledge that a teacher poses a “substantial risk” of sexual abuse).

<sup>95</sup> 604 F.3d 1248 (11th Cir. 2010).

<sup>96</sup> *Broward Cty.*, 604 F.3d at 1250 n.1.

<sup>97</sup> *Id.* at 1258–59.

<sup>98</sup> *Id.* at 1259.

notice” looks to knowledge of the *risk* of sexual abuse or harassment, the court further observed, “lesser harassment may [] provide actual notice of sexually violent conduct.”<sup>99</sup>

In *Baynard v. Malone*, however, the Fourth Circuit held that the school principal had no “actual” notice that a sixth grade teacher was sexually abusing a student in his class,<sup>100</sup> despite receiving multiple prior reports that he molested children. There, the evidence reflected that before the plaintiff started sixth grade at the school, the principal had met with one of this teacher’s former students, who reported that he had been sexually molested by the teacher while in the sixth grade, warned that the teacher was a pedophile, and that the principal should watch for certain behaviors.<sup>101</sup> In addition, another teacher at the school told the principal about allegations that this teacher sexually molested children.<sup>102</sup> Separately, the school librarian reported to the principal that she had walked in on the teacher with the plaintiff sitting in his lap, with his arm around the student, and their faces very close together, and that when the teacher saw her, he jumped up and the plaintiff fell to the floor.<sup>103</sup> In relaying the incident, the librarian told the principal the behavior had been “inappropriate.”<sup>104</sup> Though the court noted that the principal “certainly should have been aware of the *potential* for abuse,” it held that there was “no evidence in the record to support a conclusion that [the principal] was *in fact* aware that a student was being abused.”<sup>105</sup> The court dismissed the Title IX claim on the basis that no appropriate person had actual notice of the abuse of the plaintiff student.<sup>106</sup>

As the above cases reflect, in the absence of a clear definition—either in the statute or from the Supreme Court—courts vary with respect to the nature, specificity, and frequency of allegations sufficient to constitute “actual” notice for the purpose of satisfying the first prong of the analysis for Title IX liability for sexual abuse or harassment.

### Who Constitutes an “Appropriate Person”?

The Supreme Court’s liability standard for Title IX not only requires actual notice, but also that this notice be made to “an appropriate person”—that is, “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf.”<sup>107</sup> Generally, federal appellate case law reflects that rather than treating an individual’s title as dispositive,<sup>108</sup> courts engage in fact-specific determinations that appear to

<sup>99</sup> *Id.* at 1258.

<sup>100</sup> *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001). The plaintiff alleged that Lawson molested him from when he was in the sixth grade until he was a freshman in college. *Id.* at 234. The alleged abuse occurred on school grounds, before, during, and after school, and at the teacher’s home. *Id.* at 233.

<sup>101</sup> *Id.* at 233.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 238.

<sup>106</sup> *See id.* at 238–39. *Cf. id.* at 235–36 (in analyzing the same evidence and allegations at issue in the plaintiff’s Title IX claim, holding that for the purposes of the plaintiff’s § 1983 claim, the evidence would allow a reasonable jury to conclude that the principal had “at least constructive knowledge of an unreasonable risk of constitutional injury” to students).

<sup>107</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

<sup>108</sup> *See, e.g., Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1256 (11th Cir. 2010) (noting that “that the ultimate question of who is an appropriate person is ‘necessarily a fact-based inquiry’ because ‘officials’ roles vary among school districts”).

focus principally on whether an individual had the ability to halt or address the misconduct<sup>109</sup> or whether the individual occupied a position high enough within the hierarchy of the funding recipient to be fairly said to act in a representative capacity for the recipient.<sup>110</sup>

Because the Court’s opinions in *Gebser* and *Davis* do not clearly delineate which individuals may constitute “appropriate person[s],”<sup>111</sup> federal courts have reached varying—and at times conflicting—determinations.

In the elementary or secondary school context, for example, courts vary as to which individuals—a principal, teacher,<sup>112</sup> or guidance counselor<sup>113</sup>—have the requisite “authority to address the alleged discrimination” and “institute” corrective action to constitute “an appropriate person.”<sup>114</sup>

Some federal courts of appeals have held that a public school principal may—but not always—constitute “an appropriate person.”<sup>115</sup> In *Warren ex rel. Good v. Reading School District*,<sup>116</sup> the Third Circuit held, in a Title IX case alleging sexual abuse by a fourth grade teacher,<sup>117</sup> that the school principal was an “appropriate person” in light of her authority to investigate a teacher’s misconduct, which in turn implied her authority to “initiate” corrective measures such as reporting her findings to the school board.<sup>118</sup> The Fourth Circuit, however, reached the opposite

<sup>109</sup> See, e.g., *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 458 (8th Cir. 2009) (holding that evidence was insufficient to establish that a school guidance counselor constituted an “appropriate person,” citing the absence of evidence to indicate that counselor could suspend the teacher engaging in the sexual abuse, “curtail[]” his teaching or other “school-related privileges,” or “requir[e] him to attend sessions or meetings about his behavior”).

<sup>110</sup> See, e.g., *Hill v. Cundiff*, 797 F.3d 948, 956, 959–63, 971 (11th Cir. 2015) (in holding that teacher’s aide was not an “appropriate person” for the purpose of reporting student-to-student harassment or assault, stating that “she was not high enough on the chain-of-command” for her acts to constitute an official decision by the school district).

<sup>111</sup> See, e.g., *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1287 (11th Cir. 2003) (“In *Davis*, the Supreme Court majority did not directly address *who* must have notice even in the face of Justice Kennedy’s dissent, and there is scant persuasive authority from the other circuits”) (emphasis added); *Broward Cty.*, 605 F.3d at 1254–55 (“The Supreme Court has not clearly delineated which school officials are appropriate persons for purposes of Title IX actual notice.”).

<sup>112</sup> Cf., e.g., *Plamp*, 565 F.3d at 457–59 (in Title IX claim alleging a teacher’s sexual harassment of his student, rejecting argument that other teachers in that case were “appropriate person[s]” based on their role as mandatory reporters of sexual misconduct and in light of their ability to institute corrective measures; stating, among other reasons, that it would be contrary to Title IX’s purposes to hold that the duty of school staff to report potential discrimination “amount[s] to an authority to take a corrective measure or institute remedial action within the meaning of Title IX”); *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1243–44, 1248 (10th Cir. 1999) (in Title IX claim alleging that student had sexually assaulted and battered another, stating that teachers could possibly constitute “appropriate persons” if the misconduct, for example, occurred during school hours on school grounds).

<sup>113</sup> See, e.g., *Plamp*, 565 F.3d at 458 (holding that guidance counselor did not constitute an “appropriate person,” in the absence of evidence that the counselor could take corrective action with respect to the teacher, such as suspending him or requiring him to attend training); *Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163, 173–74 (3d Cir. 2002) (holding that evidence was “clearly insufficient” in that case to create a triable issue that the guidance counselor was an “appropriate person”; stating that though the counselor “handled referrals of abuse and assumed the role of principal” in the principal’s absence, the counselor was not acting as a principal when he became aware of the teacher’s alleged sexual abuse of his student).

<sup>114</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

<sup>115</sup> *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1256 (11th Cir. 2010) (citing cases and stating that “the majority of our sister circuits addressing the issue have interpreted the *Gebser* and *Davis* opinions as standing for the proposition that at least in some circumstances, if not generally, a principal enjoys ample authority to ‘take corrective measures’ in response to allegations of teacher or student sexual harassment”).

<sup>116</sup> 278 F.3d 163 (3d Cir. 2002).

<sup>117</sup> *Id.* at 164–65.

<sup>118</sup> *Id.* at 172–73 (also citing testimony reflecting that the principal “was in charge of every aspect of the daily operations” of the elementary school, including the supervision and discipline of teachers).



conclusion in *Baynard v. Malone*,<sup>119</sup> holding that the principal—despite being responsible for supervising and evaluating teachers—was not an “appropriate person.”<sup>120</sup> The court emphasized that the principal could not “be considered the functional equivalent of the school district” and lacked the authority to “hire, fire, transfer, or suspend teachers.”<sup>121</sup>

Meanwhile, at least one federal court of appeals has held that a principal who engages *directly* in sexual abuse or harassment may not constitute an “appropriate person.” In *Salazar v. South San Antonio Independent School District*, the Fifth Circuit interpreted *Gebser*<sup>122</sup> to hold that where a school official sexually abuses a student, he or she cannot be considered an “appropriate person,” even if he would otherwise constitute an “appropriate person.”<sup>123</sup> That case involved allegations that a vice principal, who later became principal, sexually abused a student from his third grade to seventh grade year.<sup>124</sup> Though “uncontroverted testimony at trial” established that the school official had corrective authority to address sexual harassment during the time he molested the plaintiff, the Fifth Circuit reasoned that it was “highly unlikely” that he would take corrective measures or report his own behavior so as to provide actual notice to the funding recipient.<sup>125</sup> The court further rejected the argument that the principal’s abuse should be treated as an official action of the school district for Title IX liability purposes, given the Supreme Court’s rejection of agency principles to Title IX.<sup>126</sup> The Fifth Circuit concluded that the “goals and purpose” of Title IX “would not be accomplished or effectuated by permitting damage awards” in such circumstances.<sup>127</sup>

In the higher education context, federal courts of appeals have engaged in similarly fact-specific analyses to determine whether a university employee—for example, a college dean,<sup>128</sup> university counsel,<sup>129</sup> or athletics director<sup>130</sup>—constitutes an “appropriate person” for the purposes of a Title

<sup>119</sup> 268 F.3d 228 (4th Cir. 2001).

<sup>120</sup> *Id.* at 239.

<sup>121</sup> *Id.* at 238–39 (also stating its agreement “with the Fifth Circuit that whether a supervisory employee may be viewed as the proxy of the school district depends upon whether the district has delegated to that employee the traditional powers of an employer, e.g., the authority to hire and terminate employees”).

<sup>122</sup> *Salazar v. S. San Antonio Indep. Sch. Dist.*, 690 F. App’x 853, 857 (5th Cir. 2017) (concluding that the statement in *Gebser* regarding actual notice by a wrongdoer “was part of the Supreme Court’s holding in *Gebser*, not dicta”). *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998) (in response to the dissenting opinion’s assertion that the teacher who engaged in sexual abuse had knowledge of his own actions, stating that “the knowledge of the wrongdoer himself is not pertinent to the analysis” of actual notice).

<sup>123</sup> *Salazar*, 690 F. App’x at 854–55 (“We conclude that the judicially implied private right of action under Title IX does not impose liability on a school district when the only employee or representative of the district with actual knowledge of the molestation was the perpetrator himself, even if the perpetrator had authority to institute corrective measures on behalf of the district to end discrimination by other individuals or in the school’s programs.”).

<sup>124</sup> *Id.* at 855.

<sup>125</sup> *Id.* at 858–59.

<sup>126</sup> *Id.* at 859–60.

<sup>127</sup> *Id.* at 862–63.

<sup>128</sup> *See, e.g., Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89–90 (2d Cir. 2011) (analyzing whether student’s report of harassment to a dean of the college constituted actual notice to the college).

<sup>129</sup> *See, e.g., Jennings v. Univ. of N.C.*, 482 F.3d 686, 700–01 (4th Cir. 2007) (en banc) (holding that evidence was sufficient to establish that the university had actual notice of sexual harassment, where the plaintiff reported the conduct to the assistant to the chancellor, who was also counsel to the university).

<sup>130</sup> *See, e.g., Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294–95 (11th Cir. 2007) (analyzing whether the university’s president and the university’s athletic director were “appropriate persons”); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184–85 (10th Cir. 2007) (emphasizing the actual knowledge of the head coach of the university’s football team, of the sexual assaults occurring during the recruitment of college football players, and noting

IX private right of action. The analyses in these cases appear to emphasize evidence relating to the individual’s ranking in the university hierarchy, responsibilities involving receiving allegations of harassment, and ability to correct or halt the misconduct.<sup>131</sup>

Yet, even when there arguably is such evidence, it may not be sufficient to render that individual an “appropriate person.” In *Ross v. University of Tulsa*, for example, the Tenth Circuit held that campus security officers were not “appropriate person[s]” through whom the university could have actual notice of an on-campus sexual assault.<sup>132</sup> The court rejected the contention that the officers’ mandatory reporting of sexual assaults to university personnel rendered them “appropriate person[s],” instead likening mandatory reporting to a “clerical act” rather than taking corrective action.<sup>133</sup> The court also rejected the argument that the officers’ participation in investigations of campus violence rendered them “appropriate person[s],” as that contention, as presented, “would assume that anyone participating in the initiation of a corrective process” is an “appropriate person.”<sup>134</sup>

Given the variability of courts’ analyses as to who may constitute an “appropriate person,” it is unlikely that a school’s or university’s Title IX Coordinator will categorically constitute an “appropriate person.”<sup>135</sup> Rather, as reflected in the above decisions, a court’s determination—based on the legal standard set out in *Gebser*—will likely depend on the characteristics it finds indicative of an “appropriate person” and the evidence relating to the individual’s responsibilities in that institution.

### Deliberate Indifference: A “Clearly Unreasonable” Response

As discussed earlier, after establishing “actual notice” of the discrimination to an “appropriate person,” a plaintiff must additionally prove that the funding recipient acted with deliberate indifference in its response—that is, that the entity acted in a manner that was “*clearly unreasonable* in light of the known circumstances.”<sup>136</sup> Federal appellate courts interpret this standard to require more than a showing that the school or institution failed to respond or act

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that his rank in the university hierarchy “was comparable to that of a police chief in a municipal government”).

<sup>131</sup> See, e.g., *Papelino*, 633 F.3d at 89–90 (in concluding that the college had actual notice of a professor’s sexual harassment, citing evidence that the dean to whom the student reported the harassment was “a high-ranking member of the College’s administration who was ‘responsible for the administration of the Student Code’”); *Jennings*, 482 F.3d at 700–01 (en banc) (holding that evidence was sufficient to establish that the university had actual notice, where the student reported coach’s sexual harassment to the assistant to the chancellor, who was also the University’s “highest ranking lawyer” and responsible for “fielding sexual harassment complaints”); *Williams*, 477 F.3d at 1294–95 (holding that plaintiff had sufficiently pled facts that the university president and athletic director were both “appropriate person[s],” where it was undisputed that both officials had “the authority to take corrective measures” for the university and its athletics program “to end the alleged discrimination”).

<sup>132</sup> 859 F.3d 1280, 1289–92 (10th Cir. 2017) (rejecting several arguments asserting that campus security officers constitute “appropriate person[s]”). In that case, two students called campus security to report that their friend had been sexually assaulted, after which the officers contacted the plaintiff and she reported the alleged rape directly to them. *Id.* at 1284–86.

<sup>133</sup> *Id.* at 1289–90.

<sup>134</sup> *Id.* at 1291. The court declined to address the question of whether an investigation itself is a “form of corrective action” that might render campus police an “appropriate person,” on the basis that the plaintiff’s argument on this point had been “perfunctory.” See *id.* The court noted, however, that its holding was “limited to the evidence and arguments before us,” and did not “foreclose consideration of campus-security officers as appropriate persons.” *Id.* at 1292 n. 9.

