

*DAVIS V. MONROE COUNTY BOARD OF EDUCATION:
A HOLLOW VICTORY FOR STUDENT VICTIMS OF
PEER SEXUAL HARASSMENT*

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I. INTRODUCTION

[T]he School District was well aware of Mr. Doe’s history. Indeed, Mr. Doe’s mother had specifically cautioned the teachers and the principal of the need to keep a watchful eye on him. . . . Sometime in November, Mr. Doe took Ms. Jones to a secluded area and sexually assaulted her. Ms. Jones, who was menstruating at the time, bled and vomited during the course of the assault and battery. Upon discovering Mr. Doe and Ms. Jones, a janitor told them to clean up the mess, returned them to class, and advised the teachers where he had found them. . . . [T]he teachers had tied other clothing around her waist to hide it, but [her mother] was never . . . informed of any of the circumstances leading to the soiling of Ms. Jones’ clothing. . . . The teachers told Ms. Jones not to tell her mother about the incident and encouraged her to forget it

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had happened at all. . . . Because of these incidents and because she had begun to engage in self-destructive and suicidal behavior, Ms. Jones left school and entered a psychiatric hospital. . . . Following her release from the hospital, Ms. Jones attempted to return to school . . . but stayed for only one day because she was once again battered by Mr. Doe and ridiculed by other students for Mr. Doe's earlier sexual attacks on her.¹

Following the 1999 United States Supreme Court decision in *Davis v. Monroe County Board of Education*,² Verna Williams, lead counsel for the plaintiff, wrote that *Davis* "is a wake-up call to the nation's educational institutions—elementary, secondary, and post-secondary alike—to make sure that they take seriously complaints about a student's sexual harassment by a peer."³ Ms. Williams succeeded in convincing the Court that educational institutions should be required to pay damages under Title IX of the Education Amendments of 1972 "if they turn their backs when students harass one another sexually."⁴ While students were previously granted the right to seek damages against educational institutions if sexually harassed by a teacher,⁵ *Davis* was the first case in which the Court extended this right under Title IX to students sexually harassed by their fellow classmates.⁶

Like Ms. Williams, many women's rights advocates declared a victory for young women as *Davis* appeared to finally acknowledge that students in federally funded educational institutions deserve protection and relief from sexual harassment.⁷ This victory seemed much needed, particularly after the American Association of University Women announced in 1993 that eighty-five percent of all female students experienced some form of sexual harassment, with sixty-five percent being harassed in the classroom, and seventy-three percent being harassed in their school hallways.⁸ The *Davis* decision appeared to give federally funded educational institutions the motiva-

1. *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1243-44 (10th Cir. 1999). *Murrell* is one of two successful Title IX peer sexual harassment claims to date and demonstrates the level of severity the harassment must reach to be considered actionable sex discrimination under Title IX.

2. 526 U.S. 629 (1999).

3. Verna Williams, *A New Harassment Ruling: Implications for Colleges*, 45 CHRON. HIGHER EDUC. 41, A56 (1999).

4. *Id.*

5. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992).

6. 526 U.S. at 643.

7. EQUAL RIGHTS ADVOCATES: A WOMAN'S LAW CTR., SEXUAL HARASSMENT IN SCHOOLS, available at www.equalrights.org/sexhar/school/sh-scho.htm [hereinafter ERA] (last viewed Aug. 24, 2002) (on file with author).

8. AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993) [hereinafter AAUW].

tion needed to adopt effective policies to protect students from the potentially debilitating effects of sexual harassment.⁹

However, the majority opinion in *Davis*, written by Justice O'Connor, sets forth a standard under which students have had difficulty winning their Title IX peer sexual harassment claims.¹⁰ While reiterating the Court's rejection of the use of agency principles,¹¹ Justice O'Connor concluded that federally funded educational institutions must have actual notice of, and act deliberately indifferent to, sexual harassment "that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."¹² O'Connor stated that the notice requirement "cabins the range of misconduct that the statute proscribes"¹³ and that all of the required factors under this new standard "combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."¹⁴ While the symbolic significance of granting students the ability to be awarded monetary damages for being subjected to sexual harassment is great, the practical reality is that the federal circuit courts have been careful to construe O'Connor's standard narrowly, thus dismissing many students' Title IX claims even though they have been subjected to what should amount to actionable sexual harassment. Distillations of the *Davis* standard vary from circuit to circuit, and questions remain unanswered as to the level of control required, the form of actual notice needed to trigger deliberate indifference, and the extremity of post-notice harassment needed to show that an educational institution has been deliberately indifferent.

In this Comment, I consider how the federal circuit courts have reacted to the *Davis* decision and discuss whether the lower courts have consistently applied and interpreted the *Davis* standard. Specifically, I discuss in Part II the evolution leading to the *Davis* decision through which a cause of action has been recognized under Title IX for peer sexual harassment. In Part III, I discuss the standard arising from *Davis*. In Part IV, I provide a comparative analysis of the federal circuit court decisions applying the *Davis* standard. In Part V, I conclude by discussing several questions *Davis* left unre-

9. 526 U.S. 629 (1999).

10. *Id.* at 650.

11. *Id.* at 642; *see also* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998).

12. *Davis*, 526 U.S. at 650.

13. *Id.* at 644.

14. *Id.* at 645.

solved that have led to the federal circuit courts' conservatively construing O'Connor's *Davis* standard.

II. RECOGNIZING A CAUSE OF ACTION UNDER TITLE IX¹⁵ FOR SEXUAL HARASSMENT OF STUDENTS IN FEDERALLY FUNDED EDUCATIONAL INSTITUTIONS

A. *Legislative Intent of Title IX*

Legal questions regarding the applicability of Title VII to protect students in federally funded educational institutions from discrimination were mooted when Congress passed Title IX of the Education Amendments of 1972 (Title IX).¹⁶ Congress crafted Title IX broadly with the intention of reaching all forms of sexual discrimination within the control of a school, as it 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."¹⁷ Senator Birch Bayh, the congressional sponsor of the amendment, "recognized that discrimination can result from a school's attitude, as well as its actions, toward women"¹⁸ and stated that "one of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women."¹⁹

Title IX forms the basis for student complaints of sexual harassment by a member of his or her educational community.²⁰ The Office for Civil Rights (OCR), which provides support to the United States Department of Education, is responsible for enforcing Title IX and other federal statutes that prohibit discrimination in education programs and activities receiving federal financial assistance.²¹ The OCR offers guidelines entitled, "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties"²² and maintains the belief that "[w]hen a school makes it clear that sexual harassment will not be tolerated, trains its staff,

15. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2000).

16. *Id.*

17. *Id.* § 1681(a).

18. Daniel G. McBride, *Guidance for Student Peer Sexual Harassment? Not!*, 50 STAN. L. REV. 523, 535 (1998).

19. 118 CONG. REC. 5,803 (1972) (statement of Sen. Bayh).

20. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992).

21. *See* OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

22. *Id.*

and appropriately responds when harassment occurs, students will see the school as a safe place where everyone can learn.”²³

However, in one Title IX lawsuit, the Court applied a narrow reading of Title IX’s enforcement ability.²⁴ The Court found that the only enforcement mechanism for Title IX was the termination of federal money to the discriminatory institution.²⁵ Because this enforcement mechanism only reached the specific program or activity receiving funds and not the entire institution, the Court ruled that Title IX could only apply to specific programs or activities receiving federal funds.²⁶ To clarify the purpose of Title IX after this “unacceptable decision,”²⁷ Congress passed the Civil Rights Restoration Act of 1987 “to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application” of certain civil rights laws, including Title IX.²⁸

B. Progression of Case History Leading to Davis v. Monroe County Board of Education

Although the language of Title IX does not expressly provide a private cause of action for student victims of sexual harassment, in *Cannon v. University of Chicago* the Court found that Title IX was sufficiently broad in nature to include an implied private right of action for victims.²⁹ Subsequently, the Court held in *Franklin v. Gwinnett County Public Schools* that private plaintiffs could receive monetary damages for sexual harassment under Title IX.³⁰ The *Franklin* Court extended the theories of the traditional line of Title VII sexual harassment cases³¹ to faculty-on-student harassment, reiterating that sexual harassment is sex discrimination; “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”³² The *Franklin* Court ruled that the sexual harassment of a student by a teacher (or other agent of the school) is considered quid pro quo sexual harassment, a form of sex discrimination prohibited under Title IX.³³ But as recently as 1998, the United States Supreme Court “clarified” the

23. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC, available at <http://www.ed.gov/offices/OCR/ocrshpam.html> (last modified Mar. 21, 2002).

24. See *Grove City Coll. v. Bell*, 465 U.S. 555, 573-74 (1984).

25. *Id.*

26. *Id.*

27. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 73 (1992) (explaining Congress’s interpretation of the Supreme Court’s decision in *Grove*).

28. Pub. L. No. 100-259, § 2, 102 Stat. 28 (1988) (codified at 20 U.S.C. §§ 1687-88 (1994)).

29. 441 U.S. 677, 709 (1979).

30. 503 U.S. at 76.

31. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

32. *Franklin*, 503 U.S. at 75 (quoting *Vinson*, 477 U.S. at 64).

33. *Id.*

standard for holding schools liable for damages under Title IX for sexual harassment of a student by a teacher in *Gebser v. Lago Vista Independent School District*.³⁴ The Court held that schools are liable for damages when a school official with authority to take corrective action actually knew about the sexual harassment and acted with deliberate indifference.³⁵

Peer sexual harassment is the most common form of sexual harassment in schools, with over eighty percent of students who are sexually harassed reporting that a peer had sexually harassed them.³⁶ The number of allegations of peer sexual harassment has steadily increased throughout the last decade.³⁷ However, determining liability for student-on-student sexual harassment has been a comparatively arduous journey as determining standards of liability for workplace sexual harassment. Before *Davis*, numerous conflicting lower court decisions made the discussion of school liability for peer sexual harassment ripe for United States Supreme Court review. Such conflicts primarily stemmed from defining the appropriate standards for notice, authority, and responsibility.³⁸

As early as 1993, the Ninth Circuit heard the first case of student-on-student sexual harassment in *Doe v. Petaluma*.³⁹ Jane Doe, a middle-school student in Petaluma, was subjected to sexually harassing remarks and behavior for many months by her peers.⁴⁰ Doe reported the harassment to school officials, who promised to end the harassment but failed to do so.⁴¹ Nor did any school officials inform Doe or her parents of her rights under Title IX.⁴² In 1995, the *Doe* court theorized that Title VII principles might be applied in determining if a school had notice of peer harassment and failed to take appropriate corrective action.⁴³

However, cases that followed would further confound, rather than clarify, liability standards for schools faced with student-on-student sexual harassment claims. In *Burrow v. Postville Community School District*, one federal district court determined that a student may bring a Title IX cause of action against a school for its knowing failure to take appropriate remedial action in response to the hostile environment created by students at the school.⁴⁴ In the same year, the

34. 524 U.S. 274 (1998).

35. *Id.* at 292-93.

36. AAUW, *supra* note 8.

37. ERA, *supra* note 7.

38. 526 U.S. 629 (1999).

39. 54 F.3d 1447 (9th Cir. 1995).

40. *Id.* at 1449.

41. *Id.*

42. *Id.*

43. *Id.* at 1452.

44. 929 F. Supp. 1193, 1205 (N.D. Iowa 1996).

Fifth Circuit ruled in *Rowinsky v. Bryan Independent School District* that a school district should not be held liable for peer sexual harassment under Title IX unless the funding recipient directly committed the sexual harassment or the school district treated the sexual harassment of one gender more seriously than the sexual harassment of the other.⁴⁵ The Eleventh Circuit in *Davis v. Monroe County Board of Education* affirmed the district court's decision to dismiss Davis's claim on the ground that Title IX provides no private cause of action for peer sexual harassment.⁴⁶ This disagreement over the nature of school liability under Title IX gave the United States Supreme Court an opportunity to break the stalemate.

III. THE DAVIS DECISION

The United States Supreme Court chose to address the issue of peer sexual harassment in the case of *Davis v. Monroe County Board of Education*.⁴⁷ As set forth in the complaint, a classmate of fifth-grader LaShonda Davis had subjected her to fondling, offensive comments, and abusive actions over a five-month period.⁴⁸ During that time, LaShonda's mother pleaded for help from school officials, but no meaningful action followed.⁴⁹ One teacher allegedly refused, for more than three months, to allow LaShonda to change her assigned seat away from her tormentor.⁵⁰ The school lacked a sexual harassment policy and procedure that could have helped LaShonda find a way to remedy the sexual harassment.⁵¹ Eventually, LaShonda's mother filed a criminal complaint against the harasser and filed suit against the school district.⁵² The harasser pleaded guilty to the criminal charge and finally, the harassment ceased.⁵³

In its *Davis* ruling, the Court followed the progression of most lower courts and decided against the view of the Fifth Circuit. The Court found that just as Title VII is violated if a sexually hostile working environment is created by co-workers and tolerated by the employer, Title IX is violated if a fellow student creates a sexually hostile educational environment and the supervising authorities knowingly fail to act to eliminate the harassment.⁵⁴

45. 80 F.3d 1006 (5th Cir. 1996).

46. 120 F.3d 1390, 1406 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999).

47. 526 U.S. 629 (1999).

48. *Id.* at 633 (in reviewing the legal sufficiency of the cause of action, the Court "assume[d] the truth of the material facts as set forth in the complaint") (quoting FED. R. CIV. P. 12(b)(6)).

49. *Id.* at 633-34.

50. *Id.* at 635.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 647.

