



# Sexual Harassment and Assault at School: Divergence Among Federal Courts Regarding Liability

April 7, 2022

Under [Title IX](#) of the Education Amendments of 1972 (Title IX), schools that receive federal financial assistance are liable for a “deliberately indifferent” response to the sexual harassment and assault of students by teachers, as well as by fellow students in certain circumstances. While this standard is a [stringent](#) one to meet, federal courts have not applied it uniformly. In particular, federal courts of appeals have taken [diverging](#) positions over [whether](#) a school’s insufficient response to a single incident of student-on-student harassment itself can establish liability under Title IX, or whether further incidents of harassment are required in order for liability to attach. This disagreement turns, at least in part, on language in Supreme Court [decisions](#) establishing the general parameters of school liability for sexual harassment under Title IX, as well as the interpretation of legislation enacted pursuant to Congress’s [spending power](#) under the Constitution.

## Background: Supreme Court Cases on Sexual Harassment and Title IX

Title IX [prohibits](#) sex discrimination in education programs or activities that receive federal financial assistance. Most public school districts and universities [receive](#) federal funds (although the statute does have various [exceptions](#)). Importantly, the statute’s text does not explicitly create a cause of action, specify judicial remedies available to plaintiffs, or even mention sexual harassment. The Supreme Court has nevertheless interpreted Title IX to extend to sexual harassment, and [has crafted](#) the relevant standards and available judicial relief in such cases. In doing so, the Supreme Court has examined the structure of the statute’s enforcement scheme and stressed the principles attendant to spending power legislation. Two cases set the general framework for establishing liability under Title IX in cases of sexual harassment.

First, the Supreme Court has [interpreted](#) Title IX’s bar against sex discrimination to authorize holding school districts liable in damages in certain cases of sexual harassment of a student *by a teacher*. In *Gebser v. Lago Vista Independent School District*, the Court [ruled](#) that school districts can be liable for a damages claim under Title IX for a deliberately indifferent response to known acts of harassment in such circumstances. Under *Gebser*, in addition to showing a school’s deliberate indifference, plaintiffs must show that “an appropriate person,” defined as “an official who at a minimum has authority to address the

Congressional Research Service

<https://crsreports.congress.gov>

LSB10726

alleged discrimination and to institute corrective measures on the recipient’s behalf,” had “actual knowledge of discrimination.” In such circumstances, liability attaches based on “an official decision ... not to remedy the violation.”

The Court soon extended this reasoning to sexual harassment of a student *by another student*, [ruling](#) in *Davis Next Friend v. LaShonda D. v. Monroe County Board of Education* that federally funded school districts with actual knowledge of such harassment can be held liable for a deliberately indifferent response if certain conditions are met. The discrimination must be “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.” The Court expressed that this determination would often be fact-intensive, and opined that it was “unlikely that Congress” would have intended that a single instance of harassment would meet that standard.

Most relevant for the purposes of the current disagreement among federal courts, the Supreme Court also explained that when the recipient does not engage in harassment directly, it may not be held liable unless the school’s own deliberate indifference “subjects” students to harassment. The school’s response must, “at a minimum, ‘cause students to undergo’ harassment or ‘make them liable or vulnerable’ to it.” The harassment thus must occur in situations in which the school has “substantial control” over the harasser and the context in which the misconduct occurs. One important consideration in making that determination, the Court noted, is whether the school has disciplinary authority over the harasser.

## **Can a School’s Insufficient Response to a Single Incident, Without Further Harassment, Be Sufficient to Trigger Liability?**

A question that is dividing federal appellate courts is how to apply the standard enunciated in *Davis*—in particular, how to interpret the Court’s language regarding what it means for a school to “subject” students to harassment. Can a school’s insufficient response to a single incident of student-on-student sexual harassment, when no further incidents of harassment occur, meet this threshold? Although there are a [number of different appellate decisions](#) that touch on this question, recent decisions from the U.S. Courts of Appeals for the Fourth and Sixth Circuits helpfully illustrate quite distinct approaches.

### **A School’s Deliberately Indifferent Response to a Single, Severe, Incident Can Be Sufficient**

In a split [decision](#) from 2021, the Fourth Circuit ruled in *Doe v. Fairfax County School Board* that a school may be liable under Title IX for a “clearly unreasonable” response to a “single incident of severe sexual harassment” if it renders the student “more vulnerable” to more harassment or further contributes to the deprivation of a student’s access to educational opportunities. In that case, a student was allegedly sexually assaulted on a school trip. There were no further incidents, but the student argued that the school’s response to the misconduct was deliberately indifferent in violation of Title IX.

The Fourth Circuit [observed](#) that in *Davis*, the Supreme Court construed Title IX as prohibiting the deprivation of “access to educational benefits and opportunities on the basis of gender” and described school liability as available when a deliberately indifferent response renders a student “liable or vulnerable” to harassment.

The panel [reasoned](#) that a single incident of harassment, “if sufficiently severe,” can cause lasting harms. When those harms deprive victims of educational benefits and opportunities, and that deprivation is not remedied, or made worse by a school’s deliberately indifferent response, Title IX is violated because the victim is “denied access to educational benefits and opportunities on the basis of gender.” The panel thus rejected the argument that a school cannot be found to act with deliberate indifference when officials only receive notice of the misconduct after the fact and the school’s response does not cause more harassment.