<sup>135</sup> See, e.g., *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1256 (11th Cir. 2010) (noting that “that the ultimate question of who is an appropriate person is ‘necessarily a fact-based inquiry’ because ‘officials’ roles vary among school districts”).

<sup>136</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (emphasis added).

reasonably, or was negligent.<sup>137</sup> Nor is a school required to remedy the harassment to avoid liability in a private right of action based on “deliberate indifference.”<sup>138</sup>

In these highly fact-intensive analyses, courts examine the nature of the allegations the funding recipient had knowledge of, and what actions the recipient took, if any, in response to that information to determine whether the response was so “clearly unreasonable” as to amount to “deliberate indifference” to the alleged sexual harassment or abuse.<sup>139</sup> The clearest cases of “deliberate indifference” generally concern evidence that the recipient made no effort to respond at all to “actual” notice of sexual harassment or abuse.<sup>140</sup> Evidence of such circumstances might include, for example, a funding recipient’s failure to initiate an investigation into serious allegations,<sup>141</sup> or take *any* disciplinary actions in light of repeated reports of sexual harassment.<sup>142</sup>

Where there is evidence that the funding recipient responded in *some* manner, however, federal case law reflects what appear to be divergent and variable analyses as to whether a response is so deficient as to amount to deliberate indifference. Federal appellate courts have commonly described the requisite showing for deliberate indifference as a “high” bar to meet.<sup>143</sup>

<sup>137</sup> See, e.g., *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167 (5th Cir. 2011) (to show deliberate indifference in a Title IX private right of action, stating that “neither negligence nor mere unreasonableness is enough”); *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1287 n.11 (11th Cir. 2003) (“This is not a mere ‘reasonableness’ standard or a failure to use reasonable care standard similar to negligence.”) (citing *Davis*, 526 U.S. at 649).

<sup>138</sup> See *Davis*, 526 U.S. at 648 (rejecting the dissent’s “mischaracterize[ation]” that the standard requires funding recipients to remedy peer harassment). See, e.g., *Sanches*, 647 F.3d at 167–68 (describing the requisite showing for deliberate indifference and stating that “[s]chools are not required to remedy the harassment”); *Gabrielle M. v. Park Forest-Chicago Heights, IL. Sch. Dist.* 163, 315 F.3d 817, 824 (7th Cir. 2003) (“According to *Davis*, this is not a mere reasonableness standard, nor does it require funding recipients to remedy peer harassment.”); *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) (“The recipient is not required to ‘remedy’ sexual harassment nor ensure that students conform their conduct to certain rules . . . .”) (citing *Davis*, 526 U.S. at 648–49).

<sup>139</sup> See generally, e.g., *McCoy v. Bd. of Educ. Columbus City Sch.*, 515 F. App’x 387, 391–92 (6th Cir. 2013) (explaining that when assessing “deliberate indifference” in the Title IX context, “the proportionality of the school’s response in light of available information lies at the heart of the indifference analysis”; discussing two cases to “illustrate the relationship between school officials’ level of knowledge and the reasonableness of their actions”).

<sup>140</sup> See *Davis*, 526 U.S. at 654 (holding that complaint sufficiently alleged a Title IX claim to survive a motion to dismiss; on deliberate indifference, pointing to allegations that the school board “made no effort whatsoever either to investigate or to put an end to the harassment”). See also, e.g., *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 90 (2d Cir. 2011) (concluding that a reasonable jury “could surely find” deliberate indifference from evidence that the college dean who received the sexual harassment allegations against a professor did not speak to anyone about the complaint and “did nothing to investigate” it); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 700–01 (4th Cir. 2007) (en banc) (holding that the university’s “failure to take any action to remedy the situation would allow a rational jury to find deliberate indifference to ongoing discrimination”).

<sup>141</sup> *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1243–44, 1248 (10th Cir. 1999) (where Title IX complaint alleged repeated sexual assaults of developmentally disabled student, of which the principal had been notified, stating that the principal’s “complete refusal to investigate known claims of the nature advanced by [the plaintiff], if true, amounts to deliberate indifference”).

<sup>142</sup> See, e.g., *McCoy*, 515 F. App’x at 391 (“A failure to take *any* disciplinary action despite reports of repeated sexual harassment rises to the level of deliberate indifference.”) (emphasis in original). See also, e.g., *Vance*, 231 F.3d at 261 (holding that “deliberate indifference” may be shown by evidence that a school district has actual knowledge that its corrective efforts have been ineffective, and continues to use those same methods “to no avail”; explaining that such a response reflects a failure “to act reasonably in light of the known circumstances”).

<sup>143</sup> See, e.g., *I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 368 (2019) (“Deliberate indifference is an extremely high standard to meet.” (quoting *Domino v. Tex. Dep’t of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001))); *Doe v. Galster*, 768 F.3d 611, 619 (7th Cir. 2014) (“The standard of deliberate indifference sets a high bar for plaintiffs”).

In *Doe ex rel. Doe v. Dallas Independent School District*, for example, the Fifth Circuit held that the school district’s response did not amount to deliberate indifference,<sup>144</sup> despite evidence that could arguably be described as reflecting a deficient response. In that case, the plaintiffs, a group of former students, alleged that the same third grade teacher had sexually abused numerous male students, over the course of four years.<sup>145</sup> The plaintiffs presented evidence that in response to a report of sexual molestation,<sup>146</sup> the principal told the parent that the alleged perpetrator was a “good teacher” and that he knew her son was lying; failed to report the allegation to Child Protective Services; did not monitor the teacher further or require him to attend any training; and never raised the issue of sexual abuse again with the teacher until he was ultimately arrested.<sup>147</sup> In the court’s view, this evidence failed to create a triable issue of deliberate indifference, as the principal had nonetheless interviewed the student, spoken with his mother, and warned the teacher that if the allegations were true, “he would be ‘dealt with.’”<sup>148</sup> It could not say, the court concluded, that these actions “were an inadequate response” to the student’s allegation.<sup>149</sup>

When faced with apparently similar evidence of a school’s response to allegations of teacher sexual misconduct, the Eleventh Circuit held that, given “serious deficiencies,” the district court had erred in holding that defendant’s response, as a matter of law, was *not* deliberately indifferent.<sup>150</sup> There, the principal had received sexual harassment complaints by two students about the same teacher.<sup>151</sup> In its analysis, the court highlighted the response to the second complaint, because by that time, the principal had notice of a possible pattern.<sup>152</sup> The principal, however, “effectively did nothing other than obtain a written statement” from the student and the teacher.<sup>153</sup> In addition, though the principal, as he had with the first complaint, reported the second complaint to the school board’s special investigative unit, he nonetheless failed to notify the unit that the allegation concerned “the same teacher who had been the subject of a formal investigation just months earlier.”<sup>154</sup> It could not be said, the court concluded, that “merely because school officials ‘confronted [the teacher],’ ‘obtained statements’ from the complaining students, and ‘informed the [unit] of the sexual misconduct allegations’ (while omitting material details),” that this response was reasonable.<sup>155</sup> Rather, the “failure to institute any corrective

<sup>144</sup> 220 F.3d 380, 388–89 (5th Cir. 2000).

<sup>145</sup> *Id.* at 381.

<sup>146</sup> *Id.* at 387 (reflecting that parent of a student reported that the teacher “had fondled” her son, and that the student had relayed to the principal that the teacher had touched him “‘in his private place’”).

<sup>147</sup> *Id.* at 388.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1263 (11th Cir. 2010).

<sup>151</sup> *Id.* at 1250–53 (describing both complaints and the sexual harassment alleged in each report).

<sup>152</sup> *Id.* at 1260–63 (concluding that though actions taken in response to first complaint did not amount to deliberate indifference, the response to the second complaint, “in light of the known circumstance that a prior female student had also accused [the same teacher] of sexual harassment in the same school year,” created a triable issue of deliberate indifference).

<sup>153</sup> *Id.* at 1261 (noting the absence of any formal or informal investigation, and no interviews of any other relevant witnesses). *Cf. Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 387–89 (5th Cir. 2000).

<sup>154</sup> *Broward Cty.*, 604 F.3d at 1261–62 (reflecting that the principal had also “recommended that no further investigation occur” and noting that corrective measures such as monitoring the teacher’s classroom were not taken).

<sup>155</sup> *Id.* at 1263.

measures aimed at ferreting out the possibility of [the teacher]’s sexual harassment of his students could constitute deliberate indifference.”<sup>156</sup>

Meanwhile, some courts of appeals have analyzed allegations of deliberate indifference that, in their view, the Court’s *Gebser* and *Davis* decisions did not directly address.<sup>157</sup> In *Simpson v. University of Colorado, Boulder*, for example, the Tenth Circuit addressed allegations that a university had an “official policy of deliberate indifference” by failing to provide adequate training or guidance in light of an “obvious” need for such actions.<sup>158</sup> There, the head coach and other staff of the university’s football program selected current players to host high school recruits on campus, for the purpose of “show[ing] the recruits a good time.”<sup>159</sup> During one such football recruiting visit, the plaintiffs, who had agreed to meet with them, alleged that university football players and high school recruits sexually assaulted them.<sup>160</sup>

In analyzing the issue of deliberate indifference, the court highlighted evidence that the university coaching staff had prior and ongoing knowledge of sexual assaults occurring during football recruitment and by football players, including the rape of a female student by a university football player two months before the plaintiffs were assaulted.<sup>161</sup> The university had also been previously advised by the local district attorney to implement changes and training to its football recruiting program in light of such sexual assaults.<sup>162</sup> In addition, the head coach “continued to resist recruiting reforms.”<sup>163</sup> One player testified that he received little guidance on his responsibilities as a “player-host”; and a handbook provided by the school to the players, the court observed, did not “provide guidance to player-hosts on appropriate behavior by themselves and recruits.”<sup>164</sup>

The court emphasized that the evidence would support findings that, before the plaintiffs had been assaulted, the head coach had both general and specific knowledge of sexual assaults occurring during recruiting visits, that there had been no change in the recruiting program to lessen the likelihood of such assaults, and that the university “nevertheless maintained an unsupervised player-host program.”<sup>165</sup> The evidence, the court held, created a triable issue of deliberate indifference.<sup>166</sup>

As with the other components of the Supreme Court’s standard for a Title IX private right of action—“actual” notice to an “appropriate person”—federal case law reflects fact-intensive,

<sup>156</sup> *Id.* at 1261.

<sup>157</sup> See *Simpson v. Univ. of Colo., Boulder*, 500 F.3d 1170, 1175–79 (10th Cir. 2007) (stating that the *Davis* decision provided an “imperfect” framework by which to analyze plaintiffs’ Title IX claim, but discussing and looking to *Gebser* and *Davis* for guidance as to the appropriate requirements to apply in the case). See also, e.g., *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1295 (11th Cir. 2007) (in Title IX claim alleging university liability for the rape of a student by university football players, noting the “factual distinctiveness” of the Title IX claim, and that “to the extent that we deal with a scenario that is factually distinct” from *Gebser* and *Davis*, it would analyze the claim in light of circuit precedent addressing municipal liability under § 1983 claims).

<sup>158</sup> *Simpson*, 500 F.3d at 1178.

<sup>159</sup> *Id.* at 1173, 1180.

<sup>160</sup> *Id.* Evidence included that at least one player understood the purpose of meeting with the alleged victims was “to provide recruits another chance to have sex.” *Id.*

<sup>161</sup> *Id.* at 1181–83.

<sup>162</sup> *Id.* at 1181–82.

<sup>163</sup> *Id.* at 1184.

<sup>164</sup> *Id.* at 1183.

<sup>165</sup> *Id.* at 1184.

<sup>166</sup> *Id.* at 1184–85.

variable determinations with respect to the evidence necessary to meet the “high” bar<sup>167</sup> for showing deliberate indifference on the part of a funding recipient.

## Administrative Enforcement of Title IX

In addition to the private rights of action discussed above, Title IX is also enforced by federal agencies that provide funding to educational programs. Title IX makes nondiscrimination based on sex a condition for receiving federal financial assistance in any education program or activity.<sup>168</sup> In this administrative enforcement context, if a school is found to have violated Title IX, the ultimate sanction is termination or suspension of federal funds, rather than a legal judgment requiring payment of damages to a particular student.<sup>169</sup> Agencies are authorized to issue regulations (subject to presidential approval) and orders to enforce the statute and are responsible for monitoring recipients’ compliance with Title IX.<sup>170</sup> While a number of federal agencies issue funds for educational programs, and thus are responsible for enforcing the statute with respect to recipients of financial assistance for educational programs, two agencies play particularly prominent roles in enforcing Title IX.

Pursuant to the Education Amendments of 1974, the Secretary of Education (ED) is specifically directed to promulgate regulations concerning the prohibition of sex discrimination at education programs that receive federal assistance.<sup>171</sup> Because ED is, among other things, “the primary administrator of federal financial assistance to education,”<sup>172</sup> the agency plays a lead role in enforcing Title IX against educational institutions.<sup>173</sup> And according to an executive order, the Attorney General coordinates the implementation and enforcement of Title IX across the executive branch.<sup>174</sup> Subject to the coordinating function of the Attorney General, the Department of Justice’s Civil Rights Division and OCR collaborate in enforcing Title IX consistent with a

<sup>167</sup> See *supra* note 30.

<sup>168</sup> 20 U.S.C. § 1681(a). Title IX contains a number of exceptions, such as exemptions for educational institutions controlled by a religious organization and those whose primary purpose is training for military service or the merchant marine. *Id.* §§ 1681(a) (1)–(9). Employees of educational institutions may also be protected from sexual harassment under Title IX, although they are also protected by Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e *et seq.*

<sup>169</sup> It bears mention that at least some resolution agreements reached between OCR and universities have required reimbursement to complainants of university expenses. See, e.g., *Voluntary Resolution Agreement*, Southern Methodist University, OCR Case Nos. 06112126, 06132081, and 06132088, at 15 (Nov. 16, 2014), <https://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf>.

<sup>170</sup> 20 U.S.C. § 1682; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Common Rule, 65 Fed. Reg. 52,858 (2000) (incorporated throughout the Code of Federal Regulations) [hereinafter Final Common Rule].

<sup>171</sup> Education Amendments Act of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974) (codified at 20 U.S.C. § 1681 note.)

<sup>172</sup> *Grove City Coll. v. Bell*, 687 F.2d 684, 688 (3d Cir. 1982).

<sup>173</sup> ED’s Title IX regulations served as the model for the comprehensive “common rule” implementing Title IX by 21 other executive branch agencies, including DOJ. This common rule recognized ED’s lead role in enforcing Title IX through guidance and investigations. See Final Common Rule, *supra* note 170. While various federal agencies that issue federal funds to education programs enforce Title IX with respect to those programs, some agencies also play another role in indirectly interpreting Title IX. For instance, the Affordable Care Act bars discrimination in any health program or activity that receives federal funds on the grounds prohibited by various civil rights statutes, including Title IX. 42 U.S.C. § 18116. The Secretary of the Department of Health and Human Services (HHS) is authorized to issue regulations implementing this provision. *Id.* § 18116(c). HHS did so in 2016, but these regulations were enjoined by a federal district court (insofar as they prohibited discrimination on the basis of gender identity and termination of pregnancy). *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016).