The *Davis* ruling did not surprise the OCR. When the OCR issued its guidelines on the sexual harassment of students in March of 1997, it suggested that peer sexual harassment should be actionable under Title IX.⁵⁵ The OCR criticized the Fifth Circuit as the odd-man-out in its deviation from other federal courts on the subject of school liability for student-on-student sexual harassment.⁵⁶ The Fifth Circuit determined in *Rowinsky v. Bryan Independent School District* that a school district is not liable under Title IX for peer harassment unless the school district itself directly discriminates based on sex by responding differently to similar claims of sexual harassment by girls versus boys.⁵⁷ The OCR and, ultimately, the United States Supreme Court believed that this decision was a misapplication of Title IX, as the OCR explained:

Title IX does not make a school responsible for the actions of the harassing student, but rather for its own discrimination in failing to take immediate and appropriate steps to remedy the hostile environment once a school official knows about it. If a student is sexually harassed by a fellow student, and a school official knows about it, but does not stop it, the school is permitting an atmosphere of sexual discrimination to permeate the educational program. The school is liable for its own action, or lack of action, in response to this discrimination. Notably, Title VII cases that hold that employers are responsible for remedying hostile environment harassment of one worker by a co-worker apply this same standard.⁵⁸

In *Davis*, the United States Supreme Court did not, however, ignore the potential for the courts to be flooded with peer sexual harassment cases.⁵⁹ The growing body of research at that time showed that student-on-student sexual harassment was rampant in educational institutional settings, particularly in America's colleges and universities.⁶⁰ The Court thus narrowed the circumstances in which schools can be held liable and what actions constitute sex discrimination under Title IX. Justice O'Connor, writing for the majority, stated:

[F]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of

55. See OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

56. *Id.*

57. 80 F.3d 1006, 1016 (5th Cir. 1996).

58. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 62 Fed. Reg. 12,048 (Mar. 13, 1997).

59. 526 U.S. at 648.

60. *Id.*

which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.⁶¹

While Justice O'Connor narrowed the circumstances in which harassment may be actionable, it is clear that this ruling applies to all levels of education, including institutions of higher learning: "[R]ecipients of federal funding may be liable for 'subject[ing]' 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."⁶²

Thus, women's advocacy organizations had their victory: a recognized right under Title IX for student victims of peer sexual harassment to sue schools and districts that fail to respond to sex discrimination occurring under their noses.⁶³ However, a carefully crafted standard was carved into the woodwork of *Davis* that so narrows the range of actionable conduct that only some victims are able to realize fully their after-the-fact right to be free from sexual harassment. The *Davis* holding can hardly be said to be a victory for student victims of sexual harassment, when the only victims who succeed under *Davis* are students utterly debilitated by the harassment. *Davis* does not equal the right to be free from sexual harassment, nor is *Davis* an effective tool to motivate educational institutions to participate in the effort to eliminate sexual harassment in our schools. Rather, *Davis* has been the glue that has held the educational status quo of general indifference in place.

A. *The Actionable Right*

The language of Title IX is short and sweet: "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."⁶⁴ Congress included an enforcement provision that empowered federal programs offering financial assistance to use "any . . . means authorized by law" to fulfill the congressional intent of Title IX.⁶⁵

While the Court could have concluded that Title IX only bestows a federal right to terminate funds to a funding recipient in response to a violation of Title IX, the Court has interpreted the "any means"

61. *Id.* at 650.

62. *Id.* at 646-47.

63. ERA, *supra* note 7.

64. 20 U.S.C. § 1681(a) (2000).

65. *Id.* § 1682.

provision as allowing the termination of funding as just one possible option. The Court has not, however, chosen to limit the federal government's power to enforce Title IX solely through the termination of funding.⁶⁶ The Court justified its broader interpretation of Title IX by comparing the language in Title IX to the similar language in Title VI.⁶⁷ Because the Court had already recognized an implied right of action in Title VI prior to congressional adoption of Title IX, it was appropriate to determine that Congress intended the similar language in Title IX to bestow the same private cause of action.⁶⁸ Thus, *Franklin's* previous approval of the availability of monetary damages from such an action logically followed.⁶⁹

However, this right of a private cause of action is limited by the power under which Congress passed Title IX.⁷⁰ The Court has treated Title IX as legislation passed under Congress's Spending Clause authority.⁷¹ While typically Congress cannot abrogate the States' Eleventh Amendment immunity under the Spending Clause,⁷² the United States Supreme Court has categorized Title IX funds as gifts to the States,⁷³ through which States agree to waive their immunity from suit in exchange for the gifted funds.⁷⁴

However, the United States Supreme Court clarified that the "mere receipt of federal funds cannot establish that a State has consented to suit in federal court."⁷⁵ Rather, Congress must manifest "a clear intent to condition participation" in the federal funding "on a State's consent to waive its constitutional immunity."⁷⁶ Thus, to sue under Spending Clause provisions, funding recipients must have adequate notice that they could be liable for particular conduct. This contractual arrangement allows Congress to encourage certain behavior in exchange for federal funds, but requires Congress to "speak [in] a clear voice" to ensure an equal understanding of the terms of the agreement.⁷⁷

66. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

67. *Id.* at 694-96; see 42 U.S.C. § 2000(d) (1994) (stating within Title VI: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

68. *Cannon*, 441 U.S. at 694-96.

69. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992).

70. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639-40 (1999).

71. *Id.*; see U.S. CONST. art. 1, § 8, cl. 1 for origin of Congress's Spending Power, which provides in part: "The Congress shall have Power To lay and collect Taxes . . . to . . . provide for the . . . general Welfare of the United States."

72. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996).

73. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-87 (1999).

74. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981).

75. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985).

76. *Id.*

77. *Halderman*, 451 U.S. at 17.

While the Monroe County Board of Education argued in *Davis* that school districts could not have anticipated liability stemming from student-on-student sexual harassment, the Court relied on its previous holdings in *Gebser* and *Franklin* to suggest that Title IX peer sexual harassment claims only seek to hold the school district liable for its own acts of subjecting students to sexual harassment in its educational programs.⁷⁸ Thus, the person committing the acts of sexual harassment becomes less relevant (although not entirely irrelevant), while the reaction the school has to the student's complaint of sexual harassment becomes key.⁷⁹

B. The Davis Standard: A Heightened Standard for Student Victims

1. Severe, Pervasive, and Objectively Offensive

The issue in *Davis* was not whether sexual harassment is sex discrimination.⁸⁰ Nor should the question have been what type of conduct constitutes sexual harassment.⁸¹ Rather, the issue in *Davis* was whether a recipient of federal funding for an educational program or activity may be held liable for damages under Title IX for sex discrimination in the form of student-on-student sexual harassment.⁸² The answer to this question was a no-brainer based on the Court's previous line of Title IX decisions.⁸³

O'Connor reaffirmed in *Davis* that the Court had "previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX" when a school acts with deliberate indifference to complaints of sexual harassment.⁸⁴ The Court easily could have determined that the same actions sufficient to raise a hostile environment claim under Title VII, including demands for sexual favors, sexual advances, fondling, indecent exposure, and sexual assault,⁸⁵ are equally sufficient to raise a hostile environment claim under Title IX for student-on-student sexual harassment when these

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

79. *Id.*

80. The U.S. Supreme Court established that sexual harassment is a form of sex discrimination in *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

81. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (providing examples of sexual harassment that may constitute sex discrimination under Title VII).

