Title IX for What: Enforcing Title IX in the Wake of Controversy

MIA LAZARINI*

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* Staff Member, Volume 52 and Senior Staff Member, Volume 53, *The University of Memphis Law Review*; Juris Doctor Candidate, University of Memphis Cecil C. Humphreys School of Law, 2023; Master of Business Administration Candidate, University of Memphis Fogelman College of Business and Economics, 2023. Thank you to Professor Daniel Kiel for serving as my faculty advisor and providing me with wonderful insight and feedback throughout the Note-writing process. Thank you to Ericka Webster and April Huntoon for guiding me in the development of my Note and helping me create a piece that speaks so well on a topic close to my heart. Last, thank you to my friends and family for always supporting me and giving me the freedom to march to the beat of my own drum.

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I. INTRODUCTION

In the Fall of 2011, Elizabeth Shank arrived on campus at Carleton College in Northfield, Minnesota, eager to begin her undergraduate career.[1] Four days into her freshman year, another Carleton College student sexually assaulted Elizabeth in her dorm.[2] Hesitant to bring forward her claim, Elizabeth remained on campus.[3] She continuously encountered her assailant because they lived in the same dorm, and the school plastered his athletic posters throughout campus.[4]

Elizabeth experienced post-traumatic stress disorder and suicidal ideation, resulting in her hospitalization.[5] At this point, school administrators became aware of the assault, yet they offered her little support, failed to notify her of her right to request a different dorm, and declined to remove the assailant's posters from campus.[6] When Carleton College decided to file its own complaint against the assailant o, administrators failed to interview Elizabeth, did not notify her of the sanctions imposed against him, and declined her request to appeal when

1. Shank v. Carleton Coll., 993 F.3d 567, 569 (8th Cir. 2021).
2. *Id.* at 569–70.
3. *Id.* at 570.
4. *Id.*
5. *Id.*
6. *Id.*

the school allowed him to remain on campus.[7] Elizabeth continued to frequently see her assailant on campus, purposely stayed away from areas at school where she was likely to see him, and experienced a decline in her mental health, often turning to drinking to cope.[8]

This story is likely relatable for many and far too common among university students. Despite recent trends in society like the #MeToo movement, which shed light on the pervasiveness of sexual violence and the serious, long-lasting effects it has on victims,[9] sexual violence on college campuses continues to be a major issue.[10] Title IX aimed to provide protection to all in the pursuit of their education, punishing those educational institutions receiving federal funds that deprive individuals of equal access to education based on gender.[11] Over time, sexual violence came within the scope of Title IX because victims of sexual violence cannot experience the equal access to education promised by Title IX if the administration fails to ensure that they have access to a safe learning environment.[12] Despite these advancements and intentions, 26.4% of women and 6.8% of men still experience sexual violence while in college,[13] and these numbers have *risen* in recent years.[14] Even worse, victims struggle to bring claims forward because

7. *Id.* at 571–72.

8. *Id.* at 572. Studies show that victims of sexual violence have higher rates of alcohol and drug use disorders because many victims turn to these substances to cope with their experience. *The Link Between Substance Abuse & Sexual Violence*, P'SHIP FOR A HEALTHIER CARROLL CNTY., https://healthycarroll.org/wp-content/uploads/2019/01/03.link-between-substance-abuse-and-sexual-violence.pdf (last visited Mar. 30, 2023).

9. K. Daw et al. eds., *Sexual Harassment in Education*, 21 GEO. J. GENDER & L. 439, 441, 448 (2020).

10. Sexual violence is one of the most prevalent crimes on college campuses with 13% of all students, including undergraduate, graduate, and professional students, experiencing rape or sexual assault. *See Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence (last visited Mar. 30, 2023). Even worse, these statistics are likely underinclusive considering only 20% of female student victims report to law enforcement. *Id.*

11. *Title IX Legal Manual*, U.S. DEP'T JUST., https://www.justice.gov/crt/title-ix (last visited Mar. 30, 2023).

12. *See id.* (discussing how Title IX sexual violence protections stem from Title IX's general prohibition against discrimination based on sex).

13. RAINN, *supra* note 10.

14. *See, e.g.*, DAVID CANTOR ET AL., REPORT ON THE AAU CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, 1, 11 (revised Jan. 17, 2020),

university responses to sexual violence are often unsatisfactory as more universities implement high standards of proof for victims.[15]

This lack of proper redressability stems from unclear judicial opinions and conflicting guidance offered by the federal government to universities.[16] Because Congress intentionally enacted Title IX as a broad statute that aimed to combat sex discrimination in all forms,[17] the courts have interpreted much of its language when applying this statute in the courts.[18] The judicial branch has consistently supported increasingly broad interpretations of Title IX in the fight against gender discrimination.[19] The Supreme Court recognized an implied right to private action in Title IX in *Cannon v. University of Chicago*, allowing individuals to bring Title IX violations against entities like educational

https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf (showing that results for 21 schools that participated in both the 2015 and the 2019 surveys revealed the rate of sexual violence increased by three percentage points from 23.4% of college women experiencing sexual violence to 26.4% of women as of 2019).

15. Many recent cases brought by victims against educational institutions result in victims' claims being dismissed because they cannot meet the high standards of proof imposed by universities. Victims may be required to prove that the educational institution exercised control over the place in which the sexual violence occurred, that the school's response was not just negligent or careless but clearly unreasonable under the circumstances, and that the school's response subjected the victim to further discrimination or harassment. *See generally* Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1161–62 (9th Cir. 2020); Shank v. Carleton Coll., 993 F.3d 567, 573 (8th Cir. 2021); Cavalier v. Cath. Univ. of Am., 513 F. Supp. 3d 30, 49–50 (D.D.C. 2021).

16. *Compare* Letter from Russlynn Ali, Assistant Sec'y for Civ. Rts., Off. for Civ. Rts., to Colleague (Apr. 4, 2011) (on file with the United States Department of Education), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter Dear Colleague Letter] (expanding the scope of Title IX and providing expansive protections for victims of sexual violence on college campuses), *with* 34 C.F.R. § 106.1–106.82 (2022) [hereinafter Trump's Title IX Regulations] (rescinding many of the rights afforded to victims of sexual violence on campus and limiting the scope of Title IX).

17. *See* discussion *infra* Section II.A (discussing the legislative history of Title IX).

18. *See* discussion *infra* Sections II.B, II.C, II.D (discussing several Supreme Court and lower court holdings and interpretations of Title IX).

19. *See* discussion *infra* Sections II.B, II.C (discussing several Supreme Court holdings that interpreted Title IX broadly).

institutions.[20] Further, the Court expanded Title IX's scope to prohibit both teacher-on-student and peer sexual violence.[21] Despite Title IX's advancements, the Court failed to properly define the standard individuals must meet when bringing Title IX claims forward, leaving many victims of sexual violence with different results depending on what jurisdiction they file in.[22]

Further, the Department of Education Office for Civil Rights (OCR) enforces Title IX and offers guidance for complying with the statute to educational institutions.[23] OCR functions within the framework of the judicial branch, so a war between protecting victims versus upholding the independence of educational institutions has developed with different presidents enacting guidance to advance their side of the argument.[24] This Note argues that judicial and executive interpretation of Title IX is inconsistent, and, as a result, educational institutions are not sufficiently held liable for their Title IX obligations in accordance with Congressional intent. This Note advances the argument by focusing on a circuit split that affects what a plaintiff must prove to hold an educational institution liable for violating its Title IX obligations.

The Note begins by providing background on the legislature's enactment of Title IX and the judicial and executive branches' interpretation of that Act in Part II. In Part III, the Note analyzes the Supreme Court's interpretation of Title IX in *Davis v. Monroe County Board of Education* and the circuit split that resulted from this decision.

20. Cannon v. Univ. of Chi., 441 U.S. 677, 710–11 (1979). Title IX did not explicitly provide for an individual private right of action, yet its broad language and purpose of prohibiting sex discrimination makes it reasonable to find this judicially implied private right of action. *Id.*; *see also* Daw, *supra* note 9, at 443–44.

21. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284–84 (1998); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 642 (1999); *see also* discussion *infra* Sections II.B, II.C (discussing the reasoning the Supreme Court applied in its decisions that teacher-on-student and peer-on-peer sexual violence fall within the scope of Title IX).

22. *See* discussion *infra* Sections II.D, II.E (analyzing the circuit split that resulted from the Court's uncertain language in *Davis* and providing examples of the differing outcomes victims may receive from courts in different circuits).

23. 20 U.S.C. § 1681.

24. *See* discussion *infra* Section II.E; *see also* R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFAIRS (2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix (discussing the major differences between the Obama and Trump administrations' Title IX guidance).

The Note also examines the executive branch's conflicting attempts in recent years to offer educational institutions guidance on Title IX compliance in this section.[25] In Part IV, this Note argues a unique solution to the circuit split, namely that the Supreme Court should revisit *Davis* via current, similar cases and define the actual knowledge standard broadly using the 2011 Dear Colleague letter issued by the Obama administration as its standard. Considering the Court is bound to honor Congress' intent when interpreting statutes,[26] this solution best advances Congress' intent for enacting Title IX because Congress interpreted Title IX broadly, intending the statute to aid in ending gender discrimination in all its forms.[27] Honoring Congress' intentions is the best way to provide victims of sexual violence with justice and to prevent sexual violence from occurring in the first place, marking a major advancement in the fight toward gender equality.

II. HISTORY AND DEVELOPMENT OF TITLE IX

Title IX prohibits discrimination on the basis of sex in education programs and activities that receive federal financial assistance.[28] Congress passed this broad legislation in response to America's history of discrimination against women in educational institutions and professional settings, hoping to end gender discrimination by providing equal educational opportunities to all regardless of gender.[29] The law's

25. *See* discussion *infra* Section II.E (discussing the Trump and Obama administrations' differing Title IX guidance).

26. *See* Lauren E. Groth et al., *Giving* Davis *Its Due: Why the Tenth Circuit Has the Winning Approach in Title IX's Deliberate Indifference Controversy*, 98 DENV. L. REV. 307, 331 (2021); *see also Gebser*, 524 U.S. at 284–85 (discussing how the courts should avoid frustrating the intent of Congress when interpreting ambiguous statutes).

27. *See* discussion *infra* Section II.A (discussing the legislative history behind Title IX).

28. 20 U.S.C. § 1681.

