

Appellate Courts Divided on Scope of Title IX Liability for Schools in Cases of Sexual Harassment

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[Title IX](#) of the Education Amendments of 1972 (Title IX) prohibits sex discrimination in education programs and activities that receive federal financial assistance. Recipient schools can be liable under Title IX for an insufficient response to sexual harassment by a [teacher](#) or between [students](#) in certain circumstances. Federal appellate courts have taken [diverging](#) positions over [when](#) a school may be liable for its response to student-on-student (peer) harassment. The disagreement turns in part on how to interpret Supreme Court [decisions](#) establishing the general parameters of school liability in cases of sexual harassment, as well as legislation enacted pursuant to Congress's [spending power](#) under the Constitution. The Supreme Court has [repeatedly](#) interpreted Title IX as enacted pursuant to Congress's authority under the Spending Clause, which means legal obligations that flow from the law must be [clear and unambiguous](#).

A panel [decision](#) from the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit), *Arana v. Board of Regents of University of Wisconsin System*, deepened divisions between federal appellate courts on two legal questions that arise under the framework adopted by the Supreme Court for establishing school liability in cases of peer sexual harassment. First, courts [disagree](#) about whether a single instance of harassment that is sufficiently severe is actionable to trigger Title IX liability. Second, courts are [split](#) as to whether plaintiffs must show that, after receiving notice of actionable harassment, a school's deliberate indifference subjected them to *further* acts of harassment, or whether simply leaving students more vulnerable to harassment is sufficient. Reflecting these divisions, the Seventh Circuit later granted rehearing en banc and [vacated](#) the panel decision in *Arana*. The en banc Seventh Circuit (in this case, all the Seventh Circuit's [active judges plus](#) a senior judge who was on the original panel) [affirmed](#) the district court's original decision to dismiss the case. The en banc court explicitly acknowledged continuing disagreement among the circuits on the scope of Title IX liability in cases of sexual harassment; nonetheless, it rested its decision on grounds that avoided weighing in on the two issues above.

This Sidebar begins by briefly describing the legal framework for sexual harassment claims available under Title IX, as established by two major Supreme Court decisions: *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*. It continues with a discussion of the

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disagreement among federal appellate courts on how to interpret those decisions before examining the Seventh Circuit's panel and en banc decisions in *Arana*. The Sidebar concludes with considerations for Congress.

Supreme Court Cases on Sexual Harassment and Title IX

All public school districts and most colleges and universities [receive](#) federal funds and, as such, must comply with Title IX's sex discrimination prohibition. While Title IX does not explicitly create a cause of action or mention sexual harassment, the Supreme Court has interpreted the statute to include an [implied private right of action](#) and to [extend](#) to sexual harassment. The Court [has also crafted](#) the relevant standards for determining liability and specified what judicial relief is available in such cases.

In doing so, the Court has stressed that Title IX was enacted pursuant to Congress's power under the [Spending Clause](#). The Court has characterized such legislation as akin to a contract: in exchange for funds, recipients agree to comply with "[federally imposed conditions](#)." Because a recipient must voluntarily and knowingly accept the terms of this "contract," the [Court](#) requires that the obligations set forth in legislation be "clear" and "unambiguous[]." This requirement contrasts with "ordinary legislation," which can [impose](#) requirements on regulated parties without their consent.

Two Supreme Court cases set the general framework for establishing school liability under Title IX in cases of sexual harassment. First, in *Gebser*, the Supreme Court [interpreted](#) Title IX's bar on sex discrimination to authorize holding school districts liable for damages in certain cases of sexual harassment of a student *by a teacher*. The Court [ruled](#) that school districts can be liable on 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" had "actual knowledge of discrimination." An appropriate person is [defined](#) as "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf." 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* that the "misconduct" in *Gebser*—a school's deliberate indifference to known harassment—violates Title IX if certain conditions are met. First, the harassment [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 indicated that it was "unlikely that Congress" would have intended that a [single instance](#) of harassment would meet the standard.

Additionally, the Court in *Davis* indicated that when a recipient school does not engage in harassment directly, it is only liable if 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." As a result, a school is only liable for harassment that occurs 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 this determination, the Court observed, is whether a school has [disciplinary authority](#) over the harasser.

In sum, to establish Title IX liability for peer sexual harassment, a plaintiff must establish that

- the recipient school had actual knowledge of harassment in its programs and activities;
- the harassment was "so severe, pervasive, and objectively offensive" that it deprived the victim of educational opportunities; and
- the school's response was deliberately indifferent and subjected students to harassment.