82. 526 U.S. at 643.

83. Or at least Justice O'Connor's opinion suggests the answer was easy. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (rejecting agency principles, but defining standard for school reaction using the deliberate indifference standard to determine whether the school subjected the student to sexual harassment after receiving notice of teacher-student harassment); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992) (same). Of course, if Title IX serves to protect students from sex discrimination, it would be absurd to bar some people in the school community from engaging in such discriminatory conduct but not others.

84. 526 U.S. at 650.

85. See generally *Vinson*, 477 U.S. 57.

acts are ignored by a school that has the authority and control to correct them.

Yet, in *Davis*, Justice O'Connor used the Spending Clause's adequate notice requirement to define "discrimination" in a new light. While admitting that the Court had "elsewhere concluded that sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst's* notice requirement and serve as a basis for a damages action,"⁸⁶ O'Connor went on to conclude that Title IX's other provisions "help give content to the term 'discrimination' *in this context*."⁸⁷ At that point, she started down the path of categorizing a special brand of sexual harassment specifically for students in the context of a Title IX action.

Justice O'Connor explained that "[s]tudents are *not only* protected from discrimination, *but also* specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.'"⁸⁸ Her summary of Title IX suggests that it not only serves to protect students generally from sexual harassment as we have come to define it in the massive catalogs of sexual harassment cases, but also to protect students from discriminatory conduct that would exclude or obstruct their access to the same educational opportunities and benefits that all students are free to enjoy.⁸⁹ This was likely the intent of Congress in passing Title IX.⁹⁰

However, O'Connor skipped over her own "not only" language to combine the two standards into one: Title IX only protects sex discrimination that serves to bar access to educational programs and activities. This simplification of standards ignores the portion of Title IX's language that grants students the right to be free from exclusion from an educational program on the basis of sex *or* be subjected to discrimination under an educational program on the basis of sex.⁹¹ Justice O'Connor stated, "[t]he statute makes clear that, *whatever else it prohibits*, students must not be denied access to educational benefits and opportunities on the basis of gender,"⁹² but neglected to return to the question of what else the statute prohibits. The clear language of the statute, in allowing for several kinds of conduct to be

86. *Davis*, 526 U.S. at 649-50.

87. *Id.* at 650 (emphasis added).

88. *Id.* (emphasis added) (quoting 20 U.S.C. § 1681(a) (1994)).

89. *Id.*

90. As Senator Bayh, the sponsor of the amendment that created Title IX, stated: "[Title IX] is a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education and training for later careers." 118 CONG. REC. 5803, 5806-07 (1972) (statement of Sen. Bayh).

91. 20 U.S.C. § 1681(a) (1994).

92. *Davis*, 526 U.S. at 650 (emphasis added).

violative of Title IX, demonstrates Congress's intention for Title IX to eliminate sexual harassment, not just sexual harassment that reaches such a severe level that it debilitates a student to the point of emotionally or physically barring access to his or her education.

Thus, based on this extremely narrow reading of Title IX's prohibited conduct, the Court felt the need to be "constrained to conclude that student-on-student sexual harassment, *if sufficiently severe*, can likewise rise to the level of discrimination actionable under the statute."⁹³ It is only when the sexual harassment is sufficiently severe that it can be said to bar access to educational opportunities and activities that the school must become involved to correct the acts. The reasoning is that Title IX only prohibits the school from denying educational opportunities, programs, and activities based on sex or gender. Thus, if the sexual harassment does not reach this level, it is not within the realm of Title IX protection.⁹⁴

By placing the standard for the sexual harassment level of severity so high, it effectively destroys Title IX's ability to achieve Congress's goal, while simultaneously redefining what types of sexual harassment constitute sex discrimination for a certain subclass of victims. The students that Title IX is intended to protect often have few options for mobility, virtually no authority to correct disruptive behavior on their own, and are required to attend an interactive educational institution where they must face their harassers on a daily basis. However, Justice O'Connor in *Davis* stated that although "recipients may be liable for their deliberate indifference to known acts of peer sexual harassment . . . the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands (contemplating that victim could demand new desk assignment)."⁹⁵

In the United States Supreme Court decision in *Harris v. Forklift Systems, Inc.*,⁹⁶ the Court recognized the importance of defining the level of sexual harassment required before a victim could sue for relief. The Court developed the "reasonable woman" standard to determine what conduct can be actionable as "abusive work environment" harassment.⁹⁷ The Court held that even where it does not "seriously affect [an employee's] psychological well-being' or 'lead the [employee] to suffe[r] injury,"⁹⁸ conduct could be considered actionable sexual harassment. This statement recognized that sexual har-

93. *Id.* (emphasis added).

94. *Id.*

95. *Id.* at 648 (citation omitted).

96. 510 U.S. 17, 20-23 (1993).

97. *Id.* at 20.

98. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

assment is unlawful under Title VII, even without evidence that the harassment damaged the victim's well-being.

Harris involved an employee who left her employer after months of enduring crude remarks and propositions from the firm's president.⁹⁹ The employer attempted to argue that because Harris had no physical injury, nor any evidence of psychological damage, the conduct was not severe and pervasive enough to affect her working conditions. The Court found that the behavior the plaintiff endured would reasonably be harmful to women, whereas it probably would have been merely offensive to men and not so severe that it would affect work performance.¹⁰⁰

In *Harris*, the Court attempted to find a compromise between making any conduct that is merely offensive actionable and requiring the conduct to cause a "tangible psychological injury."¹⁰¹ The Court found that Title VII protects an employee from having to "endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."¹⁰² Thus, the Court began to develop what later would be dubbed the "reasonable woman" standard, which allowed the Court to look at whether sexual conduct in the workplace reasonably could affect a woman being subjected to that type of sexual conduct. This standard did not rely on tangible injury but rather considered whether the conduct was the type that could reasonably lead a woman to suffer tangible injury.¹⁰³

In *Harris*, the Court recognized the congressional purpose of Title VII was to protect employees from discrimination. However, in *Davis*, the Court forgot this important goal.¹⁰⁴ Rather, we see schoolgirls having mental breakdowns from enduring daily threats, physical

99. *Harris*, 510 U.S. at 19.

100. *Id.*

101. *Id.* at 21.

102. *Id.*

103. This standard later became referred to as the "reasonable person" standard, but still considers whether the conduct is the type that could lead to tangible injury for a person similarly situated to the plaintiff.

104. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999) ("The dissent fails to appreciate these very real limitations on a funding recipient's liability under Title IX . . . we [do not] contemplate, much less hold, that a mere 'decline in grades is enough to survive' a motion to dismiss.") (quoting *id.* at 677 (Kennedy, J., dissenting)); see *Gabrielle M. v. Park Forest-Chic. Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 828-29 (7th Cir. 2003) (Rovner, J., concurring) (noting that like in the employment context, where the Supreme Court has "firmly rejected any requirement that the victim of harassment suffer the equivalent of a nervous breakdown before she can recover under a hostile environment theory . . . a hostile environment should be actionable before it results in consequences so dramatic as hospitalization or leaving school.").

withdraw from school, and escalating suicidal tendencies.¹⁰⁵ This can hardly be the optimal goal Title IX was created to achieve.¹⁰⁶

2. *Deliberate Indifference to Actual Notice*

Because the *Davis* Court rejected the use of agency principles to support a claim of sex discrimination for peer sexual harassment under Title IX,¹⁰⁷ the school cannot be held liable for the independent acts of third parties who are not in authoritative positions capable of effectuating change.¹⁰⁸ Rather, as *Gebser* established, an educational institution violates Title IX and can be liable for damages where it is “deliberately indifferent” to known acts of harassment.¹⁰⁹

This *Davis* standard was borrowed directly from *Gebser*, where the Court previously determined that a student could sue under Title IX for a school’s deliberate indifference to known acts of harassment by a teacher. While the Monroe County Board of Education tried to argue in *Davis* that liability for sexual harassment by *students* rather than teachers was beyond the scope of Title IX, the Court reiterated its rejection of agency principles in Title IX liability.¹¹⁰ The *Davis* Court answered “whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude . . . it does.”¹¹¹

The Court explained, as had the OCR previously, that the liability stems not from the fact that the sexual harassment occurred, but rather begins when the educational institution knows that the harassment is occurring and fails to respond.¹¹² Thus, the response of the educational institution in the face of known sexual misconduct

105. See *Davis*, 526 U.S. 629; *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1243 (10th Cir. 1999).

106. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (Congress enacted Title IX with two principal objectives in mind: “[T]o avoid the use of federal resources to support discriminatory practices” and “to provide individual citizens effective protection against those practices.”).

107. See *Davis*, 526 U.S. at 643 (“As an initial matter, in *Gebser*, we expressly rejected the use of agency principles in the Title IX context, noting the textual difference between Title IX and Title VII . . . (invoking agency principles on ground that definition of ‘employer’ in Title VII includes agents of employer).”) (citations omitted).

108. See *id.* at 644 (“A recipient cannot be directly liable . . . where it lacks the authority to take remedial action.”).

109. *Id.* at 643.

110. *Id.* at 640-42.

111. *Id.* at 643.

112. *Id.* at 644-45 (stating that “[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference ‘subject[s]’ its students to harassment. That is, the deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.”) (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)).

within the control and boundaries of the school is key in determining whether the school caused the student to be “subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹¹³

For the Court to reach a determination of whether an educational institution acted with deliberate indifference, a plaintiff must establish that actual notice was given to the educational institution. However, unlike in Title VII sexual harassment cases, the *Davis* Court did not require that the school have a formal school policy describing the method of giving actual notice (to put potential victims on notice of their rights and obligations) or describe the form of notice required. The only standard given in *Davis* was that “[d]eliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.”¹¹⁴ Naturally, the federal circuit courts have used different methods to determine what this actual notice requirement means.¹¹⁵

In *Davis*, LaShonda Davis, the student victim, made repeated reports to her classroom teacher and her mother. Upon inquiry, the teacher told the mother that the school principal had been informed of the incidents.¹¹⁶ No disciplinary action was taken subsequent to these reports. Following the reports, the sexual harassment continued.¹¹⁷ LaShonda reported these incidents to her physical education teacher. One week later, another sexually harassing incident occurred under the supervision of another teacher. LaShonda reported it to the supervising teacher and her mother again followed up. Eventually, with no action even attempted by the school to curb the behavior toward LaShonda, the primary harasser was charged with and pleaded guilty to sexual battery. In the end, LaShonda was subjected to five months of harassment without so much as a seat change made to move her away from her harasser.¹¹⁸ Finally, the harassment ceased, but only after LaShonda’s previously high grades had dropped and she had written a suicide note.¹¹⁹

113. 20 U.S.C. § 1681(a) (1994).

114. *Davis*, 526 U.S. at 644.

115. See discussion *infra* Part IV.B.

116. *Davis*, 526 U.S. at 633-34. The incidents at this point included peers attempting to touch LaShonda’s breasts and genital area and vulgar statements such as “I want to get in bed with you” and “I want to feel your boobs.” *Id.*

117. *Id.* Following the first set of reports, the sexual harassment included a student placing a doorstop in his pants followed by sexually suggestive mannerisms during physical education class. *Id.*

118. *Id.* at 635.

119. *Id.* at 634.

Because there were so many attempts made by both the student and the mother, the *Davis* Court had no difficulty determining whether there had been actual notice. Additionally, because the complaints continued over five months with the harassment ceasing only when the criminal justice system stepped in, it was clear that the school had not responded to the complaints in an effective manner. Nor did the school provide training on how to handle student complaints of sexual harassment, have a policy for students and parents to follow if they needed to report sexual harassment, or have any personnel designated to handle sexual harassment complaints.¹²⁰ However, whether actual notice had been given becomes more difficult to determine in cases where parents fail to become involved, teachers fail to pass the reports on to authoritative personnel who have the power to make corrections, or fewer reports of harassment are made.

Once a plaintiff overcomes the hurdle of actual notice, the *Davis* Court established that the school must act with “deliberate indifference” to that complaint for Title IX liability to attach. However, the phrase is amorphous. While on one hand it suggests a school must be responsive in the face of a sexual harassment complaint, the Court took a step back, explaining that “courts should refrain from second-guessing the disciplinary decisions made by school administrators.”¹²¹ Rather, courts should declare a school deliberately indifferent “only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”¹²² This is not a reasonableness standard or a simple negligence standard. As Justice O’Connor explains, this standard does not actually require the school to “remedy” peer harassment, just to act in a manner not clearly unreasonable as a matter of law.¹²³

This student standard is so high that Justice O’Connor expressed doubt regarding whether LaShonda Davis would be able to show on remand that the school’s response to her five months of complaints was “clearly unreasonable.”¹²⁴ O’Connor suggested that Davis may be able to show that because the school failed to respond in *any* way during those five months that the school acted “clearly unreasonably.” However, this twinge of doubt laid the foundation for the nearly impossible standard under which students could effectuate the broad and noble goals of Title IX.

120. *Id.* at 635.

121. *Id.* at 648.

122. *Id.*

123. *Id.* at 648-49.