29. *See* U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 1, 2 (June 23, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf [hereinafter FORTY YEARS OF TITLE IX] (discussing the struggles women faced to access educational settings and the major impact Title IX had on increasing opportunities for women); *see also* discussion *infra* Section II.A (noting that many legislators intended for Title IX to bring an end to gender discrimination).

impact on women has been extraordinary with women now making up more than 56% of America's college students.[30] That said, women still face many obstacles to equal access to education. Sexual violence is one of the biggest threats to equal educational access, considering one in five women and one in sixteen men are sexually assaulted while in college.[31] Victims often struggle to complete their education after experiencing sexual violence.[32] Many students experience some combination of PTSD, depression, anxiety, or alcohol and substance abuse, which harms victims' ability to focus, commit time to school, and engage with peers thereby barring them from the equal access to education that is promised under Title IX.[33]

Because Congress intentionally drafted Title IX as a broad statute, the judicial and executive branches have interpreted this law since its passing.[34] To comply with Congress' intentions behind enacting Title IX, the judicial branch broadly construed Title IX throughout

30. Jon Marcus, *The Degrees of Separation Between the Genders in College Keep Growing*, WASH. POST (Oct. 27, 2019, 3:00 PM), https://www.washingtonpost.com/local/education/the-degrees-of-separation-between-the-genders-in-college-keeps-growing/2019/10/25/8b2e5094-f2ab-11e9-89eb-ec56cd414732_story.html. Prior to Title IX's passing, only 8% of women had a college degree. FORTY YEARS OF TITLE IX, *supra* note 29. Title IX also increased women's access to school-affiliated athletics. Women now make up 42% of all high school athletes in America. *Title IX*, AAUW, https://www.aauw.org/issues/education/title-ix (last visited Mar. 30, 2023).

31. *Statistics About Sexual Assault*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf (last visited Sept. 8, 2022).

32. *See* Rachel Dunham, Comment, *Title IX Beyond School Lines: The Proposed Regulations That Will Limit Colleges and Universities' Jurisdictional Scope of Responsibility*, 25 ROGER WILLIAMS U. L. REV. 265, 283–84 (2020).

33. *See id*. "A[] study found that students who experienced sexual victimization were more likely to drop out than students who did not, noting that 'the dropout rate for students who had been sexually victimized (34.1%) was higher than the overall university dropout rates (29.8%).' Clearly, the psychological impact of sexual assault increases the likelihood that a student will withdraw or decline academically." *Id.* (citing to Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. COLL. STUDENT RETENTION: RSCH., THEORY & PRAC. 234, 244 (2016)).

34. *See* discussion *infra* Sections II.B, II.C, II.D, II.E (discussing several cases in which the Supreme Court interpreted Title IX and analyzing the executive branch's interpretation of Title IX in recent years).

history.[35] While the judicial branch has consistently broadened the causes of action available to plaintiffs under Title IX, it has failed to properly define what an individual plaintiff must prove to hold an educational institution liable for a Title IX violation.[36] Further, the executive branch's guidance aimed at helping educational institutions comply with Title IX has drastically changed in recent years, moving from advanced, broad protections for victims of sexual violence toward an outdated system with limited protections for victims.[37]

A. Legislative History of Title IX

President Nixon signed Title IX, also known as the Prohibition of Sex Discrimination, into law as part of the Education Amendments Act of 1972.[38] Title IX states "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."[39] Thus, this legislation broadly affects every K-12 school, college, and university that receives federal funds for their programs or activities.[40] Title IX requires the U.S. Department of Education's Office for Civil Rights to enforce its provisions, so OCR releases guidance for institutions to follow in compliance with Title IX.[41]

Congress had express intentions for enacting Title IX: (1) to ensure that federal funds were not being used to support discriminatory activities in educational programs and (2) to protect individuals from

35. *See* discussion *infra* Sections II.B, II.C (discussing several cases in which the Supreme Court expanded the scope of Title IX).

36. *See* Groth, *supra* note 26, at 309–10 (discussing the circuit split resulting from the ambiguous language used by the Supreme Court in *Davis*).

37. *See* discussion *infra* Section II.E (noting the executive branch's recent move toward a narrow interpretation of Title IX under the Trump administration); *see supra* note 16 and accompanying text.

38. *Title IX Legal Manual*, *supra* note 11.

39. 20 U.S.C. § 1681. Title IX offered the same protections as and was, therefore, intentionally modeled after Title VII, which prohibits sexual harassment discrimination in the workplace. *Id.*

40. *See* Groth, *supra* note 26, at 311.

41. *See e.g.*, U.S. DEP'T EDUC., TITLE IX AND SEX DISCRIMINATION (Aug. 20, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

those discriminatory activities.[42] Many senators and representatives vocalized these goals upon Title IX's passing.[43] Most notably, Representative Patsy Mink, co-author and sponsor of Title IX, helped develop the law in response to adversity she experienced throughout her own education.[44] Representative Mink famously stated,

> Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access . . . *If we really believe in equality, we must begin to insist that our institutions . . . practice it* or not come to the Federal Government for financial support.[45]

Congress passed Title IX with these goals in mind, evidencing that Congress broadly intended for Title IX to aid in ending gender

42. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (citing to several senators' and representatives' comments about the purpose and goals of Title IX).

43. Representative Wolff stated "As a supporter of equal rights for women, I was pleased to note the inclusion, in this bill of title IX which would prohibit sex discrimination in any education program receiving Federal financial support. It also has important provisions on equal employment and pay opportunities." 110 CONG. REC. 39350 (daily ed. Nov. 4, 1971) (statement of Rep. Wolff). Senator Bayh stated "[B]ecause education provides access to jobs and financial security, discrimination here is doubly destructive for women . . . [A] strong and comprehensive measure is needed to provide women with solid legal protection from the persistent . . . discrimination which is serving to perpetuate second-class citizenship for American women." 110 CONG. REC. 5804 (1972).

44. Prior to public service, dozens of medical schools denied Representative Mink admission. Kate Stringer, *No One Would Hire Her. So She Wrote Title IX and Changed History for Millions of Women. Meet Education Trailblazer Patsy Mink.*, THE 74, https://www.the74million.org/article/no-one-would-hire-her-so-she-wrote-title-ix-and-changed-history-for-millions-of-women-meet-education-trailblazer-patsy-mink (last visited Mar. 30, 2023). After obtaining her law degree, she was denied employment at many law firms because she was a mother, so Mink changed the law for women as a politician instead. *Id.*; *see also* Kerri Lee Alexander, *Patsy Mink*, NAT'L WOMEN'S HISTORY MUSEUM, https://www.womenshistory.org/education-resources/biographies/patsy-mink (last visited Mar. 30, 2023).

45. 110 CONG. REC. 39252 (daily ed. Nov. 4, 1971) (statement of Rep. Wolff) (emphasis added).

discrimination.[46] The Act aims to provide equal access to educational programs and activities regardless of sex, which helps combat the even broader issue of gender inequality in society by giving every gender the same educational, and thus professional, opportunities.[47]

To comply with Title IX's goals, educational institutions are required to follow several procedures, such as notifying the public that they do not discriminate on the basis of sex, designating at least one Title IX coordinator, and adopting grievance procedures to resolve Title IX violations.[48] Title IX does not provide a specific grievance procedure, so educational institutions have the responsibility of establishing these grievance procedures themselves, which gives power to the institutions to adjudicate violations within their own framework.[49] That said, OCR does issue guidance for effective Title IX grievance procedures that educational institutions often abide by.[50]

Presently, OCR recommends that institutions implement the Title IX grievance process outlined in the Trump administration's 2020 Title IX guidelines.[51] This grievance process generally provides that all Title IX violation hearings be held in person when higher education institutions are involved and that schools may designate their own "reasonably prompt time frames" for grievance procedures.[52] The guidance also outlines due process standards and defines the standards that a

46. *See* Groth, *supra* note 26, at 311–12.

47. *See id.* (discussing Congress' legislative intent for enacting Title IX and highlighting Congress members' statements about the impact of Title IX on providing women with greater access to educational and professional opportunities).

48. *Title IX Legal Manual*, *supra* note 11.

49. *See id.*

50. *See id.*

51. *Sex Discrimination: Frequently Asked Questions*, OCR, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html (last visited Mar. 30, 2023). It is important to note that President Biden proposed changes to Title IX guidance on June 23, 2023. Suzanne Eckes et al., *Reactions to the Biden Administration's Proposed Title IX Changes from Education Law Scholars*, BROOKINGS (June 30, 2022), https://www.brookings.edu/blog/brown-center-chalkboard/2022/06/30/reactions-to-the-biden-administrations-proposed-title-ix-changes-from-education-law-scholars. OCR will collect and review comments from the public for several months before new guidance is officially issued. *Id.* The Biden administration's guidance intends to reverse many of the Trump administration's harsh guidance, and implement broader protections for victims of sexual violence. *Id.*

52. Trump's Title IX Regulations, *supra* note 16, at 30053.

victim-plaintiff must meet in order to hold a school liable for a Title IX violation.[53] Generally, grievance procedures on college campuses take anywhere from many months to years to process, while victims often do not receive much information from their school's Title IX office regarding updates to the investigation or the procedural process.[54] Few perpetrators are expelled for sexual violence, even when the Title IX office finds them guilty of violating the school's sexual misconduct policies.[55] Thus, because internal grievance procedures often provide insufficient remedies for Title IX violations, many Title IX issues end up being processed by the OCR or adjudicated by the courts.[56]

B. Judicial Interpretation of Title IX

Evidently, Title IX has a broad scope, leaving much of its language to be interpreted by the courts. Much of the judicial branch's interpretation of Title IX began in 1979, in *Cannon v. University of Chicago*, where the Supreme Court recognized an individual's implied right to private action in enforcing Title IX.[57] Because of the *Cannon*

53. *Id.* at 30029–30.

54. *See* Fran, *Guest Editorial: Vanderbilt Chose Not to Expel My Rapist*, *Guest Editorial*, VAND. HUSTLER (Jan. 17, 2022), https://vanderbilthustler.com/45350/featured/guest-editorial-vanderbilt-chose-not-to-expel-my-rapist; Alexis Timko, *Privacy, Secrecy and Scandal: Inside USC's Handling of Title IX Cases*, USC ANNENBERG MEDIA (Jan. 25, 2022), https://www.uscannenbergmedia.com/2022/01/25/privacy-secrecy-and-scandal-inside-uscs-eeo-tix-office.

55. *See* Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence—with U-Va.A Prime Example*, WASH. POST (Dec. 15, 2014), https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence—with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html. Studies conducted by the Justice Department's Office on Violence Against Women of about 100 universities revealed that out of 478 sanctions given for sexual assault, only 12% of those were expulsions and only 28% were suspensions. *Id. See also* sources cited *supra* note 54 (discussing detailed accounts of how sexual violence allegations were handled at two universities).

56. *See* discussion *infra* Sections II.B, II.C (discussing several cases in which the Supreme Court expanded the scope of Title IX); *Taking Legal Action Under Title IX*, KNOW YOUR IX, https://www.knowyourix.org/legal-action/taking-legal-action-title-ix (last visited Sept. 9, 2022).

57. Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979); *see* Groth, *supra* note 26, at 312 (discussing the Supreme Court's reasoning for extending the scope of Title IX to include an individual's implied private right of action); *see also* Daw, *supra* note

Court's ruling, individuals can obtain damages by bringing claims against educational institutions in violation of Title IX, expanding the scope of Title IX and allowing individuals to use this law to protect their rights.[58] Later, in *Gebser v. Lago Vista Independent School District*, the Court again expanded the scope of Title IX when it allowed a school to be held liable for teacher-on-student sexual violence.[59] The *Gebser* Court established that the school must have actual knowledge of the teacher's misconduct and act deliberately indifferent by refusing to remedy the misconduct to be liable under Title IX.[60]

1. Title IX Right to Private Action: *Cannon v. University of Chicago*

In *Cannon*, the petitioner argued that she was denied from the university's medical school, which was a recipient of federal funds, because she was a woman.[61] She sought to hold the university liable for violating Title IX by excluding her from the medical school based on her sex.[62] The Supreme Court recognized that Title IX did not explicitly authorize a private action by an individual arguing a Title IX related injury.[63] However, the Court held that there is an implied right of private action in Title IX, reasoning that Congress did not expressly deny this right, that the Act is intended to protect a class of people discriminated against on the basis of sex, and that a private right of action is beneficial to enforcement of the statute.[64] Thus, the Court concluded

9, at 443–44 (discussing how Title IX did not explicitly provide for an individual's private right of action, yet the Court found it reasonable to establish this judicially implied private right of action).

58. *Cannon*, 441 U.S. at 717; *see also* Groth, *supra* note 26, at 312 (discussing how individuals' rights are affected by Title IX violations, so individuals should be allowed to bring a private action against an educational institution for a Title IX violation).

59. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281 (1998) (citing Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992)).

60. *Gebser*, 524 U.S. at 277.

61. *Cannon*, 441 U.S. at 680.

62. *Id.*

63. *Id.* at 683.

64. *Id.* at 694, 705–06, 709.

that Congress intended to make a remedy available to individuals protected by the statute through a private action.[65]

After *Cannon*, individual victims can bring claims forward when they are injured by a Title IX violation of an educational institution. This method of enforcing Title IX is different from the government's means of enforcing Title IX by stripping an educational institution of federal funds for a Title IX violation because, under *Cannon*, an individual, rather than the government, is holding the educational institution liable for violating Title IX.[66] Therefore, the potential damages from a Title IX private right of action may be far greater than the loss of the amount of federal funding the institution receives if an individual successfully proves the institution's liability.[67] Ultimately, the Court expanded the broad scope of Title IX to better protect victims.

2. Expanding Title IX's Scope to Encompass Teacher-on-Student Sexual Violence: *Gebser v. Lago Vista Independent School District*

After *Cannon*, the Court again construed Title IX broadly to encompass teacher-on-student sexual harassment as a violation of Title IX in *Gebser v. Lago Vista Independent School District*.[68] In *Gebser*, a high school teacher made sexually suggestive comments to students and engaged in a sexual relationship with a student.[69] The Court held

65. *Id.* at 688, 709; *see also* Groth, *supra* note 26, at 312 ("[W]hile Title IX targets schools as potentially discriminatory actors, the consequences of that discrimination are borne by individuals whose advocacy on their own behalf is essential.")

66. *See Title IX Legal Manual*, *supra* note 11 (discussing that Congress limited the amount of funds that may be terminated or suspended to only federal funds benefitting the particular program in which noncompliance with Title IX was found); *see Cannon*, 441 U.S. at 688–89.

67. *See* Jill Castellano, *Campus Sexual Assault Can Cost Universities Millions*, FORBES (June 18, 2015), https://www.forbes.com/sites/jillcastellano/2015/06/18/campus-sexual-assault-can-cost-universities-millions (discussing universities' risking major payouts if they mishandle a sexual assault case and using the University of Connecticut, which faced a $1.3 million payout after settling a federal sexual assault lawsuit, as an example of these huge payouts). Courts may consider several factors when calculating damages in plaintiff's private Title IX violation claims against educational institutions, including the degree of seriousness of the violation, whether the injury to the plaintiff was substantial, whether the injury is pecuniary in nature, and whether the injury involved emotional distress. *Title IX Legal Manual*, *supra* note 11.

68. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 277 (1998).

69. *Id.* at 277–78.

that Title IX prohibits teacher-on-student sexual violence.[70] However, proof of the school's actual knowledge and deliberate indifference to such misconduct are necessary for an individual to hold a school liable for violating Title IX.[71]

The Court reasoned that actual knowledge is necessary because Congress required that administrative agencies enforce Title IX by advising appropriate school officials of their Title IX violations and allowing an opportunity to correct those violations before stripping the institution of federal funds.[72] Congress expressly stated that compliance issues should be resolved "by informal means whenever possible," resorting to punishments like ceasing federal funding only when such informal means are ineffective.[73] Therefore, appropriate school officials must have actual knowledge of the violation before the institution can be held liable.[74] The Court clarified that an "appropriate person" for satisfying this standard is "an official of the recipient entity with authority to take corrective action to end the discrimination."[75] Thus, the actual knowledge standard requires a victim-plaintiff to show that an appropriate school official has actual knowledge of the sexual violence.[76]

The Court also reasoned that once an institution has actual knowledge of the violation, its response must be deliberately indifferent in order for the individual to hold the school liable for a Title IX violation.[77] Again, the Court relied on the fact that Title IX calls for administrative enforcement, requiring that a school official have a chance to correct the violation before its federal funds are suspended or terminated.[78] The Court hinted that a decision by the institution *not* to remedy the violation constituted deliberate indifference.[79]

70. *Id.* at 281 (citing Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992)).

71. *Id.* at 277.

72. *Id.* at 288–91.

73. *Id.* at 288 (quoting 34 C.F.R. § 100.7(d) (1997)).

74. *Gebser*, 524 U.S. at 288–91.

75. *Id.* at 290.

76. *Id.*

77. *Id.* at 290–91.

78. *Id.*

79. *Id.* The Court again relied on the administrative enforcement of Title IX when attempting to define the deliberate indifference standard. *Id.* The Court

Ultimately, the Court provided that to hold the school liable for violating Title IX and to award the plaintiff damages, the plaintiff must show both that the school had actual knowledge of the sexual violence and that the school had a deliberately indifferent response to the misconduct.[80]

C. Title IX's Prohibition of Peer Sexual Violence: Davis v. Monroe County Board of Education

After the Court expanded the scope of Title IX in *Cannon* and *Gebser* to provide a private right of action for enforcing Title IX and to include teacher-on-student sexual violence as a violation of Title IX, the Court again extended Title IX's scope to include student-on-student sexual violence in the landmark case *Davis v. Monroe County Board of Education*.[81] In *Davis*, a minor experienced prolonged sexual harassment by one of her classmates.[82] The minor reported multiple incidents of the harassment to her mother and her teacher.[83] When the mother contacted the school, the school advised her that the principal knew of the incidents, yet no disciplinary action took place.[84] The minor continued to experience sexual harassment by her classmate, causing her grades and mental health to decline and contributing to her experiencing suicidal ideation.[85]

The Court held that "recipients of federal funding may be liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority."[86] Using the actual knowledge and deliberate indifference standards

considered situations where a school official knows of a Title IX violation and refuses to remedy the violation enough to satisfy this standard. *Id.* The Court was concerned that a lower standard for meeting deliberate indifference might lead to errors in which the educational institution is liable for the individual actions of its employees, rather than its own "official decision[s]." *Id.* at 290.

80. *Id.* at 277.

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

82. *Id.* at 633.

83. *Id.* at 633–34.

84. *Id.* at 634.

85. *Id.*

86. *Id.* at 646–47.

established by *Gebser*, the Court clarified the requirements for establishing an educational institution's liability under Title IX for peer sexual harassment in a private right of action.[87] Educational institutions subject to Title IX are only liable when they have actual knowledge of and act deliberately indifferent to sexual harassment that is "so severe, pervasive, and objectively offensive that it . . . deprive[s] the victims of access to the educational opportunities or benefits provided by the school."[88]

Regarding actual knowledge, the Court recognized that funding recipients are on notice that they can be held liable for a third party's misconduct.[89] The Court reasoned that schools are on notice of this liability because the common law provides that schools may be responsible for failing to protect their students from third party misconduct.[90] Further, at the time, OCR guidelines required institutions to ensure third parties under their control were not discriminating on the basis of sex.[91] Therefore, the Court held that the school board could be liable under Title IX because it had actual knowledge of the third-party student's conduct and that student was under its authority.[92]

To establish deliberate indifference, the victim-plaintiff must show that the institution's deliberately indifferent response subjected the victim to harm that negatively impacted the victim's educational

87. *Id.* at 646–47.

88. *Id.* at 650; *see also* Daw, *supra* note 9, at 445–47, 449–53 (discussing the tests applied by courts in private actions against schools for Title IX violations); A.J. Bolan, Note, *Deliberate Indifference: Why Universities Must Do More to Protect Students from Sexual Assault*, 86 GEO. WASH. L. REV. 804, 814–15 (2018) (discussing the implementation of the actual knowledge and deliberate indifference standards from *Gebser* for Title IX cases against universities for peer sexual violence).

89. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644 (1999) ("The common law, too, has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties . . . In fact, state courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers.").

90. *Id.* at 644 (citing to RESTATEMENT (SECOND) OF TORTS § 320 (AM. L. INST. 1965)).

91. *Id.* at 643–44 (citing to 34 C.F.R. §§ 106.31(b)(6), 106.31(d), 106.37(a)(2), 106.38(a), 106.51(a)(3) (1998)).

92. *Id.* at 646–47.

access.[93] The *Davis* Court noted that the deliberate indifference must actually cause students to experience harassment *or* put them at risk of experiencing subsequent harassment.[94] To protect schools' independence, the Court further clarified that to satisfy the deliberate indifference standard, the institution's response must be "clearly unreasonable" under the circumstances.[95] The Court trusted that lower courts could easily identify whether institutional responses were clearly unreasonable as a matter of law.[96] Thus, a student victim of peer sexual violence must establish that the school had actual knowledge of the incident and exhibited a deliberately indifferent response amounting to depriving the victim of equal access to his or her education in order for the school to be liable for the third party's misconduct under Title IX and for the court to award monetary damages to the plaintiff.[97] While the Court clearly identified the actual knowledge and deliberate indifference standards, it failed to adequately define these standards, leaving the lower courts to interpret its language.

D. Post-Davis *Circuit Split*

Since *Davis*, the lower courts have struggled to interpret the Supreme Court's language, causing a circuit split and leading to conflicting outcomes for victims.[98] The issue among the lower courts arises primarily from the Court's definition of the deliberate indifference

93. *Id.* at 642–43 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291 (1998)).

94. *Id.* at 644–45 (citing *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966); *Subject*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2275 (1961) for definitions of "subject").

95. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999). Title IX does not require a reasonable response to fully "remedy" student-on-student sexual violence; rather, the school need only respond to known sexual violence "in a manner that is not clearly unreasonable." *Id.* at 648–49.

96. *Id.* at 649. The Court did not provide any further clarification of what a clearly unreasonable response to a Title IX violation might be, stating that "[T]here is no reason why courts . . . could not identify a response as not 'clearly unreasonable' as a matter of law." *Id.*

97. *See id.* at 650.