<sup>174</sup> Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250 (1980).

memorandum of understanding reached between the agencies, which notes that OCR has primary responsibility for enforcing the statute directly against recipients of financial assistance from ED through complaint investigations and compliance reviews.<sup>175</sup>

Accordingly, ED has promulgated regulations implementing Title IX that apply to traditional educational institutions of all levels that receive federal assistance, including elementary and secondary schools, as well as institutions of higher education.<sup>176</sup> Those regulations specifically bar educational institutions from excluding individuals or denying the benefits of any education program or activity on the basis of sex.<sup>177</sup> ED regulations also require that recipients of federal financial assistance that operate education programs designate an employee (commonly referred to as the Title IX Coordinator) to coordinate efforts to comply with ED regulations regarding sex-based discrimination.<sup>178</sup> Further, schools must establish grievance procedures that provide “prompt and equitable resolution” of complaints alleging prohibited actions.<sup>179</sup>

Pursuant to its role in enforcing Title IX, OCR may conduct periodic reviews of institutions, or directed investigations, to ensure that recipients of federal funds are complying with applicable requirements.<sup>180</sup> OCR also receives complaints from individuals alleging violations of Title IX by educational institutions and investigates allegations. When violations of the statute are found through these means, the office can seek informal resolution through a resolution agreement.<sup>181</sup> According to OCR, if negotiations do not reach a resolution agreement, it may then take more

<sup>175</sup> Memorandum of Understanding Between the United States Department of Education, Office for Civil Rights, and the United States Department of Justice, Civil Rights Division (2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED\\_DOJ\\_MOU\\_TitleIX-04-29-2014.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf).

<sup>176</sup> 34 C.F.R. § 106.2. See Dep’t of Justice, Civil Rights Div., *Title IX Legal Manual* (updated Aug. 6, 2015), <https://www.justice.gov/crt/title-ix> (explaining that the document is not a guide for Title IX enforcement regarding “traditional educational institutions such as colleges, universities, and elementary and secondary schools [that] have been subject to the Department of Education’s Title IX regulations and guidance for 25 years,” but is instead intended for other federal agencies that fund educational programs such as “police academies, job training programs, vocational training for prison inmates, and other education programs”).

<sup>177</sup> 34 C.F.R. § 106.31(a). The predecessor of the Department of Education was the Department of Health, Education, and Welfare (HEW), which originally issued Title IX regulations in 1975. Congress created the Department of Education in 1980. Department of Education Organization Act, Pub. L. No. 96-88, § 201, 93 Stat. 668 (1979) (codified at 20 U.S.C. § 3411). All of HEW’s regulations continued and all functions of HEW’s Office for Civil Rights were transferred to the Secretary of Education. 20 U.S.C. § 3441(a)(3). HEW’s Title IX regulations were recodified at 34 C.F.R. pt. 106. See Establishment of Title and Chapters, 45 Fed. Reg. 30,802, 30,955–56 (1980).

<sup>178</sup> 34 C.F.R. § 106.8(a). See also OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., NOTICE OF LANGUAGE ASSISTANCE DEAR COLLEAGUE LETTER ON TITLE IX COORDINATORS (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

<sup>179</sup> 34 C.F.R. § 106.8(b). In addition, under the Clery Act and its implementing regulations, schools that receive funding under Title IV of the Higher Education Act of 1965 must report certain crimes to ED and the campus community. 20 U.S.C. § 1092(f). A covered institution must also prepare an annual security report that contains a statement of policy regarding its procedures for disciplinary action in the case of alleged dating violence, domestic violence, sexual assault, or stalking. 34 C.F.R. § 668.46(k).

<sup>180</sup> 34 C.F.R. § 106.71 (incorporating by reference the procedures applicable under 34 C.F.R. § 100.7(a)). See OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUC., CASE PROCESSING MANUAL 22 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [hereinafter CASE PROCESSING MANUAL] (“In appropriate circumstances, OCR may conduct a directed investigation when information indicates a possible failure to comply with the laws and regulations enforced by OCR, the matter warrants attention and the compliance concern is not otherwise being addressed through OCR’s complaint, compliance review or technical assistance activities.”).

<sup>181</sup> See CASE PROCESSING MANUAL 15–17. See, e.g., *Departments of Justice and Education Reach Settlement to Address and Prevent Sexual Assault and Harassment of Students at the University of Montana in Missoula*, U.S. DEP’T OF EDUC. (May 9, 2013), <http://www.ed.gov/news/press-releases/departments-justice-and-education-reach-settlement-address-and-prevent-sexual-assault-and-harassment-students-university-montana-missoula>.

formal enforcement measures, including seeking to suspend or terminate an institution’s funding.<sup>182</sup>

Notably, neither Title IX’s text nor ED’s current regulations directly address sexual harassment. In the administrative context, ED’s OCR has issued a series of guidance documents that have interpreted Title IX to bar sexual harassment and define distinct responsibilities for educational institutions with regard to such allegations.<sup>183</sup>

These documents—while sometimes subject to change—generally reflect a different analysis for assessing a school’s Title IX liability for harassment than the Supreme Court case law addressing private rights of action for damages for sexual abuse or harassment. In particular, ED has applied a constructive notice requirement that prompts a school’s Title IX responsibility to respond, rather than “actual notice” to “an appropriate person” as required in the context of suits for damages. In addition, while the Supreme Court has explained that a school’s response will result in liability only where “clearly unreasonable,” ED has articulated baseline standards for how schools must respond to comply with Title IX.<sup>184</sup> Finally, while the Supreme Court rejected holding schools responsible for sexual harassment under theories of vicarious liability, ED has held schools responsible for sexual harassment under Title IX where a teacher commits misconduct in the scope of their employment.<sup>185</sup>

## 1997 ED Guidance and Subsequent Supreme Court Decisions Regarding Sexual Harassment

In 1997, OCR released a guidance document stating that sexual harassment of students by school employees, other students, or third parties is a form of sex discrimination prohibited by Title IX.<sup>186</sup> The guidance explained that two general types of conduct constituted sexual harassment:

1. **Quid pro quo harassment:** wherein a school employee “explicitly or implicitly conditions a student’s participation in an education program or activity or bases an educational decision on the student’s submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature”; or
2. **Hostile environment harassment:** wherein sexual harassing conduct by a school’s employee, another student, or a third party “is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.”<sup>187</sup>

In the former case, the 1997 Guidance explained that a school would be liable for quid pro quo harassment by an employee in a position of authority whether or not it knew or should have

<sup>182</sup> See CASE PROCESSING MANUAL 15–17. See 20 U.S.C. § 1682; 34 C.F.R. § 106.71 (incorporating by reference the procedures applicable under 34 C.F.R. § 100.8).

<sup>183</sup> See Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 898–905 (2016) (noting how the Department of Education’s expectations for educational institutions’ responsibilities regarding allegations of sexual harassment have evolved).

<sup>184</sup> See, e.g., 2001 GUIDANCE, *supra* note 11, at 5–14.

<sup>185</sup> *Id.* at 10.

<sup>186</sup> Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

<sup>187</sup> *Id.* at 12,038.



known of the harassment.<sup>188</sup> In the latter case, the 1997 Guidance explained that, in instances of hostile environment harassment by *employees*, a school would be liable for harassment if the employee acted with apparent authority or was aided in carrying out the harassment due to his or her position.<sup>189</sup>

With respect to sexual harassment by *other students or third parties*, a school would be liable for harassment if “(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.”<sup>190</sup> The Guidance explained that while Title IX does not render a school responsible for the actions of its students, it does make schools responsible for their “own discrimination in failing to remedy [harassment] once the school has notice.”<sup>191</sup>

Following the release of OCR’s 1997 Guidance, the Supreme Court shortly thereafter recognized a substantively different standard for establishing liability in a private suit for damages directly against a school.<sup>192</sup> As discussed above, in 1998, in *Gebser*, the Supreme Court ruled that in cases of harassment committed by a *teacher*, a school district is liable only when it has actual knowledge of allegations by an “appropriate person,” and so deficiently responds to those allegations that its response amounts to deliberate indifference to the discrimination.<sup>193</sup> And the next year in *Davis*, the Court held that in addition to a showing of actual knowledge by an appropriate person, and deliberate indifference, a plaintiff suing for damages for sexual harassment committed by a *student* must show that the conduct was “so severe, pervasive, and objectively offensive” that it denied the victim equal access to educational opportunities or benefits.<sup>194</sup>

Crucially, the Court in *Gebser* distinguished between actions by a school that could result in Title IX liability for damages in a private right of action, and Title IX administrative requirements imposed by a federal agency in implementing and enforcing the statute.<sup>195</sup> According to the Court, agencies possess authority to enforce requirements that effectuate Title IX’s mandate, “even if those requirements do not purport to represent a definition of discrimination under the statute.”<sup>196</sup> In other words, agencies enforcing Title IX may administratively require recipients to comply with certain procedures and rescind funding for violations, even though breaches of such requirements might not subject a school to liability under a private suit for damages.

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<sup>188</sup> *Id.* at 12,039.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 12,039–40. The Guidance also indicated that “[e]ven in situations not involving (i) quid pro quo harassment, (ii) creation of a hostile environment through an employee's apparent authority, or (iii) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority, a school will be liable for sexual harassment of its students by its employees under the same standards applicable to peer and third party hostile environment sexual harassment.” *Id.* at 12,039.

<sup>191</sup> *Id.* at 12,040.

<sup>192</sup> *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 74–75 (1992).

<sup>193</sup> *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289–90 (1998); *Franklin*, 503 U.S. at 75.

<sup>194</sup> *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650–51 (1999).

<sup>195</sup> *Gebser*, 524 U.S. at 291–92.

<sup>196</sup> *Id.*

## ED’s Guidance Documents Regarding Sexual Harassment Subsequent to *Gebser* and *Davis*

Following these Supreme Court decisions regarding the standard for liability in Title IX damages suits alleging sexual harassment, ED issued a number of guidance documents generally reaffirming its basic position outlined in its 1997 Guidance, including with respect to notice, a school’s responsibilities under Title IX to comply with the statute, and the application of vicarious liability in certain situations. In these documents, ED has indicated that the liability standard imposed by the Supreme Court for Title IX sexual harassment violations is distinct from the standards appropriate in the administrative enforcement context.<sup>197</sup> In other words, a school’s responsibilities in responding to sexual harassment allegations under Title IX have been treated differently in the context of a suit for damages than in the administrative enforcement context.

### 2001 Sexual Harassment Guidance

In 2001, OCR issued a Revised Sexual Harassment Guidance document that—in light of the intervening Supreme Court decisions that set a more stringent standard for obtaining relief regarding private damages actions<sup>198</sup>—reaffirmed the standards of the agency’s 1997 Guidance as grounded in Title IX regulations and distinct from private damages litigation.<sup>199</sup> The guidance explicitly applies to all educational institutions that receive federal funds, including universities.<sup>200</sup> It outlines the compliance standards OCR uses for enforcing and investigating violations of Title IX.<sup>201</sup>

### *Required Response*

As a threshold matter, schools are responsible for adopting grievance procedures that provide prompt and equitable resolution of complaints of sexual harassment.<sup>202</sup> Failure to do so will mean that a school is in violation of Title IX.<sup>203</sup> Generally speaking, when sexual harassment has occurred, educational institutions must take “prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.”<sup>204</sup> If the “school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations.”<sup>205</sup> Though framed as guidance, the 1997 and 2001 documents were promulgated by

<sup>197</sup> 2001 GUIDANCE, *supra* note 11, at i (noting that the revised guidance distinguishes the responsibilities of a school in the administrative enforcement context from those applicable in private suits for damages).

<sup>198</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289–90 (1998) (recognizing that an institution may be liable for money damages under Title IX when it is deliberately indifferent to known acts of sexual harassment by a teacher); *Davis*, 526 U.S. at 650 (ruling that private Title IX damages action are available for student-on-student harassment when harassment is so severe, pervasive, and objectively offensive that it deprives the victim of access of educational opportunities or benefits, and the institution had actual knowledge of and was deliberately indifferent to the harassment).

<sup>199</sup> See 2001 GUIDANCE, *supra* note 11. The Guidance also described the interaction between the Family Educational Rights and Privacy Act (FERPA), Title IX, and the Due Process Clause. *Id.* at vi–viii, 22.

<sup>200</sup> *Id.* at i.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 19.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at iii.

<sup>205</sup> *Id.*

ED after an opportunity for the public to comment on them.<sup>206</sup> (This does not mean, however, that the documents are legislative rules that carry the force of law; guidance documents generally serve to inform the public about the agency’s approach to enforcement of the laws and regulations it administers.<sup>207</sup>)

### *Types of Harassment*

The 2001 Guidance stated that “unwelcome conduct of a sexual nature” constitutes sexual harassment.<sup>208</sup> It indicated, however, that it aimed to “move away from specific labels for types of sexual harassment.” Instead, the 2001 Guidance explained that the crucial issue in each case “is whether the harassment rises to a level that it denies or limits a student’s ability to participate in or benefit from the school’s program based on sex.”<sup>209</sup> In that situation, “harassment has occurred that triggers a school’s responsibilities under, or violates, Title IX or its regulations.”<sup>210</sup> That said, it went on to describe types of harassment that largely tracked the categories outlined in the 1997 Guidance: quid pro quo harassment and hostile environment harassment. In the former situation, wherein a teacher or employee conditions a benefit or educational decision on a student’s submission to unwelcome sexual conduct, such harassment is automatically considered harassment that limits or denies a student’s ability to participate in or benefit from the school’s program and thus discriminates based on sex in violation of Title IX.<sup>211</sup>

Unlike so-called quid pro quo harassment, a case of hostile environment harassment requires a further investigation into whether the conduct is sufficiently serious to limit or deny a student’s ability to benefit from or participate in a school’s program because of sex.<sup>212</sup> Because fellow students do not generally have positions of authority, student-on-student harassment generally is considered hostile environment harassment rather than quid pro quo harassment, although teachers and employees may also create a hostile environment.<sup>213</sup> The 2001 Guidance explained that, in evaluating whether hostile environment harassment has occurred, OCR examines all circumstances relevant to the situation.<sup>214</sup> This includes whether the conduct in question was welcome.<sup>215</sup>

<sup>206</sup> See Sexual Harassment Guidance: Peer Sexual Harassment, 61 Fed. Reg. 42,728 (Aug. 16, 1996); Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52,172 (Oct. 4, 1996); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092 (Nov. 2, 2000). Agency guidance documents typically do not go through the notice and comment procedures required of binding legislative rules as required under the Administrative Procedure Act, 5 U.S.C. § 553. Instead, guidance documents are intended to inform the public about the agency’s approach to a regulatory or statutory scheme. See CRS Report R44468, *General Policy Statements: Legal Overview*, by Jared P. Cole and Todd Garvey. They do not carry the force of law and may not be relied upon by an agency to bring an enforcement action. *Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014) (Kavanaugh, J.). In order to support an enforcement action against a regulated party, an agency must rely on an underlying substantive regulation or statute for support. *Id.*

<sup>207</sup> See generally *Am. Tort Reform Ass’n v. Occupational Safety & Health Admin. & Dep’t of Labor*, 738 F.3d 387, 394 (D.C. Cir. 2013) (noting that publication in the Federal Register and the Code of Federal Regulations is “not dispositive” as to whether the agency’s document carries the force of law as a legislative rule).