124. *Id.* at 649 (stating that “it remains to be seen whether petitioner can show that the Board’s response to reports of G.F.’s misconduct was clearly unreasonable in light of the known circumstances”).

IV. COMPARATIVE ANALYSIS OF CIRCUIT COURT DECISIONS:
DISPARITY AMONG THE CIRCUITS

Since the *Davis* ruling in 1999, the federal circuit courts have reviewed numerous peer sexual harassment cases. While not exactly the flood of litigation of which the dissent in *Davis* warned, there are enough cases to determine that the federal circuit courts of appeal are not entirely comfortable with the *Davis* standard. Although the federal circuit courts understand the general test set forth in *Davis*, they are struggling to define the vague terms within the *Davis* test. Accordingly, the courts have narrowly construed the *Davis* standard, cognizant of the unanswered questions. This conservatism has resulted in few winning student Title IX claims for either teacher-student or student-on-student sexual harassment.

The federal circuit courts, while understanding the general *Davis* standard, still vary in their presentation of the essential elements of *Davis* liability. While some circuits focus primarily on the specifically enumerated *Davis* elements—that Title IX liability requires that 1) the sexual harassment be so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school; 2) the funding recipient had actual knowledge of the sexual harassment; and 3) the funding recipient was deliberately indifferent to the harassment¹²⁵—other circuits also include an element that the school district must have the power to exercise substantial control over both the harasser and the context in which the known harassment occurs.¹²⁶

However, how the federal circuits have defined each of these elements varies widely, with several circuits commenting on the lack of guidance in O'Connor's *Davis* opinion.¹²⁷ Consequently, the courts have been left to search in the pages of the *Davis* opinion for some guiding light. What they have been left with is a dissent in *Davis* that warns of a barrage of litigation that will drain taxpayer dollars

125. This includes the First, Sixth, Seventh, and Tenth Circuits. See *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000); *Wills v. Brown Univ.*, 184 F.3d 20 (1st Cir. 1999); *Adusumilli v. Ill. Inst. of Tech.*, No. 98-3561, 1999 U.S. App. LEXIS 17954 (7th Cir. July 21, 1999); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999).

126. This includes the Eighth and Ninth Circuits. See *P.H. v. The Sch. Dist. of Kan. City*, 265 F.3d 653 (8th Cir. 2001); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000).

127. See, e.g., *P.H.*, 265 F.3d at 662 (“[T]he actual notice standard of *Gebser* has not yet been clearly defined.”); *Murrell*, 186 F.3d at 1252 (Anderson, J., concurring) (“The . . . majority wisely ‘decline[s] . . . to name job titles that would or would not adequately satisfy’ *Davis*’ requirement that the school have control over the harassing student[,] . . . leaving liability limited in general terms to cases involving ‘an official decision by the [Title IX] recipient not to remedy the violation.’”) (quoting *Davis*, 526 U.S. at 642); *Wills*, 184 F.3d at 31 (Lipez, J., dissenting) (“This is a vexing case for many reasons. The facts are difficult. The applicable law is complex and evolving . . . with . . . unruly elements . . .”).

and a majority opinion that attempts to persuade readers that it is sufficiently narrow to combat this misconception while still offering relief to victims.

A. *Severe, Pervasive, and Objectively Offensive*

Understanding that *Davis* requires sexual harassment to be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school,”¹²⁸ the First, Sixth, Seventh, and Tenth Circuits have attempted to determine at what threshold sexual harassment becomes actionable sex discrimination under Title IX. While always a prong that must be satisfied, other circuits stopped short of this severe and pervasive inquiry upon finding other prongs of the *Davis* standard were not met. However, four circuits that have addressed the severe and pervasive prong represent the continuum on which most peer sexual harassment cases will fall: the Seventh Circuit found the conduct was not severe enough;¹²⁹ the First Circuit found that while the one incident of sexual harassment was severe, without a second incident it could not be considered to pervade the student’s educational environment to the point of compromising her educational opportunities;¹³⁰ and the Sixth and Tenth Circuits found the conduct to be egregious enough to be considered severe, pervasive, and objectively offensive enough to satisfy the prong.¹³¹

The Seventh Circuit in *Adusumilli v. Illinois Institute of Technology*¹³² defined the severe and pervasive requirement through the use of scattered narrowing terms and phrases used in the *Davis* majority opinion. It stated that actionable conduct must be “severe and repeated . . . and must have a systemic effect.”¹³³ The Seventh Circuit went on to explain that “[s]ingle incidents of student misconduct are unlikely to have such an effect . . . [s]ince in each instance the conduct ceased as soon as it occurred, and was not repeated.”¹³⁴

In *Adusumilli*, the student-plaintiff filed an action under Title IX for being subjected to sexual harassment on twelve separate occasions by four professors and six students.¹³⁵ While some of these incidents were simply described by the court as “ogling” and “unwanted

128. *Davis*, 526 U.S. at 650.

129. See *Adusumilli*, 1999 U.S. App. Lexis 17954.

130. See *Wills*, 184 F.3d 20.

131. See *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000); *Murrell*, 186 F.3d 1238.

132. 1999 U.S. App. LEXIS 17954, at *4.

133. *Id.*

134. *Id.*

135. *Id.* at *1.

touching,”¹³⁶ at least two incidents involved touching her breasts. Because the Seventh Circuit found the student had only reported two of the twelve incidents, the Court declined to address whether those unreported incidents were severe. The two incidents that were reported, including the touching of her shoulder by one student and the touching of her breast by another student, were analyzed under the *Davis* severity prong.¹³⁷

Because the Circuit Court refused to consider all of the incidents due to failure to give actual notice, the Court concluded that the two reported incidents were each single occurrences of isolated incidents that in themselves were not severe and did not permeate the student’s educational experience with sex discrimination.¹³⁸ Since there were no future incidents, the effect of the harassment ceased with the conduct, and there was no action the school needed to take.

Under the Seventh Circuit’s interpretation of the *Davis* “severe and pervasive” requirement, after a report of sexual harassment is made, there must be repeated occurrences of sexual harassment *by the same perpetrator* to evidence harassment that is “severe and repeated” enough to cause a “systemic effect” coupled with a school that did nothing to keep the repeated instances from happening.¹³⁹ This view of the severe and pervasive requirement suggests that it measures not whether the harassment in itself is objectively or subjectively severe, but rather, the effect the harassment has on the student after repeated instances.¹⁴⁰

136. *Id.* at *2.

137. *Id.* at *4.