98. *See* Groth, *supra* note 26, at 309–10 (discussing the circuit split resulting from the ambiguous language used by the Supreme Court in *Davis*).

standard.[99] In *Davis*, the Court stated that the educational institution's deliberately indifferent response must actually cause students to experience harassment *or* put them at risk of experiencing subsequent harassment.[100] Evidently, the Court's use of the word "or" led to much confusion about what standard a victim-plaintiff must meet to hold an educational institution liable for violating Title IX in a private right of action.[101] While some circuits adopted one interpretation of the Court's deliberate indifference standard over another, other circuit courts avoided the murky deliberate indifference definition, choosing to apply a broad actual knowledge standard instead and providing victims with broader protection under Title IX.

1. Deliberate Indifference: Concrete Evidence of Subsequent Harassment is Necessary

Some circuits interpret *Davis* as requiring that a plaintiff actually experience subsequent harassment in order to satisfy the deliberate indifference standard and successfully bring a Title IX claim against an institution.[102] The Sixth Circuit is the only circuit that has expressly adopted and described this view in *Kollaritsch v. Michigan State University Board of Trustees*.[103] In *Kollaritsch*, four female students reported sexual assaults by male students to campus police and administration.[104] The women alleged that the university's response was inadequate and denied them equal access to educational opportunities in violation of Title IX.[105] The court held that a Title IX plaintiff must prove (1) the occurrence of the sexual violence, (2) the school's actual knowledge of the misconduct, and (3) "some further incident of

99. *Id.* at 310.

100. *Davis*, 526 U.S. at 644–45.

101. Groth, *supra* note 26, at 310.

102. Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 621–22 (6th Cir. 2019); *see also* Groth, *supra* note 26, at 323–27 (discussing the Sixth Circuit's reasoning for adopting this interpretation of the language in *Davis*).

103. *Kollaritsch*, 944 F.3d at 621–22.

104. *Id.* at 618.

105. *Id.*

actionable sexual harassment" as a result of the school's deliberately indifferent response to a student's sexual assault of another student.[106]

The court reasoned that the *Davis* standard involves two torts: (1) "actionable harassment" by a student and (2) deliberate indifference by the school.[107] Thus, the school must have actual knowledge of sexual violence, and its deliberately indifferent response must result in further sexual harassment or violence to the victim.[108] Because the court likened the *Davis* standard to tort law, it clarified that the injury, namely deprivation of equal access to educational opportunities, must be a result of subsequent harassment, which would not have occurred but for the unreasonable school response to actual knowledge of the sexual violence.[109] This interpretation of *Davis* provides a higher, complicated standard for victim-plaintiffs to meet, requiring that they experience further violence before being able to successfully hold a university liable for violating Title IX for peer sexual violence.[110]

2. Deliberate Indifference: Vulnerability Is Enough

Other circuits adopt the language used in *Davis* in its entirety, allowing evidence of either actual subsequent harassment or the mere risk of subsequent harassment to show that the educational institution was deliberately indifferent.[111] Thus, a plaintiff's mere vulnerability to harassment as a result of the institution's deliberately indifferent response is enough to satisfy this standard.[112] The Tenth Circuit is the

106. *Id.* at 623–24. The school's response must be clearly unreasonable, "demonstrating the school's deliberate indifference to the foreseeable possibility of *further* actionable harassment of the victim." *Id.* at 621. The court clarified that the incident of further actionable sexual harassment must be inflicted against the same victim, but it does not make clear whether the same perpetrator must commit the further actionable sexual harassment. *Id.* at 621–22.

107. *Id.* at 619–20.

108. *Id.*

109. *Id.* at 622; *see also* Groth, *supra* note 26, at 324–25 (detailing how this interpretation of *Davis* maps onto common-law tort concepts).

110. Groth, *supra* note 26, at 324–25 (describing the narrow interpretation of the *Davis* Court's holding by the Sixth Circuit).

111. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019); *see also* Groth, *supra* note 26, at 321–22 (discussing the Tenth Circuit's reasoning behind the adoption of this interpretation from the language of *Davis*).

112. *Id.*; *see supra* note 97 and accompanying text.

only circuit that has explicitly adopted this view in *Farmer v. Kansas State University*, but the First Circuit appears to also adopt this interpretation.[113]

In *Farmer*, two plaintiffs were raped by fraternity members, yet the university failed to notify the victims of all methods for filing complaints regarding the sexual assaults and continuously refused to investigate the assaults that occurred at off-campus fraternity houses.[114] The court held that plaintiffs in Title IX cases against universities must show that the university's deliberate indifference caused them to be vulnerable to subsequent sexual violence or harassment at a minimum.[115] The court reasoned that requiring that victims actually experience further sexual violence "ignores *Davis'* clear alternative language recognizing that a funding recipient's 'deliberate indifference must, at a minimum, "cause students to undergo" harassment *or* make them "liable or vulnerable to" [it]'" and that the court must honor *both* parts of that language.[116] It also reasoned that this interpretation of *Davis* aligns best with Title IX's objectives, namely protecting students from discriminatory activities like sexual violence that negatively impact their access to education.[117] Ultimately, this view provides a reasonable, clear standard for Title IX plaintiffs to meet when bringing claims against educational institutions. Implementing a broad actual knowledge standard demonstrates the ability of Title IX to protect individuals' educational access by holding educational institutions accountable for knowledge of sexual misconduct and the cultures that foster sexual violence on campus. Alternatively, the narrow interpretation of actual knowledge discussed previously that requires a victim to suffer additional harassment as a result of the university's failure to

113. *See supra* note 97 and accompanying text. However, the First Circuit appeared to also adopt this view in *Fitzgerald v. Barnstable School Committee* when it stated, "[T]o 'subject' a student to harassment, the institution's deliberate indifference must, at a minimum, have caused the student to undergo harassment, made her more vulnerable to it, or made her more likely to experience it." Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 171 (1st Cir. 2007).

114. *Farmer*, 918 F.3d at 1099–102.

115. *Id.* at 1109.

116. *Id.* at 1104 (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999)).

117. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

adequately respond to peer sexual violence effectively denies student victims the right to educational access promised by Title IX.[118]

3. Experimenting with a Broad Actual Knowledge Standard as an Alternative

The Tenth and Eleventh Circuit Courts decided to try a different approach to solve the Court's ambiguous language in *Davis*. Instead of choosing one side of the circuit split as described or trying to interpret the Court's deliberate indifference standard from *Davis* in another way, these circuit courts chose to simply apply a broad actual knowledge standard to individual Title IX causes of action.[119] These courts abandoned a strict interpretation of the actual knowledge standard, allowing the victim-plaintiff to merely show that the sexual violence "stem[ed] from a known institutional policy" to meet the standard.[120]

In *Simpson v. University of Colorado Boulder*, football players and recruits visiting the university sexually assaulted two female plaintiffs.[121] The football program's policy was to show the recruits "a good time" while they were visiting campus; some of the players even promised the recruits sex.[122] The court held that the college could be liable for the sexual assaults under Title IX.[123] The court considered the football coach's "general knowledge" of the risk of sexual violence during football recruitment and his knowledge that incidents of sexual violence had occurred in the past during recruitment enough to satisfy the actual knowledge standard in the plaintiffs' case.[124] Rather than requiring that the school official have concrete knowledge of a particular

118. *See* discussion *supra* Section D.1.

119. Daw, *supra* note 9, at 451 (first citing Williams v. Bd. of Regents of the Univ. Sys. of Ga. 477 F.3d 1282 (11th Cir. 2007); and then citing Simpson v. Univ. of Colo., 500 F.3d 1170 (10th Cir. 2007)).

120. *Id.*

121. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1173 (10th Cir. 2007).

122. *Id.*

123. *Id.* at 1173, 1184–85.

124. *Id.* at 1184–85.

incident, the court considered the coach's mere "general knowledge" enough to invoke the institution to take action.[125]

Similarly, in *Williams v. Board of Regents*, multiple student-athletes raped a female student at the University of Georgia in a dormitory.[126] The court held there was enough evidence for the educational institution to be liable for the sexual assault under Title IX.[127] The court considered the school's knowledge of one of the perpetrator's past behavioral issues at other schools and the President's and Athletic Director's knowledge of the incident enough to satisfy the actual knowledge requirement even though the President and Athletic Director were not Title IX coordinators.[128] Evidently, the adoption of a broad, flexible actual knowledge standard is a workable method for resolving the ambiguity behind the deliberate indifference standard outlined in *Davis*, a method that encourages more university action in investigating and combatting sexual violence in their programs and activities.

E. Executive Interpretation of Title IX and Its Impact on Society

The post-*Davis* circuit split has been exacerbated by unclear guidance from the OCR regarding how educational institutions best comply with Title IX and recent trend of the executive branch drastically overhauling OCR's guidance on Title IX for educational institutions.[129] In 2011, under the Obama administration, OCR released a Dear Colleague letter, which greatly expanded victims' rights and

125. *See id.* (discussing the evidence the court used to determine that the coach's general knowledge of a hostile environment resulted in a high likelihood of Title IX violations within the program).

126. Williams v. Bd. of Regents of the Univ. Sys. of Ga, 477 F.3d 1282, 1288 (11th Cir. 2007).

127. *Id.* at 1288–91.

128. *Id.* at 1292–95.

129. *See* Daw, *supra* note 9, at 471–75 (discussing the major differences between the Obama administration's OCR guidelines and the Trump administration's recently enacted OCR guidelines for enforcing Title IX in universities); *see also* Michelle J. Harnik, Note, *University Title IX Compliance: A Work in Progress in the Wake of Reform*, 19 NEV. L.J. 647, 687 (2018) ("The OCR's failure to provide clear guidelines . . . has left colleges having to decide for themselves how to handle such complaints and risk improperly carrying out their Title IX obligations.").

protections under Title IX.[130] These guidelines interpreted the actual knowledge requirement broadly.[131] The guidelines stated, "[S]chools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials" and that "any employees likely to witness or receive reports of sexual harassment and violence" should receive that training.[132] Under these guidelines, student victims could report to practically anyone employed by the university and still satisfy the actual knowledge requirement.[133] Further, these guidelines considered constructive knowledge of sexual violence on campus enough to satisfy the actual knowledge requirement.[134] The 2011 Dear Colleague letter stated, "If 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 . . . ."[135]

In 2017, the Trump administration repealed the Obama administration's 2011 OCR guidance.[136] In its place, the Trump administration issued its final Title IX regulations in 2020, limiting the broad

130. *See* Daw, *supra* note 9, at 466–71; *see also* C.C. v. Paradise High Sch., No. 2:16-cv-02210-KJM-DMC, 2019 U.S. Dist. LEXIS 200827, at *11 (Ca. Dist. Ct. 2019) ("A Dear Colleague letter is a guidance document issued by a government agency providing insight into that agency's interpretation or application of a particular statute, regulation, or rule.").

131. *See* Dear Colleague Letter, *supra* note 16.

132. *Id.* (listing teachers, school law enforcement, administrators, counselors, general counsels, health personnel, and resident advisors as some of the university employees who should receive training so that they know how to proceed when a student reports a sexual violence incident to them).

133. *Id.* (discussing the range of university employees who can take on the role of reporting harassment to the appropriate school officials to satisfy the actual knowledge standard).