<sup>208</sup> 2001 GUIDANCE, *supra* note 11, at 2.

<sup>209</sup> 2001 GUIDANCE, *supra* note 11, at 5.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See *id.*

<sup>214</sup> See 2001 GUIDANCE, *supra* note 11, at 5–7 (articulating relevant factors).

<sup>215</sup> This inquiry may include the age of the student and whether the alleged harasser is in a position of authority. 2001

### ***Harassment by a Teacher or Employee***

The 2001 Guidance also explained that, in the context of harassment by a teacher or school employee, the extent of a school’s responsibilities to address harassment depends on whether the harassment occurs within “the context of the employee’s provision of aid, benefits, or services to students” (i.e., in the context of their job responsibilities).<sup>216</sup> With respect to harassment by teachers or employees in the scope of their job responsibilities (or who reasonably appear to be acting in that capacity), assuming the harassment limits or denies a student’s ability to benefit from or participate in a school program, a school is responsible for the discriminatory conduct and must stop the behavior, prevent its recurrence, and remedy the effects of harassment for the victim.<sup>217</sup> In such situations, a school is responsible to do this “whether or not” it has notice of the behavior.<sup>218</sup>

Whether sexual harassment occurs within the scope of an employee’s job responsibilities can depend on a variety of factors. In cases of quid pro quo harassment, the behavior clearly occurs in the scope of an employee’s job responsibilities.<sup>219</sup> For hostile environment harassment, OCR will evaluate a number of factors to determine whether the harassment occurred in the context of an employee’s job responsibilities.<sup>220</sup> The 2001 Guidance also indicates that sometimes harassment that does not occur within an employee’s job responsibilities will be sufficiently serious to create a hostile environment.<sup>221</sup> In these cases, once a school has notice of the behavior, it has a duty to stop the harassment and prevent its recurrence.<sup>222</sup>

### ***Harassment by Other Students or Third Parties***

Likewise, in the context of student-on-student harassment (or harassment by third parties) that creates a hostile environment, the school is responsible for eliminating the environment and preventing its recurrence.<sup>223</sup> However, a school is in violation of Title IX if it has notice of the environment and fails to take “prompt and effective action” to correct the situation.<sup>224</sup> In that case, the school is responsible for ending the harassment, preventing its recurrence, and remedying the effects of harassment for the student that “could reasonably have been prevented” if the school reacted appropriately.<sup>225</sup>

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GUIDANCE, *supra* note 11, at 7–9.

<sup>216</sup> *See id.* at 10.

<sup>217</sup> *See id.*

<sup>218</sup> *See id.* The Guidance made clear, however, that pursuant to the administrative enforcement by OCR, a school will receive notice and an opportunity to take corrective action before an administrative finding of a violation or loss of federal funds. *Id.*

<sup>219</sup> *See id.*

<sup>220</sup> *See id.* The Guidance notes that harassment by elementary and secondary school teachers or administrators during a school activity “will generally lead to a conclusion that the harassment occurred in the context of the employee’s provision of aid, benefits, or services.” *Id.* at 11.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 11–12.

<sup>223</sup> *Id.* at 12.

<sup>224</sup> *See id.* at 13.

<sup>225</sup> *See id.* at 12.

### *Notice of Sexual Harassment*

As noted above, in certain situations of harassment by a teacher or employee, schools are responsible for harassment even without notice.<sup>226</sup> Otherwise, in cases of sexual harassment by employees, students, or third parties, the 2001 Guidance explains that recipients have notice of a sexually hostile environment if a responsible school employee “knew, or in the exercise of reasonable care, should have known,” of the harassment.<sup>227</sup> A responsible employee is “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”<sup>228</sup> Even if a student fails to inform the school or use the appropriate grievance procedures to complain of harassment, a school will be in violation of Title IX if it knows or reasonably should know of a hostile environment. A school is in violation of Title IX if it has notice of a hostile environment and fails to take immediate and effective corrective action.<sup>229</sup>

### *A School’s Responsibilities*

Once a school has notice of potential sexual harassment of students, the 2001 Guidance explained that “it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.”<sup>230</sup> In cases of reports of harassment by a student, parent of an elementary or secondary student, or harassment observed by a responsible employee, regardless of whether the harassed student, or student’s parents, decide to file a formal complaint, “the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.”<sup>231</sup>

For situations where a school learns of harassment via other means, a variety of factors will determine whether there are reasonable grounds for the school to investigate. If the allegations are confirmed, then a school has a responsibility to respond as described above.<sup>232</sup>

The 2001 Guidance also noted that informal mechanisms may sometimes be used to resolve complaints if the parties agree to do so.<sup>233</sup> However, it made clear that certain informal procedures, such as mediation, are not appropriate in certain cases, such as alleged sexual assault.<sup>234</sup> Finally, the Guidance noted that while “the rights established under Title IX must be interpreted consistent with any federal guaranteed due process rights,” schools should nevertheless “ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.”<sup>235</sup>

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<sup>226</sup> *See id.* at 10.

<sup>227</sup> *See id.* at 13 (quotation marks omitted).

<sup>228</sup> *Id.*

<sup>229</sup> *See id.*

<sup>230</sup> *See id.* at 15.

<sup>231</sup> *See id.*

<sup>232</sup> *See id.* at 18.

<sup>233</sup> *Id.* at 21.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 22.

## 2011 Dear Colleague Letter Regarding Sexual Violence Between Peers

In 2011, OCR issued a Dear Colleague Letter that supplemented its 2001 Guidance and focused on the obligations under Title IX for schools that focused exclusively on peer-to-peer harassment, rather than harassment by a teacher.<sup>236</sup> The Letter explained that sexual harassment “is unwelcome conduct of a sexual nature,” and includes “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”<sup>237</sup> Sexual harassment also includes sexual violence, which refers to “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol.”<sup>238</sup>

Sexual harassment creates a hostile environment “if the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.”<sup>239</sup> When a school “knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”<sup>240</sup>

The Letter also noted that schools will sometimes have an obligation to respond to incidents of sexual harassment that occur “off school grounds, outside a school’s education program or activity.”<sup>241</sup> And whether or not the conduct occurred, if a student files a complaint, “the school must process the complaint in accordance with its established procedures.”<sup>242</sup> Because students can experience the effects of off-campus sexual harassment at school, “schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.”<sup>243</sup>

With respect to investigations of sexual harassment allegations, the Letter stated that the standards for liability in the criminal context are distinct from Title IX, and therefore a criminal investigation into allegations of sexual violence does not relieve a school of its duty to conduct a Title IX investigation.<sup>244</sup> It also instructed schools not to wait until the conclusion of a criminal investigation or proceeding to begin their own investigation under Title IX, and if appropriate, to take immediate steps to protect students while a criminal investigation occurs.<sup>245</sup> Although a school may need to temporarily delay an investigation while a criminal fact-finding occurs by

<sup>236</sup> See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 DEAR COLLEAGUE LETTER].

<sup>237</sup> See *id.* at 3.

<sup>238</sup> *Id.* at 1. The Letter noted that a person may also be unable to consent due to a disability. *Id.* at 1. The 2011 Letter also noted the relationship between Title IX and the Family Educational Rights and Privacy Act (FERPA), which prohibits nonconsensual disclosure of a student’s personally identifiable information from an education record, 20 U.S.C. §1221(d). See 2011 DEAR COLLEAGUE LETTER, *supra* note 236, at 5.

<sup>239</sup> 2011 DEAR COLLEAGUE LETTER, *supra* note 236, at 3.

<sup>240</sup> *Id.* at 4.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 10. See also 2001 GUIDANCE, *supra* note 11, at 21 (“However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.”).

<sup>245</sup> 2011 DEAR COLLEAGUE LETTER, *supra* note 236, at 10.

police, once the police have finished their fact-finding, the school must promptly resume and complete its fact-finding for Title IX purposes.<sup>246</sup>

The 2011 Dear Colleague Letter also outlined various elements of a school’s grievance procedures that are critical in order to provide “prompt and equitable resolution of sexual harassment complaints,” including sexual violence.<sup>247</sup> The Letter noted “in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard.”<sup>248</sup> This standard contrasted with the 2001 Guidance, which did not impose an evidentiary standard on school investigations, as well as the prior practice of some schools, which used a “clear and convincing” standard.<sup>249</sup> A preponderance of the evidence standard, which requires a showing that a fact or event is more likely than not, is lower than a clear and convincing standard, which requires providing the “ultimate factfinder [with] an abiding conviction that the truth of . . . factual contentions are ‘highly probable.’”<sup>250</sup>

The Letter also strongly discouraged schools from allowing the parties in a hearing to personally cross-examine one another.<sup>251</sup> It noted that if a school allows parties to appeal a finding or remedy, it must do so for both parties.<sup>252</sup>

### 2014 Q&A Document: Investigating Allegations of Sexual Violence

Following requests by schools on how to adequately comply with the 2011 Dear Colleague Letter,<sup>253</sup> ED issued a forty-six-page supplemental Questions and Answers document in 2014 (2014 Q&A) that further explained the responsibilities of schools with regard to allegations of student-on-student sexual violence.<sup>254</sup> It provided more specific instructions to educational institutions regarding their obligations under Title IX.<sup>255</sup> Like the 2011 Dear Colleague Letter, the 2014 Q&A took the form of a guidance document, rather than a legally enforceable legislative rule.<sup>256</sup>

The Q&A made clear that when “a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred.”<sup>257</sup> It clarified that, in cases of student-on-student sexual violence, a school violates Title IX when (1) “the alleged conduct is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s educational program” (creating a hostile environment)

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 9.

<sup>248</sup> *Id.* at 10–11.

<sup>249</sup> See 2001 GUIDANCE, *supra* note 11; 2011 DEAR COLLEAGUE LETTER, *supra* note 236, at 11.

<sup>250</sup> *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 423–24 (1979); *United States v. Montague*, 40 F.3d 1251, 1255 (D.C. Cir. 1994).

<sup>251</sup> 2011 DEAR COLLEAGUE LETTER, *supra* note 236, at 12.

<sup>252</sup> *Id.*

<sup>253</sup> Janet Napolitano, “Only Yes Means Yes”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 *YALE L. & POL’Y REV.* 387, 394 (2015) (“The April 2011 Dear Colleague Letter generated significant compliance questions for campuses.”).

<sup>254</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter 2014 QUESTIONS AND ANSWERS].

<sup>255</sup> See Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 *MICH. L. REV.* 155, 164–65 (2017).

<sup>256</sup> See *supra* note 206.

<sup>257</sup> 2014 QUESTIONS AND ANSWERS, *supra* note 254, at 2.

and (2) “the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.”<sup>258</sup>

The 2014 Q&A also explained that Title IX requires schools, upon notice of an allegation, to protect complainants and ensure their safety through the use of interim steps before an investigation is complete.<sup>259</sup> Among other things, it further specified in detail the requirements of Title IX with respect to the responsibilities of a school’s Title IX Coordinator (the employee required by regulation to coordinate a school’s compliance with Title IX),<sup>260</sup> the elements expected in a school’s written grievance procedures for responding to complaints of sexual violence,<sup>261</sup> and which individuals qualify as responsible employees who are required to report allegations of sexual violence to a school’s Title IX Coordinator.<sup>262</sup>

The document also detailed the requirements for schools in conducting investigations into alleged sexual violence. It stressed that while a school is permitted to use its own “student disciplinary procedures” to process complaints of sexual violence, that if a school chooses to do so, the imposition of sanctions against a perpetrator, “without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence.”<sup>263</sup>

The 2014 Q&A noted that because Title IX investigations will not result in the incarceration of individuals, “the same procedural protections and legal standards are not required” in Title IX investigations as are compelled in criminal proceedings.<sup>264</sup> Even if a criminal investigation of student-on-student sexual violence is ongoing, a school must conduct its own Title IX investigation.<sup>265</sup> Indeed, the conclusion of a criminal investigation without charges “does not affect a school’s Title IX obligations.”<sup>266</sup>

The document also explained that schools were not required to conduct hearings to assess allegations of sexual violence, but if they did, they could not require the complainant to attend.<sup>267</sup> Further, in the 2014 Q&A, OCR “strongly discourage[d]” schools from allowing parties to personally cross-examine one another because such actions “may be traumatic or intimidating, and may perpetuate a hostile environment.”<sup>268</sup> Instead, schools could allow parties to submit questions to a trained third party to ask on their behalf. The third party was advised to screen those questions “and only ask those it deem[ed] appropriate and relevant to the case.”<sup>269</sup>

<sup>258</sup> *Id.* at 1. *See also* 2001 GUIDANCE, *supra* note 11, at 5.

<sup>259</sup> 2014 QUESTIONS AND ANSWERS, *supra* note 254, at 3. *See also* 2001 GUIDANCE, *supra* note 11, at 16 (explaining that “[i]t may be appropriate for a school to take interim measures during the investigation of a complaint”).

<sup>260</sup> 2014 QUESTIONS AND ANSWERS, *supra* note 254, at 10–12. *See* 34 C.F.R. § 106.8(a).

<sup>261</sup> 2014 QUESTIONS AND ANSWERS, *supra* note 254, at 12–14.

<sup>262</sup> *Id.* at 14–18.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 27.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* *See* 2001 GUIDANCE, *supra* note 11, at 21 (noting that “because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively”).

<sup>267</sup> 2014 QUESTIONS AND ANSWERS, *supra* note 254, at 30.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 31.



## Legal Challenges to University Title IX Procedures

In response to the foregoing guidance from ED, as well as increased oversight from OCR between 2011 and 2016,<sup>270</sup> schools developed a variety of procedures to ensure that their responses to allegations of sexual assault complied with Title IX.<sup>271</sup> Generally speaking, the specific type of procedures for investigating allegations of sexual harassment vary considerably across educational institutions.<sup>272</sup> While Title IX provides ED with some discretion in terms of administrative enforcement of the statute’s bar on sex-based discrimination, including the ability to require public and private schools to develop certain procedures for handling complaints (as long as those schools receive federal funds),<sup>273</sup> this discretion is constrained with respect to state actors (including public universities) by due process protections that set a baseline for the procedural protections afforded to the accused.

In the public university context, a number of students subject to disciplinary sanctions for misconduct thus challenged the disciplinary procedures in state and federal courts as unconstitutional.<sup>274</sup> In particular, a number of students faced with disciplinary action by public universities have raised constitutional challenges to the Title IX procedures used to find them responsible for sexual misconduct, arguing that universities violated the Due Process Clause in the handling of their case.

### Due Process Clause: Background Principles

The Due Process Clause of the Fourteenth Amendment requires states to observe certain procedures when depriving individuals of life, liberty, or property.<sup>275</sup> In addition to protecting

<sup>270</sup> See Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 643 (2018) (“Between 2011 and 2016, OCR dramatically increased the number of schools that it proactively investigated for Title IX compliance, and broke with prior practice by publicly listing the names of schools under investigation.”).

<sup>271</sup> See Gersen & Suk, *supra* note 183, at 901–03.

<sup>272</sup> 2001 GUIDANCE, *supra* note 11, at 20 (“Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.”); see Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 179–80 (2017) (discussing different models for investigations at universities).

<sup>273</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291–92 (1998).