Division Among Federal Appellate Courts

Federal appellate courts have split on two closely related questions that have arisen under the *Davis* framework for peer sexual harassment liability: (1) whether a single incident can [amount](#) to actionable harassment that is “severe, pervasive, and objectively offensive” and that deprives a student of educational opportunities; and (2) whether, following notice of actionable harassment, a school’s deliberately indifferent response must subject a student to [additional](#) incidents of harassment for liability to attach, or if a response that simply renders a student more vulnerable to harassment is sufficient.

Courts Holding That a Single Incident Is Not Actionable Because Not “Pervasive” and a School’s Deliberately Indifferent Response Must Itself Subject Student to Further Harassment

Some courts have read Title IX and *Davis* to mean that a single incident of peer harassment cannot establish Title IX liability for recipient schools. These courts have focused on *Davis*’s requirement that harassment be “[pervasive](#)” and that a school’s deliberate indifference “[subjects](#)” students to harassment in order to establish liability under the law. For instance, in *K.T. v. Culver-Stockton College*, the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit) [affirmed](#) dismissal of a college student’s Title IX claim against her college after she was allegedly sexually assaulted by a student on campus. The panel [ruled](#) that because the allegation was limited to a single sexual assault, the plaintiff failed to allege “pervasive” harassment. In turn, the court held that it could not conclude that the alleged misconduct had the systemic effect of denying the student access to educational opportunities. Further, the Eighth Circuit [ruled](#) that the plaintiff failed to plead deliberate indifference by the college, as there was no allegation that the college’s response caused sexual harassment, only emotional distress. Likewise, a subsequent Eighth Circuit panel in *Doe v. Board of Trustees of the Nebraska State Colleges* [ruled](#) that a plaintiff could not show deliberate indifference in a Title IX sex harassment case because no further incidents of harassment or abuse occurred once the school had notice of a sexual assault.

Similarly, in *Kollaritsch v. Michigan State University Board of Trustees*, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) [held](#) that peer harassment complaints must show (1) notice of actionable harassment and (2) that a school’s deliberate indifference resulted in *further* actionable harassment against the same victim. The panel [explained](#) that in its view, the requirement of “pervasive” harassment [meant](#) that actionable harassment required a victim to show “multiple incidents . . . ; one incident of harassment is not enough.”

In addition to establishing actionable harassment, the court determined that a peer harassment claim [must also](#) plead the elements of what it described as a “deliberate indifference intentional tort,” which consists of four elements: knowledge, an act, injury, and causation. Under the [causation](#) element, the court indicated, a plaintiff must show that a school’s response was “clearly unreasonable,” and the response “must bring about or fail to protect against . . . further harassment.” The panel [rejected](#) the argument that the Supreme 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 harassment once the school is on notice, they can prove a Title IX violation either on the basis that the school took action that instigated further harassment or did not take sufficient action to protect the victim. The court [acknowledged](#) that other courts read *Davis* differently but found their reasoning to be unpersuasive. Because the plaintiffs in the case were each assaulted only once, they did not plead any [actionable further](#) sexual harassment and thus could not establish the causation necessary to state a claim for deliberate indifference under Title IX.

One judge 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." Perhaps revealing continued disagreement over the proper interpretation of *Davis*, subsequent [decisions](#) by [different](#) panels in the Sixth Circuit have distinguished *Kollaritsch* in Title IX lawsuits.

Courts Holding That a Single Incident Can Sometimes Be Actionable and Post-Notice Further Harassment Not Necessarily Required

By contrast, particularly in cases of sexual assault, some courts have read Title IX and *Davis* to authorize damages liability against a school in situations where only a single incident of harassment occurred. For instance, in a case brought by a high school student alleging a single instance of sexual assault, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) [observed](#) in *Doe v. Fairfax County School Board* that while a single or isolated incident of harassment generally does not trigger Title IX liability, one incident can be sufficient if it is "extremely serious." In *Doe*, the panel [determined](#) that the alleged sexual assault and the "lasting trauma [it] caused" were so serious that a [reasonable jury](#) could find that they deprived the plaintiff of educational opportunities. The panel also [pointed](#) to a First Circuit [decision](#) that adopted similar reasoning.