134. *Id.* Universities know that sexual violence is a form of sex discrimination and is, therefore, prohibited by Title IX. Thus, funding recipients should prohibit sexual violence in their programs and activities to fully comply with Title IX. *See* Dear Colleague Letter, *supra* note 16; *see also* Monica D. Hutchinson, Note, *What You Know About and Don't Deal with Can Cost You: A School District's Potential Liability for Student-on-Student Sexual Harassment*, Davis v. Monroe County Board of Education, 65 MO. L. REV. 493, 511 (2000).

135. Dear Colleague Letter, *supra* note 16.

136. Suzannah Dowling, *(Un)due Process: Adversarial Cross-Examination in Title IX Adjudications*, 73 ME. L. REV. 123, 138 (2021).

scope of Title IX.[137] These new regulations require that victims of sexual violence explicitly tell the Title IX coordinator or "any official of the recipient who has authority to institute corrective measures on behalf of the [school]" to satisfy the actual knowledge requirement.[138] These regulations apply a narrow interpretation of the actual knowledge standard because they drastically limit who in an educational institution must have knowledge of the sexual violence, limiting who a victim may report to in order to meet this standard.[139] Further, these regulations do not consider constructive notice of sexual harassment enough to satisfy the actual knowledge standard.[140] Rather, the new regulations require that schools receiving federal funds only investigate instances of sexual violence when a complainant files or a Title IX coordinator signs a formal complaint.[141]

The Trump administration justified its narrow interpretation of actual knowledge by reasoning that the view better respects the autonomy of higher education institutions, giving the institutions, rather than OCR, the power to decide which of its employees satisfy the

137. *See* Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations (discussing the release of the Trump administration's new Title IX regulations and highlighting the differences between these regulations and Obama-era Title IX guidance); *What to Know About the Title IX Rule*, KNOW YOUR IX, https://www.knowyourix.org/hands-off-ix/basics (last visited Sept. 9, 2022) (discussing the significant changes the Trump administration's Title IX regulations implemented and their detrimental impact on victims of sexual violence).

138. Trump's Title IX Regulations, *supra* note 16; *see also* Dowling, *supra* note 136, at 140–41 (discussing the Trump administration's guidelines regarding who a victim must report to in order to satisfy the actual knowledge requirement).

139. *Compare* Dear Colleague Letter, *supra* note 16 (listing teachers, school law enforcement, administrators, counselors, general counsels, health personnel, and resident advisors as some of the university employees whose knowledge of sexual violence may satisfy the actual knowledge standard), *with* Trump's Title IX Regulations, *supra* note 16, at 30040 (describing the Title IX coordinator or "any official who has the authority to institute corrective measures on behalf of the [school]" as the only individuals whose knowledge of sexual violence may satisfy the actual knowledge standard).

140. Trump's Title IX Regulations, *supra* note 16 ("Imputation of knowledge based solely on vicarious liability or constructive notice is *insufficient* to constitute actual knowledge.") (emphasis added).

141. Trump's Title IX Regulations, *supra* note 16, at 30041.

standard.[142] The Trump administration also reasoned that constructive knowledge is an unfair imposition on autonomous universities because such a standard creates a negative incentive for administrators to inquire about sexual violence, disturbing the privacy of students and employees involved.[143] These drastic overhauls of OCR guidelines and the circuit split over the language used in *Davis* continue to exist even in light of recent trends in society that broadened sexual violence awareness and pushed for greater protections for victims.

On June 23, 2022, the Department of Education released the Biden administration's proposed changes to Title IX guidelines.[144] The Department of Education will collect and review public comments on these proposed changes for several months before publishing its final guidelines.[145] The proposed guidance aims to reverse many of the Trump administration's harsh interpretations of Title IX implementation and promises to "advance Title IX's goal of ensuring that no person experiences sex discrimination, sex-based harassment, or sexual violence in education."[146] The Biden administration's guidelines reflect the broad protections offered to student victims under the Obama administration's guidelines and demonstrate again the dramatic changes to Title IX guidance that occur with new presidencies.[147]

III. ANALYSIS

Despite uncertainty among lower courts as to the meaning of the Supreme Court's language in *Davis*, the resulting dramatic changes

142. *Id.*

143. *Id.*

144. Eckes, *supra* note 51.

145. *Id.*

146. *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, U.S. DEP'T EDUC. (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

147. *Id.; see also* Harnik, *supra* note 129, at 683 ("[I[f there is no uniformity or consistency in how the [OCR] handles things then how are thousands of higher education institutions expected to have any type of uniformity or consistency when they try to follow the guideline set out by [OCR]?") (quoting Keri Smith, Note, *Title IX and Sexual Violence on College Campuses: The Need for Uniform On-Campus Reporting, Investigation, and Disciplinary Procedures*, 35 ST. LOUIS UNIV. PUB. L. REV. 157, 169 (2015)).

from the executive branch in the interpretation, implementation, and scope of Title IX, and the recent social movements highlighting the pervasiveness of sexual violence, the Supreme Court has yet to clarify its language from *Davis*. Lower courts have interpreted the *Davis* language variably, resulting in different standards and often unsatisfactory protections for victims of sexual violence.[148] Further, the Supreme Court's failure to better define the standards of proof for Title IX plaintiffs allowed the Trump administration's Title IX guidelines to go into effect, stripping victims of many protections and making it exceedingly difficult to successfully bring a Title IX claim forward in higher education settings.[149] Thus, this new guidance goes directly against Congress' intentions for enacting Title IX because it promotes the continuation of educational environments that discriminate on the basis of sex by allowing sexual violence to perpetuate on college campuses.[150]

A. Davis *Court's Failures*

Although *Davis v. Monroe County Board of Education* was a landmark case in that it brought student-on-student sexual violence within the scope of Title IX, the *Davis* decision still has some shortcomings. The Court failed to clearly define the actual knowledge and deliberate indifference standards that Title IX plaintiffs must prove to hold a higher education institution liable for Title IX violations

148. *See* discussion *supra* Section II.D (discussing several cases in which lower courts applied the *Davis* Court's holding in private Title IX actions).

149. *See* discussion *supra* Section II.E (discussing the Trump administration's Title IX regulations and how it affects student victims of sexual violence).

150. *See* Dowling, *supra* note 136, at 125 (discussing the shortcomings of adversarial cross-examinations, one of the Trump administration's additions to Title IX grievance procedures, and how this procedure perpetuates rape myths and undermines victim credibility) ("[A]dversarial cross-examination actually solidifies the harms of campus sexual assault, while achieving only minimal truthseeking value and therefore failing to ensure due process either for accusing or accused students."); s*ee also* Dunham, *supra* note 32, at 301–05 (discussing how the Trump administration's Title IX guidance could exacerbate underreporting by limiting victims to only filing formal complaints with the Title IX Coordinator and permitting universities to not respond to instances of sexual violence occurring off campus, putting even more students in danger of future victimization).

involving peer sexual violence.[151] Regarding actual knowledge, the Court did not identify who within the education system must have knowledge of the sexual violence to satisfy this standard.[152] While the *Gebser* Court identified an "appropriate person" for satisfying the actual knowledge standard as "an official of the recipient entity with the authority to take corrective action to end the discrimination,"[153] the *Davis* Court included no similar details in its opinion.[154] Identifying who in the education hierarchy will satisfy the actual knowledge standard is even more important in the higher education context, where students have more autonomy and personal working relationships with professors and administrators.[155] Victims of sexual violence on college campuses may feel most comfortable reporting to any variety of university employees.[156]

The *Davis* Court also failed to adequately define the deliberate indifference standard. Regarding this standard, the Court stated that the educational institution's deliberately indifferent response must actually cause students to experience harassment *or* put them at risk of

151. *See* Joan E. Schaffner, Davis v. Monroe County Board of Education*: The Unresolved Questions*, 21 WOMEN'S RTS. L. REP. 79, 90–93 (2000) (discussing the poorly defined actual knowledge and deliberate indifference standards and how the lower courts have struggled to interpret and apply these standards).

152. *See* Hutchinson, *supra* note 134, at 510–11.

153. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

154. Davis v. Monroe Cnty. Bd. of Educ., 536 U.S. 629, 644–45 (1999).

155. *See* Dear Colleague Letter, *supra* note 16, at 4 (listing teachers, school law enforcement, administrators, counselors, general counsels, health personnel, and resident advisors as some of the university employees who are likely to witness or hear reports of sexual violence).

156. *See* Tara N. Richards et al., *An Exploratory Examination of Student to Professor Disclosures of Crime Victimization*, 19(11) VIOLENCE AGAINST WOMEN, 1408, 1410–14 (Nov. 19, 2013), https://journals.sagepub.com/doi/pdf/10.1177/1077801213514861. For example, consider a freshman attending a university with thousands of students and employees who was recently sexually assaulted. This student may feel overwhelmed in this environment and not know who to report to, making it more likely that they will confide in someone they are most comfortable with, like a professor they work closely with, a coach, or a resident assistant. A study by Violence Against Women reported that 42% of the 261 participating professors experienced a student disclosing crime victimization to them. More than half of these claims related to sexual violence victimization. *Id.*; *see also* Dear Colleague Letter, *supra* note 16; *supra* note 150 and accompanying text.

experiencing subsequent harassment.[157] The Court added to this definition slightly, noting that funding recipients act with deliberate indifference only when the recipient's response to knowledge of the sexual violence is "clearly unreasonable."[158] Evidently, the Court's use of the word "or" is ambiguous, considering the circuit split developed over its meaning.[159] While some circuits interpret the deliberate indifference definition advanced by the Court in its entirety, allowing evidence of either actual subsequent harassment or the mere risk of subsequent harassment enough to satisfy the deliberate indifference standard, others only consider the former part of the definition, or evidence of actual subsequent sexual harassment, enough to satisfy the standard.[160] This failure allowed major changes in OCR guidelines to continue because the executive branch is interpreting the ambiguous language of the Court according to its own views.[161]

B. Current Title IX Guidance Falls Short

Historical precedent shows that Congress drafted Title IX broadly, and the courts interpreted it accordingly.[162] However, the recently enacted Title IX regulations by the Trump administration work against this precedent.[163] The current Title IX regulations require that victims of sexual violence explicitly tell "the Title IX coordinator or an official with the authority to institute corrective measures on behalf of the [school]" to satisfy the actual knowledge requirement.[164] Further,

157. *Davis*, 536 U.S. at 644–45.

158. *Id.* at 648–49.

159. *See* discussion *supra* Section II.C (analyzing the circuit split that developed over the unclear language in *Davis*).

160. *See* discussion *supra* Section II.D (discussing the post-*Davis* circuit split and the two views that lower courts have adopted).

161. *See* discussion *supra* Section II.E (discussing the differences between the Trump and Obama administration's Title IX guidance); *see also* Harnik, *supra* note 129, at 687 and accompanying text.

162. *See* discussion *supra* Sections II.A, II.B (discussing the legislative history behind Title IX and the Supreme Court's historical tendency to interpret the statute broadly).

163. *See* Trump's Title IX Regulations, *supra* note 16.