<sup>274</sup> See *Plummer v. Univ. of Houston*, 860 F.3d 767, 779–80 (5th Cir. 2017) (Jones, J., dissenting) (discussing claims and litigation prompted by issuance of the 2011 Dear Colleague Letter).

<sup>275</sup> U.S. CONST. amend. XIV, § 1. The Due Process Clause of the Fifth Amendment of the Constitution prohibits the federal government from depriving persons of life, liberty, or property with due process of law. U.S. CONST. Amend. V. The Due Process Clause of the Fourteenth Amendment bars the states from doing the same. U.S. CONST. Amend. XIV. The due process procedural safeguards of the Fourteenth Amendment are no less stringent than those of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The primary vehicle for bringing suit in federal court alleging constitutional violations by state officials is via 42 U.S.C. § 1983 (authorizing suits for violations of federal rights “under color” of state law). The Eleventh Amendment generally bars suits by private citizens against states actors, U.S. CONST. amend. XI, including state universities, unless sovereign immunity has been waived or Congress has abrogated such immunity pursuant to a valid exercise of constitutional authority. See, e.g., *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55–72 (1996) (discussing the limited justifications by which Congress may validly enact a law abrogating state sovereign immunity). However, the Supreme Court in *Ex Parte Young* has permitted suits for prospective and injunctive relief against state officials under the theory that when a state officer violates the federal Constitution, the official is “stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.” *Ex parte Young*, 209 U.S. 123, 123 (1908). 42 U.S.C. § 1983 thus provides a federal cause of action for violations of federal rights, authorizing suits for injunctive and prospective relief against state officials acting under color of state law, as

against the deprivation of an individual's physical property, the Constitution guards against the deprivation of certain "property interests" without due process.<sup>276</sup> The property interests protected by the Due Process Clause are not themselves created by the Constitution; instead, those interests arise from an independent source, such as state or federal law.<sup>277</sup> To have a protected property interest in a government-created benefit, one must show a "legitimate claim of entitlement" that originates in "existing rules or understandings that stem from an independent source such as state law."<sup>278</sup> Likewise, when a state deprives an individual of liberty, states must afford due process to the individual.<sup>279</sup> In fact, when a "person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,"<sup>280</sup> due process may be implicated. In these circumstances, courts often require an accompanying state action that alters or removes a legal status to constitute a deprivation of liberty.<sup>281</sup>

Precisely what procedures are constitutionally required before depriving individuals of a protected interest can vary.<sup>282</sup> When deciding what process is due, courts balance three factors enunciated by the Supreme Court in *Mathews v. Eldridge*: (1) "the private interest that will be affected by the official action"; (2) the risk of an erroneous deprivation and the probable value of additional procedures; and (3) the interest of the government.<sup>283</sup> In general, the Court has made clear that individuals with a protected interest are entitled to notice of the proposed action<sup>284</sup> and a "meaningful opportunity to be heard" before the state may deprive them of that interest.<sup>285</sup> The Supreme Court has explained, however, that due process is not a "technical conception with a fixed content unrelated to time, place, and circumstances."<sup>286</sup> Instead, the concept is "flexible and

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well as damages actions against officials in their individual capacity. *See generally* *Kentucky v. Graham*, 473 U.S. 159, 166, 169 n.18 (1985); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" (quoting *Kentucky*, 473 U.S., at 167 n.14)).

As explained in more detail below, a private right of action is available to enforce Title IX directly against educational institutions that receive federal funds. For these suits, Congress has abrogated the states' Eleventh Amendment immunity, meaning that a damages remedy is available. 42 U.S.C. § 2000d-7. *See* *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72 (1992) (ruling that a damages remedy is available to enforce Title IX in part because "Congress abrogated the States' Eleventh Amendment immunity under Title IX"), *id.* at 75 n.8 (declining to decide whether a money damages remedy is available pursuant to Congress's Spending Clause powers or its powers arising under Section 5 of the Fourteenth Amendment.). In other words, while a damages claim against a state entity is available for violations of the Title IX statute, it is not available for constitutional violations brought under § 1983. For those claims, prospective or injunctive relief may be available against state officials, and damages might be available against officials in their individual capacities.

<sup>276</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 577.

<sup>279</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

<sup>280</sup> *Roth*, 408 U.S. at 573 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). The Supreme Court appears to sometimes require a bare reputational liberty interest to be accompanied by a tangible protected property interest for procedural due process to apply. *See* *Siegert v. Gilley*, 500 U.S. 228, 233, 234 (1991); *Paul v. Davis*, 424 U.S. 693, 711–12 (1976). Lower courts have required an alteration in legal status to accompany a reputational interest.

<sup>281</sup> *See, e.g.,* *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 315 (4th Cir. 2012).

<sup>282</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Due process is flexible and calls for such procedural protections as the particular situation demands.").

<sup>283</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>284</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 313 (1950).

<sup>285</sup> *Lachance v. Erickson*, 522 U.S. 262, 266 (1998) (citing *Loudermill*, 470 U.S. at 542); *Lopez*, 419 U.S. at 579.

<sup>286</sup> *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

calls for such procedural protections as the particular situation demands.”<sup>287</sup> In conducting the balancing of factors pursuant to *Mathews v. Eldridge*, the severity of the deprivation is a key factor in determining what procedures are constitutionally required.<sup>288</sup> In general, the stronger the private interest at risk of deprivation, the more formal and exacting procedures will be required by courts.<sup>289</sup>

The only Supreme Court case to focus on procedural due process in the (nonacademic) student discipline context is *Goss v. Lopez*.<sup>290</sup> In that case, high school students challenged their suspension from school for up to 10 days without a hearing.<sup>291</sup> The Court first ruled that the public school students had a “legitimate entitlement to a public education,” which was a property interest protected by due process; and that interest was deprived by the suspension.<sup>292</sup> As to the process required, the Court ruled that, at a minimum, “students facing suspension . . . must be given some kind of notice and some kind of hearing.”<sup>293</sup> The Court also clarified that cases of more stringent sanctions, such as suspensions beyond 10 days or expulsions, “may require more formal procedures.”<sup>294</sup>

## Due Process Rights for Students at Public Universities

Generally speaking, because public universities constitute state actors subject to the Due Process Clause, they must comply with constitutional standards when suspending or expelling students.<sup>295</sup> Private universities, on the other hand, do not.<sup>296</sup> The Supreme Court has assumed, without

<sup>287</sup> *Morrissey*, 408 U.S. at 481.

<sup>288</sup> Compare *Loudermill*, 470 U.S. at 543 (pretermination hearing required when deprivation is termination) with *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (upholding immediate suspension of employee arrested and charged with felony).

<sup>289</sup> *Lopez*, 419 U.S. at 584; *Flain v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005) (“The stronger the private interest, however, the more likely a formal written notice—informing the accused of the charge, the policies or regulations the accused is charged with violating, and a list of possible penalties—is constitutionally required.”).

<sup>290</sup> 419 U.S. 565 (1975).

<sup>291</sup> *Id.* at 567.

<sup>292</sup> *Id.* at 574–76.

<sup>293</sup> *Id.* at 579.

<sup>294</sup> *Id.* at 584; see also *id.* at 584 (“Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.”).

<sup>295</sup> See *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 192 (1988) (“A state university without question is a state actor.”); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 n.2 (2001) (“If a defendant’s conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action ‘under color of state law’ for § 1983 purposes.”). Beyond institutions that clearly qualify as state actors, such as public universities, what characterizes a public entity engaged in state action depends on a variety of factors; the Supreme Court has declined to deliver a “precise formula” for doing so. Instead, it instructs courts to “sift[] facts and weigh[] circumstances” in each case. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (examining relevant factors regarding what qualifies as state action and concluding that a private university’s actions do not); *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 103 (3d Cir. 1984) (holding “that a ‘symbiotic relationship’ exists between the Commonwealth of Pennsylvania on the one hand and Pitt and Temple on the other. Actions taken by those two institutions are, therefore, actions taken under color of state law and are subject to scrutiny under section 1983”).

<sup>296</sup> See, e.g., *Doe v. Wash. & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at \*8 (W.D. Va. Aug. 5, 2015) (“Had Plaintiff been enrolled at a public university, he would have been entitled to due process and the proceedings against him might have unfolded quite differently. Unfortunately for Plaintiff, W & L is a private university, and as such, is generally not subject to the constitutional protections of the Fifth Amendment.”); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 368 n.5 (S.D.N.Y. 2015) (noting that “such constitutional claims may be brought only against ‘state actors’ and Columbia University is a private university); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 462 (S.D.N.Y. 2015); *Bleiler v.*

deciding on the merits, that students of public universities enjoy a “constitutionally protectable property right” in their continued enrollment in an educational institution.<sup>297</sup> A number of federal courts of appeals have ruled that students enrolled in public universities have liberty and/or property interests in their education and that expulsion and certain suspensions can constitute a deprivation of that interest.<sup>298</sup>

As discussed in further detail below, as a baseline matter, federal courts have held that due process requires public schools to provide students with notice of the charges against them, the evidence used to make a determination, and the ability to present their side of the story to an unbiased decisionmaker.<sup>299</sup> Of course, whether a public university has afforded a student due process “is a fact-intensive inquiry and the procedures required to satisfy due process will necessarily vary depending on the particular circumstances of each case.”<sup>300</sup>

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Coll. of Holy Cross, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at \*4 (D. Mass. Aug. 26, 2013) (“Since there is no dispute that Holy Cross is a private school, the federal Constitution does not establish the level of due process that the College had to give [the student] in his disciplinary hearing.”); *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150-KES, 2015 WL 5838602, at \*2 (D.S.D. Oct. 7, 2015); *see generally* *Rendell-Baker v. Kohn*, 457 U.S. 830, 841–42 (1982) (ruling that the acts of a private school did not constitute state action, even though “virtually all of the school’s income” was due to government funding); *Hernandez–Loring v. Universidad Metropolitana*, 233 F.3d 49, 51 (1st Cir. 2000) (observing that “a private university is not directly governed by the due process requirements of the Fifth and Fourteenth Amendments”); *But see* *Tamara Rice Lave, A Critical Look at how Top Colleges and Universities Are Adjudicating Sexual Assault*, 71 U. MIAMI L. R. 276 (2017) (arguing that due to the pressures exerted by OCR, private colleges should qualify as state actors). That said, students at private colleges may have other legal remedies predicated on state law grounds. *See, e.g., Doe v. Univ. of S. Cal.*, 29 Cal. App. 5th 1212, 1232 (2018) (describing the principle of fundamental fairness that must attend disciplinary decisions for college students required by California Code of Civil Procedure; concluding that the university did not accord the plaintiff a fair hearing when it expelled him for sexual misconduct). *See also* *Doe v. Trs. of the Univ. of Pa.*, 270 F. Supp. 3d 799, 822 (E.D. Pa. 2017); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 611 (D. Mass. 2016) (“The question at present is simply whether the complaint plausibly alleges that the fact-finding process and its result violated the contractual relationship.”).

<sup>297</sup> *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985).

<sup>298</sup> *See, e.g., Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (“[A] student facing expulsion or suspension from a public educational institution is entitled to the protections of due process.”); *Dixon v. Ala. State Bd. of Ed.*, 294 F.2d 150, 157 (5th Cir. 1961) (“Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.”); *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 440 (8th Cir. 1998) (“At the outset, we note that the expulsion proceedings entitled Woodis to some level of due process.”); *Nash v. Auburn Univ.*, 812 F.2d 655, 660 (11th Cir. 1987); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005) (“In this Circuit we have held that the Due Process Clause is implicated by higher education disciplinary decisions.”); *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972) (“While there remain many vexing questions as to what due process requires in [university] disciplinary proceedings, a fundamental requirement is that a hearing must be accorded before an impartial decision maker.”); *Sill v. Penn. State Univ.*, 462 F.2d 463, 469 (3d Cir. 1972) (“Our inquiry in this regard, therefore, is limited to the question whether the appointment of the special disciplinary panel by the board of trustees and the submission to it of the charges against the appellants was a violation of the appellants’ right to procedural due process.”). *But see* *Brown v. Univ. of Kan.*, 599 F. App’x 833, 837 (10th Cir. 2015) (assuming without deciding that petitioner “had liberty or property interests implicated by his dismissal from the law school.”); *Tigrett v. Rector & Visitors of Univ. of Va.*, 290 F.3d 620, 627 (4th Cir. 2002) (assuming, without deciding, that students of public universities have a constitutionally protected interest in continued enrollment); *Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 772–73 (7th Cir. 2013) (“However, our circuit has rejected the proposition that an individual has a stand-alone property interest in an education at a state university, including a graduate education. . . . Instead of accepting a stand-alone interest, we ask whether the student has shown that he has a legally protected entitlement to his continued education at the university.”).

<sup>299</sup> *See* *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399–400 (6th Cir. 2017).

<sup>300</sup> *Plummer v. Univ. of Houston*, 860 F.3d 767, 777 (5th Cir. 2017), *as revised* (June 26, 2017).

## Due Process Challenges to Procedures Used by Public Universities in Sexual Assault Investigations

While colleges and universities have developed various procedures to comply with OCR's guidance regarding an institution's response to allegations of sexual harassment,<sup>301</sup> a number of individuals subject to these disciplinary processes have challenged some of these procedures in federal court. Several courts have since issued decisions in cases brought by students asserting a due process violation in the context of a Title IX investigation or adjudicatory proceeding.<sup>302</sup>

The following section discusses recent notable judicial rulings that address the constitutionality of disciplinary proceedings in the context of sexual misconduct. The discussion below is organized by the type of claim raised against the public university:

1. the university failed to provide adequate notice of the charges against the student;
2. the university did not permit the accused student to confront and challenge the credibility of witnesses who testified against him;
3. the university allowed biased decisionmakers to oversee the proceedings; and
4. the university employed unfair review processes when rehearing an allegation brought by a complainant.<sup>303</sup>

<sup>301</sup> Since the issuance of the 2011 Dear Colleague Letter, many institutions of higher education have altered their procedures for investigating allegations of sexual harassment and assault. See Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 176 (2017) ("OCR's obligations have spurred schools to create quasi bureaucracies to adjudicate complaints of sexual violence, and these creations have generated significant backlash. OCR dictates the process through which schools must carry out investigations and has directed schools to revise their procedures in order to conform to OCR's very specific guidelines."); Gersen & Suk, *supra* note 183, at 909 ("Because the threat of lost federal funds is a big stick to wield, and because the political climate makes being seen as not opposing sexual violence a public relations nightmare, all universities have complied rather than challenge OCR's actions even administratively, much less in litigation."); see, e.g., *Joint Statement Between Tufts University and Representatives and Organizers of Today's Undergraduate Student Action*, TUFTS UNIV. (May 1, 2014), <http://oeo.tufts.edu/sexualmisconduct/joint-statement-between-tufts-university-and-representatives-and-organizers-of-today%E2%80%99s-undergraduate-student-action>; *U.S. Department of Education Reaches Agreement with the Ohio State University to Address and Prevent Sexual Assault and Harassment of Students*, U.S. DEP'T EDUC. (Sept. 11, 2014), <http://www.ed.gov/news/press-releases/us-department-education-reaches-agreement-ohio-state-university-address-and-prevent-sexual-assault-and-harassment-students>; *Departments of Justice and Education Reach Settlement to Address and Prevent Sexual Assault and Harassment of Students at the University of Montana in Missoula*, U.S. DEP'T EDUC. (May 9, 2013), <http://www.ed.gov/news/press-releases/departments-justice-and-education-reach-settlement-address-and-prevent-sexual-assault-and-harassment-students-university-montana-missoula>.