The Fourth Circuit also [ruled](#) that a reasonable jury could find that the school board acted with deliberate indifference in response to the harassment even though there was not a subsequent assault. The panel [rejected](#) a dissenting judge's argument that the board could not be liable because, once the school was on notice of harassment, no school action caused any *further* harassment of the student. The panel [observed](#) that the *Davis* Court indicated liability was available under Title IX for a school's deliberately indifferent response that renders students "liable or vulnerable" to harassment. As such, the Fourth Circuit explained that it [agreed](#) with the [First](#) and [Eleventh](#) Circuits that schools can be liable based on a single incident if, after receiving notice of the harassment, their deliberately indifferent response makes a plaintiff more vulnerable to future harassment or deprives them of access to educational opportunities.

Similarly, in *Williams v. Board of Regents of the University System of Georgia*, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) [ruled](#) that it was sufficient for plaintiffs to allege that a school's deliberate indifference to an incident made them more vulnerable to harassment, rather than that they suffered further harassment. In that case, the plaintiffs [alleged](#) that they were raped by fellow students at fraternity parties and that the university refused to investigate because the incidents occurred off campus. The Tenth Circuit [ruled](#) that the plaintiffs had sufficiently pled that the university's deliberate indifference to their reports made them more vulnerable to harassment. In [particular](#), fear of running into their alleged rapists on campus caused the plaintiffs to struggle with their studies, lose a scholarship, withdraw from school activities, and avoid walking around campus alone. The court concluded that the plaintiffs had thus [adequately](#) alleged that the school's response to their harassment deprived them of educational opportunities.

Seventh Circuit Panel Decision

The Seventh Circuit's panel decision in *Arana v. Board of Regents of University of Wisconsin System* deepened these divisions. In *Arana*, a university [expelled](#) a star football player for sexually assaulting two students at an off-campus apartment. The player was later found not guilty of a distinct charge in state court criminal proceedings. Under pressure from "influential" parties, and without hearing from the alleged victims, the chancellor of the university readmitted the player. One of the alleged victims sued the school for a deliberately indifferent response to her harassment. The district court [granted](#) the university's motion for summary judgment and dismissed the case.

On appeal from the district court's decision, the university [argued](#) that the district court had correctly determined that a single instance of harassment does not meet the requirement that harassment be "pervasive" under the *Davis* standard of "severe, pervasive, and objectively offensive harassment." The Seventh Circuit panel [acknowledged](#) that, according to the reasoning of the Eighth and Sixth Circuits (in the decisions discussed above), a victim of a single sexual assault is unable to recover under Title IX. The Seventh Circuit, however, [joined](#) those circuits that allow a single incident to trigger Title IX liability when the incident is sufficiently severe or "vile" and the school's unreasonable response has the systemic effect of denying access to educational opportunities. That standard, the panel wrote, [promotes](#) the aims in *Davis* of preventing students from being deprived of educational opportunities on the basis of their sex and holding institutions liable for their failure to take action.

Regarding *Davis*'s requirement that a school's deliberate indifference subject a student to harassment, the Seventh Circuit [took note of](#) judicial disagreement on this issue as well—namely, whether a plaintiff must show that, after receiving notice of harassment, they were subjected to further acts of harassment or simply that they were left more vulnerable to harassment. The court [rejected](#) the university's argument that it was not liable because the harassment did not repeat. In line with the reasoning of the U.S. Courts of Appeals for the First, Fourth, Tenth, and Eleventh Circuits, it [concluded](#) that under *Davis*, liability extends to situations where a school's deliberately indifferent response places a student at risk of further harassment.

The majority opinion drew a dissent. The dissent [observed](#) that under *Davis*, schools must have notice of actionable harassment occurring in their programs or activities to be liable under Title IX, meaning they must have control over the harasser and the context in which the harassment occurs. Here, because the alleged sexual assault took place off campus, the dissent opined that this unsupervised setting [was](#) not under the school's programs or activities and the school was thus not responsible for it. The dissenting [opinion](#) also took the view that under *Davis*, a single instance of harassment is not actionable. The dissent finally [criticized](#) the majority's ruling that liability can attach when a school's deliberate indifference leaves students vulnerable to further harassment. Pointing to the reasoning of the Sixth Circuit's decision in *Kollaritsch*, the dissent [argued](#) that to "subject" students to harassment requires further harassment.