164. Trump's Title IX Regulations, *supra* note 16. This restriction on reporting limits student victims' options to report to another trusted school official or administrator, thereby limiting schools' Title IX obligations and responsibilities to respond to

these regulations do not consider constructive notice of sexual harassment enough to satisfy the actual knowledge standard.[165] Rather, the regulations only require that schools receiving federal funds investigate instances of sexual violence when a complainant files or a Title IX coordinator signs a formal complaint.[166]

The Trump administration's current guidance is in stark contrast to the flexibility offered under the Obama administration's guidelines. Recall that the Obama-era guidelines allowed reports to "any employees likely to witness or receive reports of sexual harassment and violence" enough to satisfy the actual knowledge standard.[167] The Obama administration's guidelines also considered constructive knowledge of sexual violence on campus enough to satisfy the actual knowledge requirement.[168] The guidance even encouraged school investigations of sexual violence when the incident occurred off campus or when a parent or third party, rather than the victim his or herself, filed a complaint, encouraging prompt, preventative investigations for the protection of all students' educations.[169] The Obama administration reasoned that

and investigate instances of sexual violence. *See* Dowling, *supra* note 136, at 140–41 (discussing the Trump administration's guidelines regarding who a victim must report to in order to satisfy the actual knowledge requirement).

165. Trump's Title IX Regulations, *supra* note 16 ("A recipient with *actual knowledge* of sexual harassment in an education program or activity of the recipient against a person . . . must respond promptly in a manner that is not deliberately indifferent.") (emphasis added).

166. Trump's Title IX Regulations, *supra* note 16; *see also What to Know About the Title IX Rule*, *supra* note 137; Meghan Downey, *The Trump Administration's New Title IX Rule*, THE REGUL. REV. (May 20, 2020), https://www.theregreview.org/2020/05/20/downey-trump-administration-title-ix-rule (discussing the narrow circumstances in which educational institutions must investigate under the Trump administration's Title IX regulations).

167. Dear Colleague Letter, *supra* note 16, at 4.

168. *Id.* ("If 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 . . . ."); *see also* Hutchinson, *supra* note 134, at 511 ("Because a school is charged under the common law with the duty of preventing harm to its students, it should be aware of any harassment which its students suffer; therefore, constructive notice should be enough to trigger a school's liability . . . .").

169. Dear Colleague Letter, *supra* note 16, at 4 ("Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating

Title IX should be interpreted with this broad actual knowledge standard because Title IX protects students from sexual harassment in *all* of a school's education programs and activities no matter where such programs or activities take place.[170] In sum, the Obama administration believed that educational institutions were not complying with their Title IX obligations unless they were proactively working to eliminate hostile environments caused by sexual violence on campus, encouraging prompt investigations whenever the institution merely has a reason to know of a such an environment.[171]

The Biden administration's proposed Title IX guidance aligns with the Obama administration's dedication to broad protections for student victims under Title IX and reverses many of the controversial guidelines implemented under the Trump administration.[172] The Biden administration's proposed guidelines aim to protect students from all "unwelcome sex-based conduct that creates a hostile environment by denying or limiting a person's ability to participate in or benefit from a school's education program or activity."[173] Further, the proposed guidelines will require educational institutions to investigate *all* complaints, a welcome change from the present guidelines that only require schools to investigate formal complaints filed with the Title IX coordinator.[174]

1. Limiting University Liability

Ultimately, the current Title IX guidelines passed by the Trump administration neither promote the intentions of Congress nor comply

whether there is a hostile environment on campus. . . . [A] school that knows, or reasonably should know, about possible harassment [no matter who notified the school] must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.").

170. *Id.*

171. *Id.*

172. *See generally* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 2022 Fed. Reg. 1373 (Jul. 11, 2022) (to be codified at 34 C.F.R. pt. 106); Dustin Jones, *Biden's Title IX Reforms Would Roll Back Trump-Era Rules, Expand Victim Protections*, NPR (June 23, 2022, 2:40 PM), https://www.npr.org/2022/06/23/1107045291/title-ix-9-biden-expand-victim-protections-discrimination.

173. Jones, *supra* note 172.

174. *Id.*

with the judicial precedent of interpreting Title IX broadly.[175] The new guidelines limit a university's liability under Title IX by restricting when the school must investigate instances of sexual violence.[176] Universities are only required to investigate formal complaints filed by a Title IX coordinator when the sexual misconduct occurred at a location or event controlled by the university or officially recognized by the university as a postsecondary institution.[177] This investigative limitation is problematic because many, if not all, students live off-campus, and most reports of sexual violence occur off-campus or in contexts not officially recognized by the university.[178] Thus, under the new regulations, many student victims of sexual violence will not be protected by Title IX.[179]

175. *See* Dunham, *supra* note 32, at 284; *see also* Kelsi B. White, Note, *Disciplining Fairness: The Role of Public Perception in Disciplining Campus Sexual Assault*, 97 DENV. L. REV. 293, 301–07 (2019) (discussing the OCR guidelines implemented by the Trump administration and how they fail to advance Congress' purpose for enacting Title IX).

176. *See* Dunham, *supra* note 32, at 301–02 (discussing the difficulties victims of sexual misconduct will face when filing legitimate complaints and the limited circumstances under which universities must investigate Title IX violations under the Trump administration's Title IX regulations).

177. *Id.* at 276–77 (discussing that schools only must investigate sexual misconduct that occurs on campus, in off-campus university affiliated housing, or school sponsored events, leaving students who may experience sexual violence in off-campus, non-affiliated housing or contexts without protection from Title IX); Trump's Title IX Regulations, *supra* note 16.

178. *See* Dunham, *supra* note 32, at 276–78. More reports of sexual violence occur off campus than on campus. *Id.* A report by United Educators showed that 41% of college sexual assaults occur off campus. *Facts from United Educators' Report: Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, UNITED EDUCATORS, [https://perma.cc/XN4X-ERL6] (last visited Mar. 30, 2023). This is partly because many university students live in off campus housing not affiliated with the university. *Id.* While all community college students live off campus, around 87% of other university students live off campus. *Id.*; Dunham, *supra* note 32, at 276–78; *see also* Rochelle Sharpe, *How Much Does Living on Campus Cost? Who Knows?*, N.Y. TIMES (Aug. 5, 2016), https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html.

179. "By limiting educational institutions' obligation to respond only to instances of sexual harassment that occur on property they own or at events they oversee, the [new Title IX regulations] overlook the circumstances under which most college sexual assaults occur. As a result, a disproportionately high number of students

2. Working Against the Vulnerable

The new guidelines also work against the victim instead of serving as a means of aid and protection after experiencing sexual violence. The new guidelines are arduous and cast doubt on the victim's experience from the onset by restricting who a victim may report to and limiting what misconduct constitutes sexual violence.[180] When the Trump administration proposed its regulations, a public comment signed by thirty-six Senators expressed concerns about exacerbating underreporting, stating: "[I]t is troubling the Department is proposing procedures that will increase the barriers to reporting, rather than seeking to decrease those barriers."[181] Making it more difficult to file an official complaint and limiting the types of violence that universities must respond to will only perpetuate underreporting of sexual violence, especially considering the primary reason victims do not report their assault is fear that their experience is not serious enough to warrant a response.[182]

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who are impacted by sexual harassment will no longer be protected under Title IX." Dunham, *supra* note 32, at 278.

180. Trump's Title IX Regulations, *supra* note 16; *see also* Dunham, *supra* note 32, at 301–05 (discussing how the new Title IX guidelines could exacerbate underreporting by limiting victims to only filing formal complaints with the Title IX Coordinator and permitting universities to not respond to instances of sexual violence occurring off campus, putting even more students in danger of future victimization).

181. Letter from United States Senators, to Betsy Devos, Sec'y of Educ., U.S. Dep't of Educ., Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), [https://perma.cc/H8SC-WQVU] (last visited Sept. 9, 2022). The Senators opened the letter by frankly stating that they reject the Trump administration's Title IX regulations. *Id.* They noted that these new regulations are a "significant step back from prior Administrations' issued guidance . . . and would allow schools to violate the Congressional intent behind Title IX . . . ." *Id.* Many other Americans expressed concerns about the Trump administration's Title IX regulations during the public comment period. *See* Dowling, *supra* note 136, at 139–40. The Department of Education received 124,196 comments. *Id.* The majority of these comments strongly opposed the implementation of the Trump administration's Title IX regulations. *Id.*; Erik Ortiz, *Public Comments Reopen for Devos' Campus Sexual Assault Rules—But Only for One Day*, NBC NEWS (Feb. 13, 2019), https://www.nbcnews.com/news/us-news/public-comments-reopen-devos-campus-sexual-assault-rules-only-one-n970956.

182. *See* White, *supra* note 175, at 315; *see also* Dunham, *supra* note 32, at 301–03. The Justice Department estimates that about 80% of sexual assaults go unreported.

Further, the new guidelines discredit the victim's trauma through procedures like mandatory live hearings, adversarial cross-examination, victim and accused access to *all* evidence, and attorney representation even if only by one party.[183] These procedures contribute to re-traumatization of student-victims by diminishing their credibility and perpetuating rape myths, or "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists."[184] Ultimately, these procedures promote questioning student-victims' reliability and credibility by encouraging perpetrators' representatives to cross-examine the victim and question all forms of offered evidence.

The new regulations also prompted an influx of litigation concerning perpetrators' rights in Title IX proceedings, often referred to as reverse Title IX claims.[185] While an in-depth discussion of reverse Title IX claims is outside the scope of this Note, such litigation has only worsened the obstacles victims face in bringing Title IX claims forward.[186] The influx of this litigation evidences that many victims' claims are not taken seriously and heightens the burden of proof they

Chiara Profenna, *Sexual Assault Often Underreported on College Campuses*, THE BEACON (Dec. 8, 2021), https://www.upbeacon.com/article/2021/12/sexual-assault-often-underreported-on-college-campuses.

183. *See* Trump's Title IX Regulations, *supra* note 16; *see also What the Trump Administration's Title IX Changes Mean for Survivors and the Accused*, PBS NEWS HOUR (May 6, 2020), https://www.pbs.org/newshour/show/what-the-trump-administrations-title-ix-changes-mean-for-survivors-and-the-accused (discussing the negative effects that the Trump administration's Title IX regulations will have on student victims of sexual violence).

184. *See* Dowling, *supra* note 136, at 125, 145. Procedures like cross-examination historically use rape myths to question the reliability of victims, often accusing the victim of contributing to the misconduct or even lying about the misconduct, causing more harm to the victim. *Id.* at 125, 144–45.

185. *See generally* Courtney Joy McMullan, Note, *Flip It and Reverse It: Examining Reverse Gender Discrimination Claims Brought Under Title IX*, 76 WASH. & LEE L. REV. 1825 (2019); Mitchell W. Bild, *Chasing Title IX: Examining the Circular Effects of Title IX from an Unpopular Perspective*, 15 SEVENTH CIRCUIT REV. 1, 2 (2019). This litigation primarily consists of allegations that universities harm the accused in Title IX investigations and proceedings by requiring the accused to prove his or her innocence and issuing often "inconsistent and arbitrary" punishments. *See generally* McMullan, *supra* note 185; Bild, *supra* note 185.