<sup>302</sup> The constitutionality of the procedures used in campus sexual assault investigations has been the subject of debate. Compare Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process*, 96 TEX. L. REV. 15, 68 (2017) ("This means that many of the post-2011 Title IX sexual assault trials that took place, and still are taking place, all over the country were and are unconstitutional.") with Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1945 (2016) (arguing that "we should support campus adjudication for sexual assault, and oppose both unique procedural protections for those accused of sexual assault and mandated penalties for those found responsible for the misconduct"). See also ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS, *RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT* 3 (2017), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf>.

<sup>303</sup> Another potential due process issue is the standard of evidence used to adjudicate responsibility for a sexual harassment allegation. At least one federal district court has rejected a motion to dismiss a claim alleging that the preponderance of the evidence standard used to determine culpability violated due process. *Doe v. Univ. of Miss.*, No. 3:18-CV-138-DPJ-FKB, 2019 WL 238098, at \*10 (S.D. Miss. Jan. 16, 2019). See also *Plummer*, 860 F.3d at 782

Importantly, some of the judicial rulings discussed below address whether a student’s stated claim is sufficient to survive a motion to dismiss and do not reach conclusive determinations about the evidence sufficient to establish a due process violation.<sup>304</sup>

## Claims Alleging Inadequate Notice of the Charges

One type of legal challenge raised by students accused of sexual misconduct is that the public universities failed to adequately notify them of the charges. As an initial matter, reviewing courts have taken the view that there generally will be no due process violation on notice grounds when the school (1) provides a student with timely notice of the actual, full charges against him; and (2) provides the accused student with a meaningful opportunity to prepare for the disciplinary hearing against him.<sup>305</sup>

The absence of such protocols, however, can form the basis of a viable due process claim. For example, at one university, an accused student alleged that he was interviewed by a school staff member assigned to investigate charges of sexual misconduct against him without first being notified of the existence of the sexual misconduct allegation.<sup>306</sup> The student was eventually suspended from the university. A federal district court ruled that, given the severity of the suspension (three years), the lack of notice could amount to a due process violation. The court thus held that the student had stated a claim sufficient to survive a motion to dismiss.<sup>307</sup>

In another case, an accused student alleged that he was not given adequate notice of the scope of charges against him.<sup>308</sup> Rather, the school only notified him that his conduct on a particular day was under review, but expelled him for sexual misconduct that occurred in relation to other incidents and dates. The federal district court ruled that “[b]y conveying a limited scope of focus

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(Jones, J., dissenting). *But see* *Doe v. Cummins*, 662 F. App’x 437, 449 (6th Cir. 2016) (“[A]s the district court recognized, the facts alleged in appellants’ complaint tend to show that the ARC panel did not place the burden of proof on either party. Rather, the panel functioned as a board of inquiry, reaching its conclusion based on a preponderance of the evidence. Allocating the burden of proof in this manner—in addition to having other procedural mechanisms in place that counterbalance the lower standard used (e.g., an adequate appeals process)—is constitutionally sound and does not give rise to a due-process violation.”).

<sup>304</sup> *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007))).

<sup>305</sup> *See, e.g., Cummins*, 662 F. App’x at 447 (“Appellants received adequate notice of the charges against them and a sufficient opportunity to prepare a defense.”); *Plummer*, 860 F.3d at 776 (“[E]ven if the University could have provided notice further in advance of the hearings of the identities of relevant witnesses and other evidence, the ultimate disciplinary decisions were conclusively supported by the videos and photo, about which McConnell and Plummer had full knowledge.”); *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 263 (D. Mass. 2018) (“These written and oral communications are more than enough to satisfy the notice requirements of the due process clause of the Fourteenth Amendment.”); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 638 (6th Cir. 2005).

<sup>306</sup> *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 927 (E.D. Mich. 2015), *vacated by* 2015 U.S. Dist. LEXIS 181951, at \*1 (E.D. Mich. Sept. 30, 2015) (settlement agreement reached).

<sup>307</sup> *Id. But see* *Howe v. Pa. State Univ.-Harrisburg*, No. 1:16-0102, 2016 U.S. Dist. LEXIS 11981, at \*16 (M.D. Pa. Feb. 2, 2016) (rejecting the plaintiff’s claims that the university’s failure to provide notice of the charges before an informal disciplinary conference because “one of the reasons for the informal conference is to provide the plaintiff with notice of the charges against him. The court finds no due process violation with respect to the notice provided.”).

<sup>308</sup> *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 623 (E.D. Va. 2016). The court made clear that it was not deciding that the failure to give proper notice constituted a due process violation. Instead, the combination of various procedural issues constituted a due process violation. *Id.* at 622–23.

to plaintiff, defendants prejudiced plaintiff's ability to mount an effective defense, which increased the possibility of an erroneous outcome."<sup>309</sup> Taken together with other procedural issues in the school's investigation and decision, the court concluded that the school had deprived the student of a liberty interest without due process of law.<sup>310</sup>

Similarly, the Sixth Circuit ruled that a student suspended by a university because of suspected sexual assault had sufficiently pleaded a due process violation when the university allegedly did not make available the evidence used in its disciplinary decision against him.<sup>311</sup> The university's Title IX investigator compiled an investigatory report, which was allegedly used by the school's disciplinary hearing panel to adjudicate the student's case. However, the investigator failed to provide the report to the defendant.<sup>312</sup> The court reasoned that the Constitution requires that a school provide the evidence used against a student in the context of significant disciplinary decisions and that a failure to do so constitutes a due process violation.<sup>313</sup>

### Claims Relating to Cross-Examination of Witnesses and Exculpatory Evidence

A number of students have brought claims alleging a denial of due process because they were not afforded the opportunity to cross-examine witnesses in school disciplinary hearings. Courts have often rejected these arguments, however, in both sexual harassment proceedings and other disciplinary hearings, noting that the rights of students in disciplinary proceedings are not the same as those of criminal defendants.<sup>314</sup> Case law reflects that courts have been more willing to entertain such claims when students have been denied an opportunity to challenge the credibility of witnesses where a witness's testimony concerns disputed and critical facts.<sup>315</sup>

As a general matter, cross-examination has not been regarded as a necessary feature of due process in the civil context. Even outside the context of sexual harassment allegations, courts have often denied due process challenges to university adjudicatory proceedings where students were not permitted to *directly* cross-examine witnesses, noting that the Due Process Clause does not guarantee the right to cross-examination in school disciplinary proceedings.<sup>316</sup> This principle has been applied in recent cases alleging due process violations in the sexual harassment context. In one case, students challenged a university's adjudicatory proceedings regarding allegations of sexual assault, where accused students were permitted to submit written questions to a panel chair rather than directly to the complainant.<sup>317</sup> The reviewing district court nonetheless rejected a due process challenge to the proceedings.<sup>318</sup>

Similarly, the Sixth Circuit denied a due process challenge to a university's disciplinary hearing concerning sexual assault allegations where students were not permitted to directly cross-examine

<sup>309</sup> *Id.* at 618.

<sup>310</sup> *Id.* at 622.

<sup>311</sup> *Doe v. Miami Univ.*, 882 F.3d 579, 603 (6th Cir. 2018).

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> See Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN ST. L. REV. 1001, 10010–11 (2016) (discussing recent cases).

<sup>315</sup> *Id.* at 1011–12.

<sup>316</sup> See, e.g., *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987).

<sup>317</sup> *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 603 (S.D. Ohio 2016). See *Doe v. Ohio State Univ.*, 219 F. Supp. 3d 645, 658–59 (S.D. Ohio 2016) (rejecting a due process claim on similar grounds).

<sup>318</sup> *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 603 (S.D. Ohio 2016).

their accuser.<sup>319</sup> The students were permitted to submit written questions to the hearing panel, but were not permitted to submit any follow-up questions, and the panel failed to ask all of the questions they submitted.<sup>320</sup> The circuit court reasoned that the proceedings satisfied the “limited” requirement of cross-examination where credibility is at issue, as the “marginal benefit that would accrue to the fact-finding process by allowing follow-up questions . . . is vastly outweighed by the burden” on the school.<sup>321</sup>

Likewise, the Fifth Circuit rejected a due process challenge to a university’s disciplinary proceedings where the challengers argued they were denied the ability to effectively cross-examine witnesses and confront their accuser.<sup>322</sup> In that case, the court noted that the school’s decision did not rest on testimonial evidence, but on the videos and a photo taken and distributed by one of the challengers.<sup>323</sup>

Where a credibility determination was critical to the outcome of a proceeding, however, courts have often ruled in favor of due process challenges.<sup>324</sup> For instance, the Sixth Circuit held that a university violated due process when it failed to provide any form of cross-examination in the hearing and the disciplinary decision necessarily rested on a credibility determination.<sup>325</sup> In that case, the university based its decision to suspend a student entirely on the hearsay statement of the complainant, who did not appear at the disciplinary hearing.<sup>326</sup> Importantly, the court noted

<sup>319</sup> Doe v. Cummins, 662 F. App’x 437, 448 (6th Cir. 2016).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> Plummer v. Univ. of Houston, 860 F.3d 767, 775–76 (5th Cir. 2017).

<sup>323</sup> *Id.*

<sup>324</sup> See Doe v. Baum, 903 F.3d 575, 581–82 (6th Cir. 2018) (“[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder”); Doe v. Univ. of Miss., No. 3:18-CV-138-DPJ-FKB, 2019 WL 238098, at \*10 (S.D. Miss. Jan. 16, 2019) (“It is at least plausible in this he said/she said case, that giving Doe an opportunity to cross-examine Roe could have added some value to the hearing under the second *Mathews* factor.”); Doe v. Penn. State Univ., 336 F. Supp. 3d 441, 450 (M.D. Pa. 2018) (“In a case like this, however, where everyone agrees on virtually all salient facts except one—*i.e.*, whether or not Ms. Roe consented to sexual activity with Mr. Doe—there is really only one consideration for the decisionmaker: credibility. After all, there were only two witnesses to the incident, with no other documentary evidence of the sexual encounter itself. As a result, in this Court’s view, the Investigative Model’s virtual embargo on the panel’s ability to assess that credibility raises constitutional concerns.”); Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961, 978 (S.D. Ohio 2018) (ruling that a student asserted a plausible procedural due process claims where he alleged that (1) “he was not permitted to conduct a meaningful cross-examination . . . because the . . . panel refused to ask [the alleged victim] his questions about her level of intoxication” (2) “Detective Richey, who conducted the only interview of [the alleged perpetrator] and obtained many of the witness statements used to help establish Schoewe’s level of intoxication, was biased in favor of Schoewe because he had romantic feelings towards her” and the alleged perpetrator was not able to cross-examine either party about this issue and (3) “the Title IX coordinator and lead investigator[] appeared at the hearing with Schoewe giving the appearance of support for her”); Roe v. Adams-Gaston, No. 2:17-CV-945, 2018 WL 5306768, at \*16 (S.D. Ohio Apr. 17, 2018) (granting a student’s motion for preliminary injunction to enjoin a university from disciplining a student based on conclusions rendered in certain disciplinary hearings because the school likely violated the student’s due process rights by denying her the opportunity to cross-examine adverse witnesses). *But see* Doe v. Loh, No. CV PX-16-3314, 2018 WL 1535495, at \*7 (D. Md. Mar. 29, 2018) (“Doe lastly avers that where questions of complainant credibility are central to a university’s decision to expel a student, due process demands that the accused be granted the right to confront and cross-examine his accuser. Doe’s argument, however, reads too narrowly the right to confrontation in educational settings. It is well settled that the accused is not entitled to “trial-like” rights of confrontation or cross-examination at disciplinary proceedings. This is especially so where, as here, Doe is afforded other mechanisms to challenge the veracity of the accused’s recitation of events.”) (citations omitted).

<sup>325</sup> Doe v. Univ. of Cincinnati, 872 F.3d 393, 396 (6th Cir. 2017).

<sup>326</sup> *Id.* at 401.



that the suspended student only requested the additional procedure of posing questions to his accuser through the hearing panel, but he did not ask for the opportunity to directly cross-examine her.<sup>327</sup> The court concluded that in such circumstances, some method must be made available to the adjudicative body to “assess the demeanor of both the accused and his accuser.”<sup>328</sup> The court concluded this procedure was necessary to comport with due process when the university’s decision rested on a credibility determination.<sup>329</sup>

Likewise, the absence of a live hearing may sometimes form the basis of a viable due process claim. For instance, one federal district court ordered a university to provide an accused student facing the possibility of expulsion with a live hearing in order to comply with due process.<sup>330</sup> In that case, the university’s procedures for handling sexual misconduct allegations involved an investigator who would meet separately with the parties, conduct interviews with witnesses, and eventually reach a determination as to culpability without any opportunity for a hearing.<sup>331</sup> The court reasoned that due to “the University’s method of private questioning through the investigator, Plaintiff has no way of knowing which questions are actually being asked of Claimant or her response to those questions.”<sup>332</sup> Accordingly, the court concluded that the university violated the accused student’s right to due process.<sup>333</sup>

Similarly, the Sixth Circuit has ruled that where credibility is at issue, a university “must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”<sup>334</sup> In that case, a university investigator concluded that the evidence supporting a finding of sexual misconduct was not sufficient, but the university’s appeals board reversed after reviewing the report because it found the description of events given by the alleged victim and adverse witnesses more persuasive. At no time was the accused student given a live hearing or a chance to cross-examine his accuser or any adverse witnesses.<sup>335</sup> The Sixth Circuit ruled that because the university ultimately had to “choose between competing narratives” in order to resolve the case, due process required a chance to cross-examine his accuser and adverse witnesses before a neutral fact-finder.<sup>336</sup>

Some students have also brought due process claims alleging that they were denied the ability to offer exculpatory evidence on their own behalf. Courts appear to examine such claims on a largely fact-specific basis. For instance, in one suit brought against a university, a student alleged he was denied the opportunity to present physical exculpatory evidence on his own behalf at a sexual assault disciplinary hearing.<sup>337</sup> Specifically, the student claimed he was unable to present

<sup>327</sup> *Id.* at 403–04.

<sup>328</sup> *Id.* at 406.

<sup>329</sup> *Id.* at 404. The court clarified that it was not ruling that the alleged perpetrator was entitled to directly question the alleged victim, noting with approval its prior, unpublished, decision in which it upheld the university’s limited method of cross-examination. *Id.* at 403 (citing *Doe v. Cummins*, 662 F. App’x 437, 448 (6th Cir. 2016)).

<sup>330</sup> *Doe v. Univ. of Mich.*, 325 F. Supp. 3d 821, 830 (E.D. Mich. 2018).

<sup>331</sup> *Id.* at 824.

<sup>332</sup> *Id.* at 828.

<sup>333</sup> *Id.* at 828.

<sup>334</sup> *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).

<sup>335</sup> *Id.* at 579–80.

<sup>336</sup> *Id.* at 580. The court clarified that an accused student may not always have a right to personally confront an accuser or other witnesses. “Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that.” Accordingly, sometimes a student’s agent could conduct the examination on his behalf. *Id.* at 583.