138. *Id.*

139. *See id.*

140. Additionally, the Seventh Circuit recently went on to add that actionable conduct must be “so severe, pervasive, and objectively offensive that it has a ‘concrete, negative effect’ on the victim’s access to education.” *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 821-23 (7th Cir. 2003) (emphasis added). However, the concurrence takes issue with the majority’s determination that “[a]lthough [Gabrielle M.] was diagnosed with some psychological problems, the record shows that her grades remained steady and her absenteeism from school did not increase. Nothing in the record shows that she was denied any educational opportunities by [the harassing student’s] actions.” *Id.* at 823. This concurrence explains that this “view of the way in which harassment can interfere with a student’s educational opportunities is too narrow Certainly at the kindergarten level, where learning social skills is at least as important as academic instruction, grades do not tell the complete story . . . in Title IX cases we have repeatedly rejected the notion that a victim’s ability to keep doing her job in the face of harassment will defeat her contention that the workplace was hostile.” *Id.* at 828 (Rovner, J., concurring). The concurrence then goes on to suggest that

[i]f anything, courts ought to be more flexible in assessing the harms that a child experiences as a result of harassment, given that children (especially young children) are far less able to articulate the fact and extent of their injuries and may manifest an array of different reactions to the harassment Neither she nor future victims of school place harassment should be penalized simply because they seem resilient.

The First Circuit in *Wills v. Brown University* defined the *Davis* severity requirement as having a lower threshold than that of the Seventh Circuit.¹⁴¹ The First Circuit attempted to define Title IX hostile environment sexual harassment in light of Title VII's more developed standard, as the Court stated:

The rubric 'hostile environment[]' applies where the acts of sexual harassment are sufficiently severe to interfere with the workplace or school opportunities normally available to the worker or student Broadly speaking, a hostile environment claim requires the victim to have been subjected to harassment severe enough to compromise the victim's employment or educational opportunities¹⁴²

Thus, the First Circuit defined the severe and pervasive requirement as simply "compromising" a student's educational opportunities, rather than barring or denying educational opportunities. However, although the First Circuit appeared to present a lower severe and pervasive standard for Title IX liability than *Davis* set forth, the student's claim in *Wills* did not survive the legal analysis actually applied in her case.¹⁴³

Wills sued Brown University after her chemistry teacher inappropriately touched her.¹⁴⁴ Wills had approached her teacher after having difficulty with her organic chemistry class.¹⁴⁵ While purporting to pray with her in his office, the teacher pulled Wills into his lap and fondled her breasts under her shirt.¹⁴⁶ Wills immediately met with the university official responsible for administering complaints of sexual harassment to report the incident.¹⁴⁷ In response to the complaint, Brown University officials placed the teacher on probation and issued a written reprimand warning against another such incident.¹⁴⁸ The university did not inflict harsher punishment because they believed it to be the teacher's first incident.¹⁴⁹ They were wrong.¹⁵⁰ Not only did the teacher have a string of complaints prior to Wills's incident, but he continued similar behavior following the rep-

Id. at 829. In *Gabrielle M.*, the student victim lost her excitement for school, resisted attending, lost her appetite, and began wetting her bed. *Id.* at 828. The concurrence appropriately points out that "[i]t is easy to imagine how such trauma might have interfered with her access to educational opportunities." *Id.*

141. 184 F.3d 20 (1st Cir. 1999).

142. *Id.* at 25-26.

143. *Id.* at 31.

144. *Id.* at 23.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 24.

rimand with no further action taken.¹⁵¹ Only two months later, Brown University renewed his contract for another year and awarded him a raise.¹⁵²

Wills's Title IX claim was unsuccessful because her claim "was of a single specific harassment incident that occurred *before* the reprimand and the later complaints (albeit one that caused continuing damages)."¹⁵³ While Wills attempted to show that Brown University was subjecting her and other students to sex discrimination through a general indifference to continuing sexual harassment, the First Circuit held that subsequent reports by other students of similar harassment by the same teacher were not relevant.¹⁵⁴ Rather, "absent a second physical assault by [the teacher] on Wills, or some form of direct harassment, Wills had no claim for sex discrimination against Brown occurring after [the first incident]."¹⁵⁵

Yet, as the dissent in *Wills* pointed out, the majority failed to appreciate "[t]he proposition that the presence of a harasser can rise to the level of hostile environment sex discrimination [which] finds support in the Title VII context."¹⁵⁶ The dissent encouraged the majority to consider adopting an objective standard of whether a student in the plaintiff's position "would find [the teacher's] mere presence at [the school] created a hostile environment."¹⁵⁷

While O'Connor in *Davis* cautioned against lower courts finding schools liable for a single instance of even sufficiently severe sexual harassment, O'Connor limited private damages to situations "having a systemic effect on educational programs or activities," not simply on one individual student.¹⁵⁸ As O'Connor states, "[e]ven the dissent suggests that Title IX liability may arise when a funding recipient remains indifferent to severe, gender-based mistreatment played out on a 'widespread level' among students."¹⁵⁹ There is room under *Davis* for the First Circuit to have determined that Brown's general attitude toward student complaints of sexual harassment by a particular teacher was enough to establish a severe permeation of sex discrimination throughout the program. By defeating an individual

151. *Id.*

152. *Id.*

153. *Id.* at 26-27.

154. *Id.*

155. *Id.* at 33 (Lipez, J., dissenting) (alteration in original) (describing the position taken by the majority of the court).

156. *Id.* at 38 (Lipez, J., dissenting) (alteration in original) (referring to *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991), where an employer's decision to allow one employee who had formerly harassed a female co-worker to transfer back into her office after a six-month "cooling off period," created a hostile working environment).

157. *Id.* (creating a "reasonable female student" standard by harkening to the "reasonable woman standard" used in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)).

158. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 653 (1999) (emphasis added).

159. *Id.*

student's claim on the basis that her single instance of individual sexual harassment was not severe enough to result in a systemic effect on that individual, harassers can harass indefinitely, so long as they never harass the same student more than once.

The result in *Wills* is important because it is a Title IX teacher-student sexual harassment claim that fails.¹⁶⁰ Though the First Circuit has yet to decide a Title IX peer sexual harassment case, the result will likely be similarly disheartening without facts as strong as those found in *Davis*. This hypothesis finds support in *Davis*, as O'Connor explained that:

The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.¹⁶¹

The only federal circuit courts to find peer sexual harassment severe and pervasive enough to satisfy the *Davis* standard are the Sixth and Tenth Circuits. Unlike the First and Seventh Circuits, these courts look to the facts of *Davis*, rather than the terminology, to define what conduct can be considered severe and pervasive. In the cases decided to date, these circuits considered the pattern of behavior, its tangible effects on the student victims, and then compared them with *Davis*.

In *Vance v. Spencer County Public School District*, a student, Alma McGowen, experienced physical and verbal sexual torment over the course of several years, including being stabbed in the hand, being held by several classmates while others tried to rip off her clothes, and being subjected to continuous verbal sexual comments, even after a detailed complaint had been filed with the school's Title IX coordinator.¹⁶² No investigation resulted, and school officials continued to use the same ineffective method of merely discussing the incidents with the perpetrators.¹⁶³ Typically, following these discussions, the sexual harassment of Alma by her classmates would escalate.¹⁶⁴

In *Murrell v. School District No. 1*, a developmentally and physically disabled student, Penelope Jones, was allegedly subjected to sustained sexual harassment, including sexual assault and battery,

160. 184 F.3d 20 (1st Cir. 1999).