186. *See* McMullan, *supra* note 185, at 1869–71, 1873–74 (discussing the struggles victims of sexual violence face and the limited liability imposed on universities under the Trump administration guidelines).

face in bringing forward claims against their perpetrators.[187] Ultimately, President Trump's Title IX regulations foster a culture on university campuses that promotes not taking sexual violence claims seriously, which contributes to underreporting of sexual violence and perpetuating the discrimination of individuals on the basis of sex.[188] Broadly, the new guidelines protect universities by limiting their liability at the expense of victims' rights under Title IX.[189]

C. Honoring Congressional Intent

The Court is bound to interpret Congress' intent in its decisions on legislation.[190] Courts follow the principle that "judges should construe statutes to execute [Congress'] legislative purpose," so when statutes are ambiguous, the courts should interpret them in a way that aligns with Congress's intent.[191] Congress intended to enact Title IX broadly.[192] Its purpose was (1) to ensure that federal funds were not being used in educational programs to support discriminatory activities, and (2) to protect individuals from those discriminatory activities.[193] Overall, Congress aimed to combat gender discrimination by

187. *See supra* note 185 and accompanying text.

188. *See* Dunham, *supra* note 32, at 284; s*ee also What to Know About the Title IX Rule*, *supra* note 137 (discussing the harmful effects of the Trump administration's Title IX regulations).

189. *See* White, *supra* note 175, at 306.

190. *See* Groth, *supra* note 26, at 331; *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284–85 (1998) (discussing how the courts should avoid frustrating the intent of Congress when interpreting ambiguous statutes); *see also* White, *supra* note 175, at 299 ("Title IX was drafted to mirror the general purpose of Title VII: to eradicate sex discrimination while providing a private right of action for civil lawsuits. Statutes that . . . share a common purpose . . . must be interpreted together—procedural provisions and all.").

191. Groth, *supra* note 26, at 331 (quoting ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014)).

192. *See* Groth, supra note 26 at 311–12 (discussing Congress' legislative intent behind Title IX and highlighting Congress members' statements about the impact of Title IX on providing women with greater access to educational and professional opportunities).

193. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (citing to several senators' and representatives' comments about the purpose and goals of Title IX).

providing all genders with equal access to education, and Congress' intentions must be honored when interpreting Title IX.[194]

The Court historically abided by its commitment to honor Congress' intent in many of its Title IX decisions. Throughout history, the Court interpreted Title IX with "a sweep as broad as its language,"[195] most famously in *Cannon*, *Gebser*, and *Davis*.[196] In *Gebser*, Justice Stevens noted that Congress implemented language in Title IX that focused on the victim of discrimination rather than the perpetrator or funding recipient, so he reasoned that victim protection should be at the forefront of all Title IX interpretation.[197] To prioritize victim protections under Title IX, the Court expanded the scope of the statute over time, allowing for better outcomes for victims of sexual violence.[198] However, since *Davis* and the resulting circuit split over its language, the intentions of Congress that should be evident in all Title IX interpretation have been lost and, as a result, victims of sexual violence are not being protected and are losing the right to equal access to education as promised under Title IX.[199]

The Sixth Circuit's narrow interpretation of deliberate indifference and Title IX works directly against congressional intent by requiring student victims to actually experience subsequent harassment because of a school's unreasonable response to sexual violence before

194. *See* Groth, *supra* note 26, at 311–12; *see also supra* notes 43–46 and accompanying text (highlighting quotes from several legislators stating that Title IX aimed to end gender discrimination).

195. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

196. *See generally* Cannon v. Univ. of Chi., 441 U.S. 677 (1979); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (providing examples of the Supreme Court expanding the scope of Title IX).

197. *Gebser*, 524 U.S. at 296 (Stevens, J., dissenting).

198. *See generally Cannon*, 441 U.S. 677; *Gebser*, 524 U.S. 274; *Davis*, 526 U.S. 629. Not only did these landmark cases establish an individual's private right of action for enforcing Title IX against educational institutions, but also, they brought teacher-on-student and peer sexual violence within the scope of Title IX, contributing to Congress's overall goal of ending gender discrimination through access to education. *See generally Cannon*, 441 U.S. 677; *Gebser*, 524 U.S. 274; *Davis*, 526 U.S. 629.

199. *See* discussion *supra* Section II.D (discussing the post-*Davis* circuit split).

that institution may be held liable in a private Title IX action.[200] This interpretation risks further restricting student victims' access to education by lowering school system's accountability for sexual violence.[201] Congress intended for Title IX to end gender discrimination in school systems in all forms,[202] and putting students at risk of further sexual violence works against these intentions by directly exposing students to further violence rather than protecting them from it.[203] Thus, a broader interpretation of Title IX as adopted by other circuit courts better protects students' access to education under Title IX by encouraging university action in response to and in prevention of sexual violence.[204]

The Obama administration also honored Congress' intentions behind Title IX by drafting OCR guidance with broad protections for student victims, aiming to eradicate the staggering amount of sexual violence among college-aged students.[205] The Obama administration recognized the pervasiveness of sexual violence among university students and broadened the scope of Title IX to combat this violence and remedy discrimination in educational settings to better protect students' access to education.[206] This guidance encouraged universities to address the continuing effects of sexual violence that might exist after the initial incident and to be proactive in eliminating hostile environments

200. *See* discussion *supra* Section II.D.1 (discussing the Sixth Circuit's adoption of a narrow interpretation of the *Davis* Court's holding); *see also* Groth, *supra* note 26, at 323–27 (discussing the Sixth Circuit's reasoning for adopting this interpretation of the language in *Davis*).

201. *See* discussion *supra* Section II.D.1 (discussing how the Sixth Circuit's narrow interpretation of Title IX and the *Davis* holding result in poor protections for student victims of sexual violence).

202. *See* discussion *supra* Section II.A (discussing the legislative history of Title IX).

203. *See* discussion *supra* Sections II.D.2, II.D.3 (discussing the Tenth and Eleventh Circuit's adoption of broad interpretations of Title IX and the *Davis* Court's holding). Because universities are on notice that sexual violence is a form of sex discrimination which is prohibited under Title IX, they accept federal funds with the condition that they will prevent sexual violence in all school programs and activities. *See* Hutchinson, *supra* note 134, at 511.

204. *See* discussion *supra* Sections II.D.2, II.D.3.

205. *See* Dunham, *supra* note 32, at 272; Dear Colleague Letter, *supra* note 16.

206. *See* Dear Colleague Letter, *supra* note 16; *see also* sources cited *supra* note 198.

that perpetuate sexual violence for students.[207] Ultimately, the Obama administration put student protections, rather than university interests, at the forefront of its Title IX guidance, honoring Congress' intentions to eliminate gender discrimination in educational settings by eradicating sexual violence.[208]

IV. SOLUTION

Ultimately, there must be some clarity regarding the standard required for Title IX plaintiffs to meet to protect the intentions of Congress when enacting Title IX. The Supreme Court should revisit the major source of the uncertainty, *Davis v. Monroe County Board of Education*, via current Title IX cases, and better define the actual knowledge and deliberate indifference standards. Congress' intentions behind Title IX were broad, intending to combat gender discrimination by providing equal access to education, so it follows that the actual knowledge standard should be interpreted broadly as well.[209] Because actual knowledge is so closely tied to the other requirements established in *Davis* for an individual's Title IX private right of action against an educational institution, clarifying the meaning of actual knowledge would resolve the circuit split by default. This broad interpretation would provide the best protections for Title IX plaintiffs, advancing the goals of Congress to protect students from discriminatory activities and to combat gender discrimination through access to education.

207. *See* Dear Colleague Letter, *supra* note 16. The Obama administration considered events like retaliation or teasing by the perpetrator and repeated exposure to the perpetrator on campus to be continuous effects of sexual violence. *See* Dunham, *supra* note 32, at 273–74; Dear Colleague Letter, *supra* note 16. While the initial sexual violence may occur off campus, the continuous effects often occur on campus, creating a hostile environment that Title IX promises to protect students from. *See* Dunham, *supra* note 32, at 273–74; Dear Colleague Letter, *supra* note 16.

208. Dear Colleague Letter, *supra* note 16. Former U.S. Secretary of Education, Arne Duncan, stated that the 2011 Title IX guidelines intended to "put an end to rape-permissive cultures and campus cultures that tolerate sexual assault." *ED Youth Voices Newsletter*, U.S. DEP'T OF EDUC. (Apr. 30, 2014), https://content.govdelivery.com/accounts/USED/bulletins/b4a642; *see also* White, *supra* note 175, at 300–01.

209. *See* Groth, *supra* note 26, at 331.

A. Revisiting the Landmark Davis *Decision*

The Supreme Court should revisit *Davis* via current, upcoming Title IX cases and better define what the actual knowledge and deliberate indifference standards mean by adopting the broad, flexible view of actual knowledge outlined by the Obama administration's 2011 Title IX guidelines.[210] The Obama administration reasoned that this broad approach to Title IX standards was appropriate because, ultimately, Title IX protects students' access to education, so schools should prioritize eliminating hostile environments that perpetuate sexual violence and harm access to education.[211] A broad interpretation of Title IX and its standards ensures prompt action by universities when they know or reasonably should know about sexual violence or a hostile campus environment and encourages preventative measures that stop future violence from occurring, and this approach has proven to be workable.[212] Further, this solution would honor the view expressed by the Supreme Court that Title IX should be interpreted broadly.[213]

1. The Revisit

There are many current cases that have reached or are expected to reach the Supreme Court seeking a grant of certiorari. In July 2020, counsel for Kollaritsch in *Kollaritsch v. Michigan State University* filed

210. *See* Dear Colleague Letter, *supra* note 16; *see also* discussion *supra* Section III.A (discussing the shortcomings of the *Davis* holding).

211. Dear Colleague Letter, *supra* note 16. Further, because universities are on notice that sexual violence is a form of sex discrimination which is prohibited under Title IX, they accept federal funds with the condition that they will prevent sexual violence in all school programs and activities. Hutchinson, *supra* note 134, at 511.

212. *See* Dear Colleague Letter, *supra* note 16; *see also* Hutchinson, *supra* note 134, at 511 ("Because a school is charged under the common law with the duty of preventing harm to its students, it should be aware of any harassment which its students suffer; therefore, constructive notice should be enough to trigger a school's liability . . . .").

213. *See generally* Cannon v. Univ. of Chi., 441 U.S. 677 (1979); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) for examples of the Supreme Court expanding the scope of Title IX.

a petition for a writ of certiorari.[214] While the Court denied certiorari, this case would have provided an optimal opportunity for the Court to revisit *Davis* and adopt the broad, flexible view of actual knowledge outlined by the Obama administration in its Title IX guidelines.[215] The *Kollaritsch* circuit court adopted the narrow interpretation of the *Davis* Court's deliberate indifference standard, requiring that plaintiffs actually experience further harassment to meet this standard.[216] Granting certiorari to hear this case would have provided the Supreme Court with the chance to explicitly reject this narrow interpretation of Title IX protections and mandate the adoption of a broad interpretation of Title IX as intended by Congress.[217]

That said, the Court has another upcoming opportunity to resolve the uncertainty of its *Davis* holding in *Doe v. Fairfax County School Board*.[218] This decision deals explicitly with the uncertainty

214. Petition for a Writ of Certiorari, Kollaritsch v. Mich. State Univ. Bd. of Trus., 141 S. Ct. 554 (2020) (No. 20-10); s*ee generally* discussion *supra* Section II.D.1 (discussing the *Kollaritsch* case in detail).