En Banc Seventh Circuit Decision

The en banc Seventh Circuit vacated the panel decision and subsequently [affirmed](#) the district court's dismissal of the case against the university. The court [rejected](#) the argument that readmitting the alleged harasser was deliberately indifferent—the school's overall response, which included maintaining an apparently effective no-contact order after the alleged harasser returned to campus, was not clearly unreasonable in the court's view. The en banc court observed that [prior](#) cases in the Seventh Circuit had held that schools are not deliberately indifferent when officials impose a no-contact order they reasonably believe effectively separates an alleged harasser from a victim. Those rulings control here, the en banc [concluded](#), because the university responded to allegations with measures to eliminate known harassment and limit further harassment, which is what *Davis* requires. Likewise, the court [disagreed](#) that the university was required to institute additional measures once the alleged harasser returned to school. The alleged harasser never contacted the victim, she never saw him again, and the no-contact order was maintained. The court [reasoned](#) that victims are not entitled to specific demands for remediation under *Davis*, only that schools respond in a manner that is not clearly unreasonable.

The majority opinion also [acknowledged](#) that its resolution of the case based on a lack of deliberate indifference meant that several issues concerning the scope of Title IX liability for schools remained open in the Seventh Circuit, including the two [issues](#) discussed above over which other appellate courts have disagreed: (1) whether a single instance of harassment is ever actionable; and (2) whether, once a school is on notice of harassment, further harassment is required to establish liability. (The court also

[acknowledged](#) open questions among federal courts about Title IX’s application to off-campus harassment; for more on that specific issue, see this [CRS Sidebar](#).)

One judge issued a [concurring](#) opinion, emphasizing the importance of the Spending Clause basis for Title IX in resolving the open questions under the law identified by the majority opinion. Under Supreme Court precedent, states must have clear notice of requirements in Spending Clause legislation; thus, according to the concurrence, when a plaintiff brings a case against a school, statutory [ambiguity](#) “cuts against” a finding of liability. Another judge separately concurred, [arguing](#) that plaintiffs alleging deliberate indifference to sexual assault must establish disparate treatment based on sex to show discrimination under Title IX. For instance, in this concurrence’s view, favoring one sex over another in responding to allegations of misconduct could show discrimination, but an insufficient school response in itself would not.

The author of the original panel decision in *Arana* [dissented](#) (joined by three other judges). According to the dissent, summary judgment for the university was inappropriate. Given [disputed](#) facts—what supported the university’s decision to readmit the alleged harasser, the extent to which donor demands determined that decision, whether the school left the alleged victim vulnerable to harassment, and whether the alleged victim’s fear the school would not enforce the no-contact order was reasonable—the dissent argued that a reasonable jury could conclude that the school’s response was deliberately indifferent.

Considerations for Congress

As described above, federal appellate courts interpreting Title IX and *Davis* are divided as to (1) whether peer harassment claims alleging only a single incident can trigger liability for recipient schools; and (2) whether, after a school is on notice of harassment, liability only attaches if further harassment occurs. Congress is free to leave Title IX as it is; it also has authority to modify or repeal the law. Congress may alter the existing legal framework and pass legislation if it wants to resolve the disagreement among federal appellate courts. As mentioned, the framework for liability in such situations was crafted by the Supreme Court through decisions recognizing an implied private right of action to enforce the statute, rather than through an explicit cause of action with accompanying standards set by Congress. Accordingly, Congress could eliminate the private right of action available under Title IX and leave enforcement of the law to federal agencies that distribute funding to education programs. Alternatively, it could explicitly create a private right of action through legislation that lays out specifically the parameters for liability in sexual harassment cases.

In the past, Congress has amended other civil rights statutes in response to judicial decisions interpreting their text. For instance, when the Supreme Court held in *General Electric Co. v. Gilbert* that Title VII did not prohibit discrimination based on pregnancy, Congress [amended](#) Title VII to do so. Were Congress to amend Title IX, a relevant example it might draw from is the [Civil Rights Restoration Act of 1987](#) (enacted in 1988), in which Congress amended [Title IX](#), [Title VI](#), and [Section 504](#) of the Rehabilitation Act (as well as the [Age Discrimination Act](#) of 1975). The legislation superseded portions of a Supreme Court [decision](#) that concluded Title IX applied only to the specific program receiving federal funds, rather than to an entire institution that receives funds. For all four statutes, Congress provided a new, expansive statutory definition of “program or activity.”

If Congress were to legislate in this context, one consideration in doing so would concern the authority generally regarded as underlying Title IX—the Spending Clause. Congress has broad authority to set civil rights conditions on the receipt of federal funding; however, as mentioned above, unlike legislation enacted on other constitutional bases, the Supreme Court has [characterized](#) Spending Clause legislation as akin to a contract that must have clear and unambiguous terms.

Congress could also enact legislation directing federal agencies that fund education programs to promulgate regulations addressing recipient schools' obligations when responding to sexual harassment allegations consistent with standards Congress adopts.

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