<sup>337</sup> *Painter v. Adams*, No. 315CV00369MOCDCK, 2017 WL 4678231, at \*7 (W.D.N.C. Oct. 17, 2017).

text messages at his hearing that he claimed would exonerate him. The district court ruled that this allegation raised concerns that he was denied due process.<sup>338</sup>

### Claims Alleging Biased Decisionmakers in Disciplinary Proceedings

Students subject to disciplinary proceedings regarding sexual harassment or assault at institutions of higher education have also brought challenges alleging that a decisionmaker was biased against them. As a threshold matter, courts generally assume that school disciplinary panels are “entitled to a presumption of impartiality, absent a showing of actual bias.”<sup>339</sup> A plaintiff must generally allege facts sufficient to overcome this baseline presumption, such as statements by decisionmakers or a pattern of decisionmaking evidencing bias.<sup>340</sup>

For instance, a Fifth Circuit panel rejected a due process claim alleging bias in a university disciplinary hearing concerning sexual assault because the challengers failed to show how the integrity of the proceedings was undermined.<sup>341</sup> In that case, the individual tasked as a victim advocate for the school investigated the charges against the accused and advised the panel members who made the disciplinary decision.<sup>342</sup> The court reasoned that the investigator relied on photo and video evidence to render his findings to the panel and “there is nothing in the record . . . to suggest that a different investigator would have uncovered information diminishing the significance of that graphic evidence to the initial findings.”<sup>343</sup> Further, a separate university attorney advised the panel that they were free to draw their own conclusions from the proffered evidence.<sup>344</sup>

Evidence of bias in the consequential behavior or statements of decisionmakers, however, may give rise to a viable due process challenge.<sup>345</sup> For example, the Sixth Circuit recently held that a student sufficiently pleaded a due process claim where he alleged that a university disciplinary

<sup>338</sup> *Id.* See also *Doe v. Ohio State Univ.*, 311 F. Supp. 3d 881, 896 (S.D. Ohio 2018) (reconsidering sua sponte its prior decision that there is no due process right to expert testimony in a disciplinary hearing and concluding that “it’s plausible that OSU violated Doe’s right to due process by failing to permit Doe’s expert to testify and present his report”).

<sup>339</sup> *Doe v. Miami Univ.*, 882 F.3d 579, 601 (6th Cir. 2018) (quoting *Doe v. Cummins*, 662 F. App’x 437, 449 (6th Cir. 2016)); *Ikpeazu v. Univ. of Neb.*, 775 F.2d 250, 254 (8th Cir. 1985); *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987).

<sup>340</sup> *Murray v. N.Y. Univ. College of Dentistry*, 57 F.3d 243, 251 (2nd Cir. 1995). See also *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 31–32 (D. Me. 2005) (“There is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.”).

<sup>341</sup> *Plummer v. Univ. of Houston*, 860 F.3d 767, 776 (5th Cir. 2017); *Doe v. Loh*, No. CV PX-16-3314, 2018 WL 1535495, at \*7 (D. Md. Mar. 29, 2018) (“Taking the Amended Complaint and its incorporated attachments as true, Doe has not alleged facts sufficient to infer plausibly that bias eclipsed his due process protections. [The investigator’s] report sets out in detail the witnesses whom he interviewed, the documents he reviewed, and the version of events as described by Roe, Doe, and other witnesses. [The investigator] then presented his findings to the [Standing Review Committee] and was subject to Doe’s questioning.”).

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 776–77.

<sup>345</sup> See *Doe v. DiStefano*, No. 16-CV-1789-WJM-KLM, 2018 WL 2096347, at \*10 (D. Colo. May 7, 2018) (“The Court finds that Plaintiff’s accusations, taken together, create a plausible inference of bias against those accused of sexual misconduct.”); *Doe v. Univ. of Miss.*, No. 3:18-CV-138-DPJ-FKB, 2019 WL 238098, at \*8 (S.D. Miss. Jan. 16, 2019) (rejecting a motion to dismiss a procedural due process claim because “the presence of an allegedly biased panel member raises a due-process problem”).

hearing for alleged sexual assault was biased against him.<sup>346</sup> In that case, one of the hearing panel members acted as investigator, prosecutor, and judge. The court noted that that fact alone did not give rise to a due process violation. Rather, because that individual also allegedly dominated the panel with remarks intended to reduce the defendant’s credibility, and reportedly said during the hearing, “I’ll bet you do this [commit sexual assault] all the time,” the student had plausibly alleged that the hearing panel member was not impartial and had pre-judged his case.<sup>347</sup>

Courts have also addressed claims alleging a due process violation for bias based on institutional pressures, such as the sexual assault training received by university officials. For example, one district court rejected a due process claim which argued that university staff members were biased because they received sexual assault training that was not balanced with training for protecting the due process rights of accused students.<sup>348</sup> The court reasoned that it was a “laudable goal” for the university to raise awareness of sexual assault and increase sensitivity to problems that victims of sexual violence experience.<sup>349</sup> Plaintiffs’ mere belief that the school “ha[d] a practice of railroading students accused of sexual misconduct simply to appease the Department of Education and preserve its federal funding” was unsupported by any evidence.<sup>350</sup>

In contrast, another district court rejected a motion to dismiss a due process claim brought by an expelled student alleging that the investigation and training materials given to the panel who decided his case were biased.<sup>351</sup> The court reasoned that while this was a “he-said/she-said” case, “there seems to have been an assumption under [the] training materials that an assault occurred. As a result, there is a question whether the panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered.”<sup>352</sup> Accordingly, the court concluded that there may have been a due process violation because it was “plausible that the scales were tipped” against the accused student.<sup>353</sup>

### Claims Alleging Unfair Rehearing or Appeal Processes

Finally, a number of federal district court cases have addressed allegations that a university’s disciplinary proceedings violated due process on the basis of unfair review processes for rehearing appeals.

In one district court case, a student was cleared by a hearing panel on a charge of sexual assault, but the university ordered a new hearing, apparently premised only on the school being unable to adequately prove its case in the first hearing.<sup>354</sup> The district court found this to be fundamentally unfair to the student and ruled that the allegations survived the university’s motion to dismiss.<sup>355</sup>

Similarly, in another district court case, a suspended student challenged the validity of a school’s procedures where he was initially found not responsible for sexual misconduct by a hearing

<sup>346</sup> *Doe v. Miami Univ.*, 882 F.3d 579, 601 (6th Cir. 2018).

<sup>347</sup> *Id.* at 26.

<sup>348</sup> *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 602 (S.D. Ohio 2016).

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Doe v. Univ. of Miss.*, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3570229, at \*11 (S.D. Miss. July 24, 2018).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at \*6 (W.D.N.C. July 22, 2015).

<sup>355</sup> *Id.*

board, but was later determined guilty after the complainant appealed that decision.<sup>356</sup> At the administrative appeal stage, the school did not give the defendant sufficient notice of, or time to respond to, new evidence against him; did not provide him with details of the identity of a woman he was newly accused of assaulting; did not tell him the names of the members of the appeal board; did not give him notice of the appeal board's meeting; and did not permit him to attend that meeting.<sup>357</sup> The appeals board reversed the initial hearing board's determination that the student was not responsible for sexual misconduct, without explanation, and without any oral presentations or live testimony.<sup>358</sup> The reviewing federal district court ruled that the school failed to provide the student with a meaningful hearing.<sup>359</sup>

Likewise, a student brought a claim in federal district court against a university after being expelled for sexual assault even though he had been found not responsible by an initial hearing panel.<sup>360</sup> In that case the school permitted a rehearing after the complainant appealed the initial hearing panel's decision, and subsequently the individual presiding over the appeal expelled the student.<sup>361</sup> The individual presiding over the appeal conducted off-the-record and ex parte meetings with the accuser and failed to deliver the accused student a record of those meetings.<sup>362</sup> According to the reviewing court, by the time the student was permitted to present his defense, the individual overseeing his appeal had pre-judged the case,<sup>363</sup> and expelled the accused student without providing a basis for the decision.<sup>364</sup> The court ruled that these procedural inadequacies, combined with a failure to offer the student notice of the full scope of allegations against him, combined to constitute a due process violation.<sup>365</sup>

## ED's Proposed Title IX Regulations Regarding Sexual Harassment

With the foregoing considerations in the background, in September 2017 OCR withdrew the 2011 Dear Colleague Letter and 2014 Questions and Answers document.<sup>366</sup> ED explained that it would begin the rulemaking process to codify a school's responsibilities under Title IX. In the interim, ED stated that it would continue to rely on the 2001 Guidance; it also issued a new Question and Answer document indicating how the department would address sexual misconduct during that time.<sup>367</sup> The document notifies schools that they may, in certain circumstances, resolve

<sup>356</sup> Doe v. Alger, 175 F. Supp. 3d 646, 648 (W.D. Va. 2016).

<sup>357</sup> *Id.* at 662.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* ("The court accordingly holds that Doe alleges sufficient facts to state a procedural due process claim based on a property interest against Warner and Alger, the ultimate decisionmakers in the review process.")

<sup>360</sup> Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 623 (E.D. Va. 2016).

<sup>361</sup> *Id.* at 612.

<sup>362</sup> *Id.* at 619.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 622.

<sup>365</sup> *Id.* at 623–34.

<sup>366</sup> In its letter withdrawing the previous guidance, ED noted that, in response to the 2011 Dear Colleague Letter and 2014 Q&A, many schools developed procedures for resolving complaints that lacked due process protections for the accused. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER 1 (2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

<sup>367</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>. Among other things, the 2017 Question and

complaints through mediation.<sup>368</sup> It also notifies schools that they may choose to allow appeals either by both parties or solely by the party found to have committed sexual misconduct and not the alleged victim.<sup>369</sup>

On November 29, 2018, ED issued a notice of proposed rulemaking in the *Federal Register*. If adopted, the proposal would significantly alter the responsibilities of schools in responding to allegations of sexual harassment.<sup>370</sup>

Among other things, the proposed regulation would (1) define in narrower terms what conduct qualifies as sexual harassment under Title IX; (2) require “actual notice” of harassment, rather than constructive notice, to trigger a school’s Title IX responsibilities; (3) provide that a school’s response to allegations of sexual harassment will violate the statute only if amounting to deliberate indifference; and (4) impose new procedural requirements that reflect concern for due process when schools investigate allegations and make determinations of culpability.<sup>371</sup>

## Conduct That Constitutes Sexual Harassment Under Title IX

The proposed regulation would first define sexual harassment in the following ways:

- an employee conditioning the provision of a benefit, service, or aid on the individual’s participation in unwelcome sexual conduct (i.e., quid pro quo);
- “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity” (i.e., hostile environment); or
- sexual assault (as defined<sup>372</sup> in regulations implementing the Clery Act).<sup>373</sup>

Notably, among the changes to past definitions of sexual harassment issued by ED, the proposal would establish a higher threshold to show a Title IX violation based on hostile environment harassment than that required by ED in the past. As explained in an earlier section of this report, ED’s 2001 Guidance described hostile environment harassment as sexually harassing “conduct [that] is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the

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Answer document does not require schools to adopt a preponderance of the evidence standard; instead, it instructs schools that the standard of evidence used should be either the preponderance standard or that of clear and convincing evidence (the standard of evidence used should be consistent with the standard used in other disciplinary cases). *Id.* at 5 n.19.

<sup>368</sup> *Id.* at 4.

<sup>369</sup> *Id.* at 7.

<sup>370</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (proposed 34 C.F.R. § 106.30). The proposal also requests input on a series of directed questions highlighting specific issues ED is interested in hearing input on. For instance, the proposal inquires whether aspects of the rule are “unworkable” for elementary and secondary schools. *Id.* at 61,482.

<sup>371</sup> *Id.* at 61,496–99. The Notice explains that new regulations are necessary to provide “clear legal obligations” to schools. In addition, ED asserts that the new regulations will afford greater control over the process to those alleging sexual harassment and ensure that a school’s procedures for investigating complaints are fair and impartial. *Id.* at 61,462.

<sup>372</sup> See 34 C.F.R. § 668.46(a) (defining sexual assault generally as “[a]n offense that meets the definition of rape, fondling, incest, or statutory rape”).

<sup>373</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,496 (proposed 34 C.F.R. § 106.30). Among other things, the Clery Act requires certain institutions of higher education that receive federal funds under Title IV to collect crime statistics from in and around their campuses and report the information to the campus community, applicants for enrollment, and ED. 20 U.S.C. § 1092(f).

school's program based on sex."<sup>374</sup> The proposed regulations would instead generally adopt the standard for actionable harassment that the Supreme Court's 1999 *Davis* decision applied in the context of private suits for damages:<sup>375</sup> "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."<sup>376</sup> In other words, whereas ED previously defined a hostile environment harassment as harassment that is "sufficiently serious to limit" a student's ability to benefit from or participate in a school's program, the proposed regulations would define a hostile environment as one "that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."<sup>377</sup>

## Adopting "Actual Notice" Requirement

Second, in a departure from past administrative practice, in which ED considered "constructive notice" (i.e., known or should have known) to trigger a school's responsibilities in cases of student-on-student harassment,<sup>378</sup> and did not impose a notice requirement in certain cases of harassment by a teacher or employee,<sup>379</sup> the proposal would establish that a school has a duty to respond to allegations of sexual harassment only when it has "actual knowledge."<sup>380</sup>

Actual knowledge is defined as notice of harassment (or allegation of harassment) to a school's Title IX Coordinator or official with authority to institute corrective measures; the regulations explicitly reject imputing knowledge to a school based on respondeat superior or constructive notice.<sup>381</sup>

<sup>374</sup> 2001 GUIDANCE, *supra* note 11, at 5. See 2011 DEAR COLLEAGUE LETTER, *supra* note 236, at 3 (defining hostile environment harassment as conduct that is "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program"); 2014 QUESTIONS AND ANSWERS, *supra* note 254, at 1 (explaining that sexual violence creates a hostile environment when "the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program").

<sup>375</sup> See *supra* "Gebser and Davis: The Supreme Court's Title IX Liability Standard."

<sup>376</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,466 (proposed 34 C.F.R. § 106.30). Compare *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) ("We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.") with *id.* at 652 ("Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.") and *id.* ("Moreover, the provision that the discrimination occur "under any education program or activity" suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity.").

<sup>377</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,496.

<sup>378</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,468 ("The Department's guidance and enforcement practices have taken the position that constructive notice—as opposed to actual notice—triggered a recipient's duty to respond to sexual harassment."). See 2001 GUIDANCE, *supra* note 11, at 13; Letter from Anurima Bhargava, Chief, Civil Rights Div., Educ. Opportunities Section, U.S. Dep't of Justice, and Gary Jackson, Reg'l Dir., OCR, Seattle Office, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont., and Lucy France, Univ. Counsel, Univ. of Mont. 4 (May 9, 2013), <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> (describing the constructive notice standard).

<sup>379</sup> See 2001 GUIDANCE, *supra* note 11, at 10.

<sup>380</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,496.