---

The Fourth Circuit's decision drew a [dissent](#). Judge Niemeyer wrote that under *Davis*, a school is not liable in cases of student-on-student harassment unless the school's own conduct itself caused the discrimination. According to the dissent, it is only after a school has notice of harassment that it can prevent future harassment. Under this reasoning, there must be more harassment after the school has notice in order to establish liability. Further, he wrote, the Court in *Davis* limited liability to situations in which there was a "systemic effect on educational programs or activities," and used the example of a single act of harassment as a situation that did not meet that standard. Under the facts in *Doe*, there was only a single incident of harassment which the school had no prior notice of and no opportunity to prevent. Because there was no further harassment that the school failed to avert, the school did not actually cause any harassment and therefore could not be liable under Title IX. (A [petition](#) for a writ of certiorari is pending before the Supreme Court.)

The en banc Fourth Circuit [denied](#) a petition to rehear the case, although that denial itself drew various opinions. Judge Wynn, [concurring](#) in the denial, wrote to emphasize that the panel's decision does not impose retroactive liability for the assault itself when the school had no warning. Rather, schools can be held liable only for their "own behavior in response to a peer assault." The "key question," Judge Wynn wrote, "is whether the school discriminated against the harassed student in how it handled the student's report of peer harassment or assault." Judge Wynn noted that the *Davis* standard of Title IX liability when deliberate indifference renders a student "liable or vulnerable" to harassment was an interpretation rooted in the [statutory phrase](#) "subjected to discrimination." Thus, schools under Title IX can be liable when their actions render a "student vulnerable to sexual harassment by their peers, such as by failing to respond appropriately after learning of an initial incident of sexual assault."

Judge Wilkinson, [dissenting](#) from the denial, criticized the majority for "subject[ing] school districts to liability for incidents they did not cause and could not prevent." He wrote that Supreme Court case law establishes a "general canon of statutory interpretation: ambiguous conditions in federal spending programs impacting areas integral to state sovereignty must be interpreted in favor of the state." He reasoned that this canon applied here, as elementary and secondary education is a vital aspect of state sovereignty, and Title IX did not unambiguously hold states liable for a "single, isolated incident of pre-notice harassment." In fact, Judge Wilkinson characterized the varying approaches taken by courts as evidence that Title IX did not unambiguously impose this condition. Accordingly, Title IX did not impose liability on schools for a "single isolated incident of pre-notice sexual harassment," because that condition "does not begin to flow unambiguously from the text of the statute."

## Schools Are Not Liable Unless Further Harassment Post-Notice Occurs

In contrast to the majority opinion of the Fourth Circuit, the Sixth Circuit, in the 2019 case *Kollaritsch v. Michigan State University Board of Trustees*, [interpreted](#) *Davis* to mean that schools are only liable for damages under Title IX when they have actual knowledge of actionable harassment and "the school's deliberate indifference to it resulted in further actionable harassment of the student-victim." In that case, a number of college students who were sexually assaulted sued the university alleging that the school's response to their harassment violated Title IX. The panel framed the deliberate indifference standard under *Davis* as an "intentional tort by the school." That standard, for the Sixth Circuit, has four elements: knowledge, an act, injury, and causation. Under the causation element, a plaintiff must show that a school's response was "clearly unreasonable" and "must bring about or fail to protect against ... further harassment."

The panel rejected the argument that the Court's language in *Davis*, which described the deliberate indifference standard as a response that would "cause students to undergo harassment or to make them liable or vulnerable to it," should be read to mean that vulnerability alone is enough to satisfy this requirement. Instead, the panel wrote, the clear meaning of that standard is that if students do experience further post-notice harassment, they can prove a Title IX violation either on the basis that the school took

action that instigated further harassment or took insufficient action (or no action) that left the victim unprotected from further harassment. Because the plaintiffs here did not plead any actionable further sexual harassment, they could not show the causation necessary to state a claim for deliberate indifference under Title IX.

Judge Thapar wrote a [concurring](#) opinion in light of the disagreement among federal courts on the issue. He stressed that because Title IX is enacted pursuant to Congress's spending power, conditions on receipt of federal funds must be unambiguous. In his view, even if there were ambiguity on the issue at hand, that ambiguity itself "would require us to adopt the less expansive reading of Title IX."

## Considerations for Congress

The divergence among federal appellate courts regarding the circumstances in which schools are liable for student-on-student harassment seems to turn in part on language in the Supreme Court's opinion in *Davis* and its interpretation of spending clause legislation. As mentioned above, the text of Title IX does not mention sexual harassment, so the applicable standards are the result of judicial creation. However, Congress enjoys discretion to amend Title IX in order to clarify any number of issues, including what conduct amounts to sexual harassment, the proper response to allegations of sexual harassment that is expected of recipients, the circumstances in which damages liability attaches, and/or the appropriate judicial remedies available. Alternatively, legislation could direct federal agencies to promulgate regulations consistent with Congress's policy goals.

More broadly, as Title IX nears its 50<sup>th</sup> anniversary, the statute is regarded as responsible for increasing [opportunities](#) for women in a number of ways, including in [academics](#) and [participation](#) in [athletics](#). Nonetheless, the precise requirements that flow from the text of Title IX [continue](#) to spark debate and controversy. Perhaps in part because that statute does not explicitly address a variety of important issues, schools' obligations are subject to shifting [regulations](#) at the agency level and [disputed](#) interpretations among the federal courts.

## Author Information

Jared P. Cole  
Legislative Attorney

---

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.