215. *See generally Davis*, 526 U.S. 629.

216. *See* discussion *supra* Section II.D.1 (discussing the *Kollaritsch* case in detail). *See generally* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613 (6th Cir. 2019).

217. *See* discussion *supra* Sections II.A, III.C (discussing Congress' intentions for enacting Title IX).

218. *See* Doe v. Fairfax Cty. Sch. Bd., 1 F.4th 257, 265 (4th Cir. 2021). While this case involves a high school rather than a higher education institution, it still presents a critical opportunity for resolving the ambiguous language the Court used in *Davis*. *See generally Doe*, 1 F.4th 257. The issue in this lawsuit is whether a school receiving federal funds may be liable under Title IX in a private action where a student victim alleged she was sexually assaulted on a school-sponsored band trip, yet the school's response to the peer-on-peer sexual violence did not explicitly cause any further harassment. *Id.* While the district court held that the school board was not liable because it did not have actual knowledge of the sexual misconduct, the Fourth Circuit reversed this decision and remanded the case for new trial. *Id.* The Fourth Circuit adopted a broad interpretation of actual knowledge, holding that "when a school official with the authority to address complaints of sexual harassment . . . receives a report that can objectively be construed as alleging sexual harassment, that receipt establishes actual notice of such harassment for Title IX purposes." *Id.* at 265; *see also Fairfax County School Board v. Doe*, SCOTUS BLOG, https://www.scotusblog.com/case-files/cases/fairfax-county-school-board-v-doe (last visited Mar. 30, 2023); Angela Woolsey, *BREAKING: Fairfax County School Board Takes Sexual Assault Lawsuit to U.S. Supreme Court*, FFX NOW (Jan. 13, 2022),

over how victim-plaintiffs meet the actual knowledge and deliberate indifference standards in private Title IX actions.[219] While the district court chose to apply the narrow interpretation of the deliberate indifference standard in favor of the school board,[220] the Fourth Circuit on appeal adopted the broad view of actual knowledge instead.[221] Granting certiorari would provide the Court with an opportunity to resolve the issue regarding what standard to apply by clarifying the *Davis* holding and adopting a broad view of actual knowledge for the best protections for victims.[222]

2. Prioritizing and Protecting Victims

The Court should adopt the Obama-era definition of actual knowledge because this definition best honors the intentions of Congress when enacting Title IX by ensuring broad victim protections from sexual violence.[223] These guidelines expressly reject the interpretation of the *Davis* holding adopted by the Sixth Circuit that requires evidence of a student victim experiencing subsequent harassment after the initial incident to hold an institution liable for violating Title IX.[224] The guidance stated that "a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe."[225] Ultimately, these guidelines encouraged schools to implement broad Title IX protections on campus, focusing not only on prompt investigations of hostile environments the university knows or should know

https://www.ffxnow.com/2022/01/13/breaking-fairfax-county-school-board-takes-sexual-assault-lawsuit-to-u-s-supreme-court.

219. *See Doe,* 1 F.4th 257, 265; Woolsey, *supra* note 218.

220. Fairfax Cnty. Sch. Bd. v. Doe, 1 F.4th 257 (4th Cir. 2021), *petition for cert. filed*, (U.S. Dec. 30, 2021) (No. 21-968).

221. *Id.*; *see also Doe*, 1 F.4th at 265.

222. *See Doe*, 1 F.4th at 265; Woolsey, *supra* note 218.

223. *See* Dunham, *supra* note 32, at 272; Dear Colleague Letter, *supra* note 16.

224. *See* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 621–22 (6th Cir. 2019); *see also* Groth, *supra* note 26, at 323–27; *see also* discussion *supra* Section II.C.2 (discussing the Sixth Circuit's interpretation of the *Davis* Court's holding).

225. Dear Colleague Letter, *supra* note 16 ("The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment . . . .").

about, but also on education and training programs to prevent sexual misconduct from occurring.[226]

3. Following Judicial Precedent

If the Supreme Court were to adopt the Obama-era actual knowledge standard, it would support the opinions of many courts that have interpreted Title IX broadly throughout history. The majority opinion of *Davis* itself supported the broad actual knowledge standard when it reasoned that the common law puts educational institutions on notice that they may be held liable for a third party's misconduct.[227] Recognizing that a school may be liable for a third-party's misconduct aligns with the Obama-era guidance suggesting that schools should eliminate hostile environments for students in *all* of a school's education programs and activities no matter where such programs or activities take place.[228]

Further, the Tenth Circuit's interpretation of the language in *Davis* also supports the adoption of the Obama-era guidelines by the Court. This circuit correctly adopted the view that the opinion of the *Davis* Court supporting a broad interpretation of Title IX should be abided by in its *entirety* when interpreting and applying Title IX.[229] The Tenth Circuit also recognized that this victim-friendly interpretation of Title IX best honors Congress' objectives for enacting Title IX by promoting the protection of students from discriminatory activities like sexual violence.[230] Perhaps most importantly, it is evident that a broad interpretation of actual knowledge and Title IX generally is workable considering both the Tenth Circuit and Eleventh Circuit have

226. *See* Dear Colleague Letter, *supra* note 16. The guidance noted that publishing a notice of nondiscrimination, designating a Title IX coordinator, posting grievance procedures, and conducting education and training programs "may bring potentially problematic conduct to the school's attention before it becomes serious." *Id.*

227. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643–44 (1999) (citing to RESTATEMENT (SECOND) OF TORTS § 320 (AM. L. INST. 1965)) (noting that state courts often find schools liable in negligence causes of action for failing to protect their students from peer tortious actions).

228. Dear Colleague Letter, *supra* note 16.

229. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1104 (10th Cir. 2019) (quoting *Davis*, 526 U.S. at 645).

230. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

implemented a broad actual knowledge standard effectively.[231] Therefore, the Supreme Court's adoption of the broad Obama-era actual knowledge standard follows historical precedent in the judicial system of interpreting Title IX broadly and effectively honors Congress' intentions behind Title IX.

B. Addressing Concerns

Some might be concerned that this expansive interpretation of actual knowledge exposes universities to excessive liability and a lack of predictability.[232] Further, some might argue that by revisiting *Davis* and defining actual knowledge broadly, the Supreme Court would likely have to overrule the language in *Gebser* that a constructive notice standard does not comply with Title IX or Congress' intentions for enacting it.[233] However, a broader interpretation of actual knowledge merely encourages universities to act in a "responsible and concerned manner" towards their students, assisting in the prevention of sexual violence and protecting students' access to education under Title IX.[234]

After all, the common law provides that schools may be responsible for failing to protect its students from third party misconduct.[235] Further, the language of Title IX and Congress' intentions for enacting this statute put schools on notice that sexual violence is prohibited under Title IX, so universities must strive to prohibit sexual violence

231. *See* discussion *supra* Section II.D.3 (discussing the implementation of a broad actual knowledge standard by the Tenth and Eleventh Circuits in *Simpson v. University of Colorado Boulder* and *Williams v. Board of Regents*).

232. *See* Bolan, *supra* note 88, at 824–25.

233. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998) ("[I]t would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on . . . constructive notice. . . .[I]t does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs."); *see also* Hutchinson, supra note 134, at 502 (discussing the reasoning the Court had for rejecting constructive notice).

234. Bolan, *supra* note 88, at 824 (quoting Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L. J. 205, 235–43 (2011)).

235. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644 (1999) (citing to RESTATEMENT (SECOND) OF TORTS § 320 (AM. L. INST. 1965)).

among their students to fully comply with their Title IX obligations.[236] Schools should be incentivized to protect their students from sexual violence to continue receiving their federal funds. Even if schools do not consider concerns for their students enough to proactively investigate sexual violence, they would likely consider fewer alumni donations, fewer interested applicants, and reputational damage, which often result from publicized sexual violence incidents, enough to encourage prompt, preventative investigations.[237] The adoption of a broad actual knowledge standard follows logically from the reasons for which Congress enacted Title IX because, ultimately, schools must protect their students from sexual violence to aid in protecting access to education and, therefore, ending gender discrimination.[238] Therefore, it is well overdue that the Supreme Court clear up uncertainty over schools' Title IX obligations by revisiting the landmark *Davis* case and defining what actual knowledge requires in line with Congress' intent.

V. CONCLUSION

Congress intended Title IX to increase professional opportunities and educational access, aiming broadly for the law to bring an end to gender discrimination. However, current Title IX guidance passed by the Trump administration goes directly against these express

236. *See* Hutchinson, *supra* note 129, at 511 ("The plain language of Title IX prohibits sex discrimination under any school program; therefore, the schools arguably have been on notice that sexual harassment, including student-on-student sexual harassment, is prohibited under Title IX. Since the schools have had notice that sexual harassment is a form of sex discrimination, and sex discrimination is prohibited by Title IX, the schools have accepted federal funding with the condition of prohibiting sexual harassment in the school's activities and programs.").

237. *See* Castellano, *supra* note 67. Even further, universities risk major payouts if they mishandle a sexual assault case. In 2014, the University of Connecticut faced a $1.3 million payout after settling a federal sexual assault lawsuit. *Id.*

238. *See* White, *supra* note 161 ("One provision of Title IX requires institutions of higher education to 'take immediate and effective steps to end sexual harassment and sexual violence' to remain in compliance.") (citing to Letter from Russlynn Ali, Assistant Sec'y for Civ. Rts., Office for Civ. Rts., to Colleague (Apr. 4, 2011) (on file with the United States Department of Education), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf); *see also* Hutchinson, *supra* note 134, at 511 ("Because a school is charged under the common law with the duty of preventing harm to its students, it should be aware of any harassment which its students suffer; therefore, constructive notice should be enough to trigger a school's liability . . .").

intentions of Congress, plaguing and re-traumatizing student victims of sexual violence in the higher education context. While the Biden administration's proposed Title IX guidance will bring broader protections for student victims under Title IX, the Supreme Court's use of ambiguous language in defining the actual knowledge and deliberate indifference standards continues to allow the implementation of conflicting guidance under each new presidency and resulting unfortunate outcomes for victims. Thus, it is well overdue that the Supreme Court revisit the landmark *Davis* case and define the actual knowledge standard broadly, honoring its commitment to interpret the law in light of Congress' intentions. This action will ensure the best protections for victims, encourage reporting of sexual violence, and prompt thorough, preventative investigations of hostile, violent environments on college campuses. Reclaiming Title IX as a broad, flexible protection for victims of sexual violence is the best way to protect the intentions behind this groundbreaking law and all education-seeking members of our society.