<sup>381</sup> *Id.* At the elementary and secondary school level, this includes a teacher in the case of student-on-student harassment. *Id.*

Notably, in contrast to past guidance from ED,<sup>382</sup> the mere ability or obligation to report by a school employee does not qualify them as one who possesses authority to institute corrective measures.<sup>383</sup> The proposal explains that this threshold for triggering a school’s obligations is intended to align the administrative standard imposed by ED with that articulated by the Supreme Court in *Gebser* and *Davis* in the context of private litigation seeking money damages.<sup>384</sup>

Further, the proposed regulations would compel schools to respond only to sexual harassment that occurs within a school’s “education program or activity.”<sup>385</sup> This contrasts with past ED guidance which provided that schools sometimes will be responsible to respond to harassment that occurs “outside a school’s education program or activity.”<sup>386</sup> For instance, past ED guidance (since rescinded) required schools to “process all complaints of sexual violence, regardless of where the conduct occurred,” in order to determine if the conduct has effects on campus.<sup>387</sup>

## Adopting the “Deliberate Indifference” Standard to Evaluate a School’s Response

In another departure from prior administrative practice, in which ED judged a school’s response under a “reasonableness” standard,<sup>388</sup> the proposed regulations only require a school to respond in a manner that is not “deliberately indifferent.”<sup>389</sup> Deliberate indifference is a “response to sexual harassment [that] is clearly unreasonable in light of the known circumstances.”<sup>390</sup> Once again, this would tether a school’s responsibility to that announced by the Court in *Davis* in the context of private suits for damages.<sup>391</sup> The proposal explains that, for ED, this standard aptly holds schools accountable while allowing for flexibility in making disciplinary decisions.<sup>392</sup>

The proposal outlines three situations in which a safe harbor is provided to a school from a finding of deliberate indifference.<sup>393</sup> First, when a formal Title IX complaint is made (by a complainant or Title IX Coordinator), the proposed regulations outline a number of grievance procedures (outlined below) that schools must follow.<sup>394</sup> When a school follows these procedures

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<sup>382</sup> According to the 2001 Guidance, a responsible employee is “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.” See 2001 GUIDANCE, *supra* note 11, at 13.

<sup>383</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,466.

<sup>384</sup> *Id.* at 61,466–67.

<sup>385</sup> *Id.* at 61,468, 61,497 (proposed 34 C.F.R. § 106.44(a)). The proposal clarifies that “Title IX’s “education program or activity” language should not be conflated with Clery Act geography; these are distinct jurisdictional schemes, though they may overlap in certain situations.” *Id.* at 61,468. See 34 C.F.R. § 668.46 (Clery Act regulations).

<sup>386</sup> 2011 DEAR COLLEAGUE LETTER, *supra* note 236, at 4.

<sup>387</sup> 2014 QUESTIONS AND ANSWERS, *supra* note 254, at 29.

<sup>388</sup> 83 Fed. Reg. 61,462, 61,468–69 (“The Department’s [prior] guidance and enforcement practices have taken the position that . . . recipients’ response to sexual harassment should be judged under a reasonableness standard, rather than under the deliberate indifference adopted by the proposed regulation.”). See also 2014 Questions and Answers, *supra* note 254, at 2.

<sup>389</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,468–69, 61,497 (proposed 34 C.F.R. § 106.44(a)).

<sup>390</sup> *Id.* at 61,468.

<sup>391</sup> See *supra* “*Gebser* and *Davis*: The Supreme Court’s Title IX Liability Standard.”

<sup>392</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,468.

<sup>393</sup> *Id.* at 61,465.

<sup>394</sup> *Id.* at 61,497 (proposed 34 C.F.R. § 106.45(b)(1)).

it would not be deliberately indifferent and has not discriminated under Title IX.<sup>395</sup> Second, if a school has actual knowledge of harassment because of multiple complainants, the Title IX Coordinator must file a complaint.<sup>396</sup> Again, compliance with the grievance procedures would negate any inference of deliberate indifference in this situation.<sup>397</sup>

Third, with respect to institutions of higher education, and in situations where there is not a formal complaint, a school would not be deliberately indifferent if it offers and implements supportive measures to the complainant that are aimed to restore or preserve the complainant's access to a school's education program or activity.<sup>398</sup> The school must also at this time notify the complainant in writing of the right to file a formal complaint.<sup>399</sup> As long as an institution of higher education follows these requirements, it would not be deliberately indifferent.

Aside from these three situations, the proposed regulations provide that a school with actual knowledge of sexual harassment in an education program or activity must respond in a manner that is not deliberately indifferent.<sup>400</sup>

The proposal would also allow schools to remove an individual accused of sexual harassment from an educational program or activity on an emergency basis.<sup>401</sup> However, a school must conduct an individualized risk and safety analysis, determine that the removal is justified because of an immediate threat to students or employees, and provide the accused with notice and an opportunity to challenge the decision.<sup>402</sup> The regulations also allow schools to place a nonstudent employee on administrative leave during an investigation.<sup>403</sup>

## Protocols for Fact-Finding and Determining Culpability

A significant component of the proposal reflects concern that schools provide accused students with due process protections during the fact-finding process and ultimate determination of culpability. As a threshold matter, schools must investigate allegations received in a formal complaint, but if the alleged conduct would not (if proved) constitute sexual harassment under the regulations, or if it did not occur within a school's program or activity, the complaint must be dismissed.<sup>404</sup> Upon receipt of a formal Title IX complaint regarding sexual harassment, a school must provide written notice to the relevant parties of the allegations, including notice of the available grievance procedures, and notice of the allegations constituting a potential violation, "including sufficient details known at the time and with sufficient time to prepare a response before any initial interview."<sup>405</sup>

<sup>395</sup> *Id.* (proposed 34 C.F.R. § 106.44(b)(1)).

<sup>396</sup> *Id.* (proposed 34 C.F.R. § 106.44(b)(2)).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* (proposed 34 C.F.R. § 106.44(b)(3)).

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* (proposed 34 C.F.R. § 106.44(b)(4)).

<sup>401</sup> *Id.* (proposed 34 C.F.R. § 106.44(c)). The proposal notes that this language tracks the language in current Clery Act regulations at 34 C.F.R. § 668.46(g). Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,471.

<sup>402</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,471.

<sup>403</sup> *Id.* at 61,471, 61,497 (proposed 34 C.F.R. § 106.44(d)).

<sup>404</sup> *Id.* at 61,498 (proposed 34 C.F.R. § 106.45(b)(3)).

<sup>405</sup> *Id.* at 61,498 (proposed 34 C.F.R. § 106.45(b)(2)(i)(B)). This includes "the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of



## Procedures for Handling Formal Complaints

A school's grievance procedures must treat complainants and respondents equitably, which means that a school must both provide remedies for complainants upon a finding of sexual harassment as well as due process protections for a respondent before any sanctions are imposed.<sup>406</sup> The proposal would provide that a school's treatment of a complainant in response to a formal complaint of harassment can constitute discrimination in violation of Title IX; likewise, a school's treatment of a respondent can discriminate on the basis of sex in violation of Title IX.<sup>407</sup>

The procedures must also require an objective evaluation of evidence (both inculpatory and exculpatory) and provide that credibility determinations not be made based on one's status;<sup>408</sup> require that individuals involved in the investigation or decisionmaking process not be biased and receive training on ensuring student safety and providing due process for all parties;<sup>409</sup> include a presumption that respondents are not guilty until proven otherwise;<sup>410</sup> and describe the range of possible sanctions and remedies available, the standard of evidence used, the ability to appeal (if offered) and the range of available supportive measures.<sup>411</sup>

With respect to a school's actual investigation of alleged harassment, the proposed regulations require that a school must:

- place the burden of proof and of gathering evidence on the school (rather than either party);
- allow each party equal opportunity to present witnesses and evidence;
- not restrict parties from gathering and presenting relevant evidence or from discussing the allegations;
- permit both parties equally to have their choice of advisor or other person join them during proceedings, although the school may restrict an advisor's participation so long as restrictions apply equally to both parties;
- provide parties with written notice of the relevant details of hearings and interviews and allow sufficient time to prepare;
- for institutions of higher education,<sup>412</sup> provide a live hearing where the decisionmaker must allow each party to ask the other party and witnesses all

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the alleged incident, if known." *Id.* at 61,498 (proposed 34 C.F.R. § 106.45(b)(2)(i)(B)).

<sup>406</sup> *Id.* at 61,497 (proposed 34 C.F.R. § 106.45(b)(1)). The requirement for due process protections in the proposed regulation applies to private schools. *Id.* at 61,472.

<sup>407</sup> *Id.* at 61,497 (proposed 34 C.F.R. § 106.45(a)).

<sup>408</sup> *Id.* (proposed 34 C.F.R. § 106.45(b)(1)(ii)).

<sup>409</sup> *Id.* (proposed 34 C.F.R. § 106.45(b)(1)(iii)). Materials used in training must not rely on sex stereotypes and must promote impartial investigations and adjudications. *Id.* (proposed 34 C.F.R. § 106.45(b)(1)(iii)). The proposal notes that this language tracks the language in current Clery Act regulations at 34 C.F.R. §§ 668.46(k)(3)(i)(C); (k)(2). Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,473.

<sup>410</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,497 (proposed 34 C.F.R. § 106.45(b)(1)(iv)).

<sup>411</sup> *Id.* (proposed 34 C.F.R. § 106.45(b)(1)(vi)–(ix)). The procedures must also include timeframes for conclusion of the process, including appeals and delays. *Id.* (proposed 34 C.F.R. § 106.45(b)(1)(v)). The proposal notes that this language tracks the language in current Clery Act regulations at 34 C.F.R. § 668.46(k)(1). Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,473.

<sup>412</sup> Elementary and secondary schools are not required to provide a live hearing, but the decisionmaker must nonetheless "ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses." And "[i]f no hearing is held, the decisionmaker must afford each party the opportunity to submit written questions, provide each party with the answers, and

- relevant questions (and follow-up questions) including those that challenge one’s credibility; cross-examination must be done by the party’s advisor;<sup>413</sup> at the request of either party, schools must allow for cross-examination via technology with the parties in separated rooms;<sup>414</sup> decisionmakers must not rely on any party or witness’s statement if they do not submit to cross-examination;<sup>415</sup>
- allow both parties an equal opportunity to review evidence from the investigation that is directly related to the allegations; and
  - develop a report summarizing the relevant evidence and provide this to the parties at least 10 days prior to a hearing (or time where responsibility is determined).<sup>416</sup>

Notably, these requirements depart from past ED guidance<sup>417</sup> by requiring, for institutions of higher education, a quasi-judicial proceeding in the form of a live hearing. Each party may question the other side, and cross-examination must be conducted by a party’s advisor.

## Determinations of Responsibility

The proposed regulations would also significantly alter the ultimate decisionmaking requirements for schools. For instance, the decisionmaker in a proceeding may not be the investigator or the school’s Title IX Coordinator.<sup>418</sup> This would bar the practice of some universities that have used a single investigator to both examine allegations and reach a decision regarding culpability.<sup>419</sup> And in contrast to past guidance from ED,<sup>420</sup> the new regulations permit schools to apply either a preponderance of the evidence standard or a clear and convincing standard.<sup>421</sup> However, schools may apply the former only if they use that same standard for conduct violations other than sexual

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allow for additional, limited follow-up questions from each party.” Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,498 (proposed 34 C.F.R. § 106.45(b)(3)(vi)).

<sup>413</sup> This requirement supersedes the discretion afforded schools to restrict an advisor’s role under proposed 34 C.F.R. § 106.45(b)(3)(iv). In addition, if a party lacks an advisor, the school must provide one.

<sup>414</sup> Any cross-examination “must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent.” Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,498 (proposed 34 C.F.R. § 106.45(b)(3)(vii)).

<sup>415</sup> Decisionmakers must explain any decision to exclude questions as irrelevant. *Id.*

<sup>416</sup> *Id.* at 61,497–99 (proposed 34 C.F.R. § 106.45(b)(3)(i)–(ix)).

<sup>417</sup> See *supra* section “Administrative Enforcement of Title IX.”

<sup>418</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,499 (proposed 34 C.F.R. § 106.45(b)(4)). The decisionmaker must also issue a written decision.

<sup>419</sup> See AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT 3 (June 2017), [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf); Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 180 (2017); Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 644–47 (2018). See also WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE, THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 14 (Apr. 2014), [https://obamawhitehouse.archives.gov/sites/default/files/docs/report\\_0.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/report_0.pdf) (positively referencing versions of the single-investigator model).

<sup>420</sup> See *supra* section “2011 Dear Colleague Letter Regarding Sexual Violence Between Peers.”

<sup>421</sup> Nondiscrimination on the Basis of Sex, 83 Fed. Reg. at 61,499 (proposed 34 C.F.R. § 106.45(b)(4)).

harassment that carry the same maximum disciplinary penalty.<sup>422</sup> Further, schools must apply the same standard of evidence for complaints against students as it does for employees and faculty.<sup>423</sup>

A schools may, but is not required to, allow appeals of decisions. If it does so, it must allow both parties to appeal.<sup>424</sup> A school may also, at any point before reaching a final determination, facilitate an informal resolution process as long as it obtains the parties' written consent and notifies them of the requirements of the process.<sup>425</sup>

## Considerations for Congress

As discussed above, the antidiscrimination mandate of Title IX, enacted in 1972, prohibits discrimination “on the basis of sex” in educational programs in general terms. The statute does not expressly refer to or address sex discrimination in the form of sexual abuse, sexual harassment, or sexual assault. Nor does the statute address when, by whom, or under what circumstances such conduct will amount to a Title IX violation.

Given the statute’s silence on these issues, federal courts have largely determined when relief is available for individual victims of sexual abuse or harassment. Indeed, in creating the remedial scheme for a private right of action to address such claims, the Supreme Court sought to “infer how the [1972] Congress *would have* addressed the issue” if there had been an express provision in the statute,<sup>426</sup> an approach that the Court observed “inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken.”<sup>427</sup> Likewise, given the sparse statutory language, federal agencies have issued shifting guidelines at to the responsibilities of educational institutions in complying with Title IX.

As a general matter, Congress enjoys substantial discretion to modify the terms of Title IX to clarify the appropriate standard in private suits for damages as well as in the administrative enforcement context. Congress could, for instance, amend Title IX to define the specific conduct that amounts to a violation of the statute regarding sexual abuse or harassment. In addition, an amendment could also clarify whether liability for harassment should be handled differently in elementary and secondary schools, as opposed to the university context. Likewise, legislation could distinguish between harassment by teachers from that between students.

Further, because the private right of action under Title IX has been judicially implied, rather than expressly codified in statute, Congress could modify the legal standards that apply in a private suit for damages.

Finally, aside from directly amending Title IX, Congress could also direct federal agencies to alter their administrative enforcement of the statute. For example, Congress could direct ED to promulgate regulations that distinguish between various types of sexual harassment or treat harassment differently depending on the context.

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<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.* (proposed 34 C.F.R. § 106.45(b)(5)).

<sup>425</sup> *Id.* (proposed 34 C.F.R. § 106.45(b)(6)).

<sup>426</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 178 (1994)) (emphasis added).

<sup>427</sup> *Gebser*, 524 U.S. at 285.

## **Author Contact Information**

Jared P. Cole  
Legislative Attorney  
[redacted]@crs.loc.gov...

Christine J. Back  
Legislative Attorney  
[redacted]@crs.loc.gov...

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