161. 526 U.S. 629, 653 (1999).

162. 231 F.3d 253 (6th Cir. 2000).

163. *Id.* at 256. The court seems to imply the lack of reaction may have stemmed from one of the perpetrators being a school board member's son.

164. *Id.*

over the course of one month.¹⁶⁵ After being warned by the assaulting student's mother of his sexually aggressive tendencies and after teachers became aware that he was, in fact, engaging in sexually aggressive behavior toward Penelope, the school allowed the harasser to act as a janitor's assistant, granting him special access to unsupervised areas of the school.¹⁶⁶ It was in this capacity that he took Penelope to a secluded area and sexually assaulted her.¹⁶⁷ Due to the escalation of the harassment, Penelope became self-destructive and suicidal and entered a psychiatric hospital.¹⁶⁸ Upon her release and return to school, Penelope was back only one day when she was once again battered by her former harasser and humiliated by the other students who knew about the earlier sexual attacks.¹⁶⁹

Similar to *Davis*, *Vance* and *Murrell* had a pattern of escalating sexual behavior committed by the same peers each time that resulted in a serious tangible physical effect on the student victim. In *Davis*, LaShonda's grades had dropped and she had written a suicide note.¹⁷⁰ In *Vance*, Alma had to complete her studies at home after being diagnosed with depression.¹⁷¹ In *Murrell*, Penelope suffered self-destructive and suicidal tendencies necessitating entering a psychiatric hospital.¹⁷²

These cases are clearly severe, and neither the Sixth nor Tenth Circuits had difficulty casting them as such. However, it seems odd that Title IX would require harassment to reach this level of extremity.¹⁷³ Not only is the *Harris* purpose left by the wayside,¹⁷⁴ but also Title IX is likely to have little impact upon schools that think nothing this extreme could ever happen under their control. If Title IX has any purpose, it must be to eradicate sex discrimination in federally funded educational institutions, not merely to compensate student victims who have been driven over the brink. For this goal to be realized, the severe and pervasive standard must allow student victims to succeed in court without having to suffer a mental breakdown. This may be the only way to persuade schools to react after the very first complaint, before any more damage can be inflicted.

165. 186 F.3d 1238, 1243 (10th Cir. 1999) (construing the facts as true to review the lower court's granting of a motion to dismiss).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1244.

170. 526 U.S. 629, 634 (1999).

171. 231 F.3d 253, 257 (6th Cir. 2000).

172. 186 F.3d at 1244.

173. *Id.* at 1252 (Anderson, J. concurring) ("The allegations in this case are . . . egregious. . . . Whether less egregious facts will suffice in future cases remains to be seen.")

174. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (holding that employees should not be made to endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation).

B. Actual Notice

Unlike the Sixth and Tenth Circuits, where there was clear and ample actual notice to high-ranking school authorities, the question of actual notice to school officials defeated student claims in the Eighth and Ninth Circuits. Unlike other circuits, the Eighth and Ninth Circuits each focused on whether a district exercised substantial control over both the harasser and the context in which the harassment occurred as an ancillary prong simultaneously analyzed with the actual notice requirement. While most circuits have not formally added this fourth prong to the *Davis* test, O'Connor did suggest in *Davis* that "[d]eliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action."¹⁷⁵

The Ninth Circuit, in *Reese v. Jefferson School District No. 14J*, determined that the students suing for Title IX sexual harassment did not give actual notice to school officials who had the power to remedy the harassment.¹⁷⁶ The students, who had already graduated, sued the school for ongoing harassment during high school by a group of male peers.¹⁷⁷ However, the Ninth Circuit held that although there may have been evidence that a teacher witnessed conduct that may have put the school on notice, this was not sufficient to establish that actual notice had been given to an official with the power to correct the harassment.¹⁷⁸ Thus, the Ninth Circuit defined the actual notice requirement narrowly to include direct reporting to an official with the authority to effectuate change. While other circuits have questioned whether notice to a teacher, who either has limited control over the immediate conduct or can pass the information on to an official with authority, should satisfy the actual notice requirement, the Ninth Circuit appears to have determined that actual notice is both a formalistic and substantive standard.

The Eighth Circuit has taken an even more narrow view of the *Davis* actual notice requirement. In *P.H. v. School District of Kansas City*,¹⁷⁹ where a student sued for sex discrimination under Title IX for a two-year sexual relationship with a teacher, the Eighth Circuit defined actual notice as an actual notice-plus standard: "a school district must have had actual notice of a teacher's sexual harassment of a student and the school district must have made an official decision

175. 526 U.S. at 644.

176. 208 F.3d 736, 740-41 (9th Cir. 2000).

177. *Id.* at 738.

178. *Id.* at 740.

179. 265 F.3d 653 (8th Cir. 2001).

not to remedy the violation in order for liability to attach to the school district.”¹⁸⁰ While P.H. argued that the actual notice standard had not yet been clearly defined and suggested that teachers could in some situations have the necessary control to take corrective action, the Eighth Circuit held that no constructive notice is permissible under *Davis*; rather, the notice must be actual and to a school official.¹⁸¹

From the current case law guidance, to be successful under a Title IX peer sexual harassment claim there must be actual notice to an official with the power to address the complaint. However, because *Davis* never required schools to maintain sexual harassment policies and reporting procedures, it is questionable whether students and parents will understand either their rights or their obligations under *Davis*. Additionally, it is questionable whether a student’s individual complaint to a teacher, the most logical person to whom a student would report incidents, may establish the actual notice required to seek damages for continued sexual harassment. Rather, students, regardless of age, will have to recognize that their complaints must be made to a high-ranking official of the school. Thus far, this person has been the school principal in the cases that have been successful.¹⁸² The *Murrell* concurrence criticizes *Davis*, as it points to Justice Kennedy’s dissent, which stated: “[T]he majority says not one word about the type of school employee who must know about the harassment before it is actionable.”¹⁸³ If the student is more comfortable discussing such matters with a teacher or guidance counselor and is told the situation will be corrected, but that complaint never reaches the principal, it is possible that even if the sexual harassment continues, the school will bear no responsibility for its inaction. This appears to be the standard irrespective of whether the principal has made any effort to require faculty, when a complaint is brought to their attention, to instruct students of their rights and responsibilities and encourage the student to report the incident to the principal.

C. *Deliberate Indifference*

Davis defined deliberate indifference as the equivalent to not acting “clearly unreasonable,”¹⁸⁴ a phrase the courts have had to struggle to define. Under the two successful circuit level student peer sexual harassment Title IX claims, the phrase “deliberate indifference”

180. *Id.* at 661.

181. *Id.* at 663.

182. See *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1252 (10th Cir. 1999) (Anderson, J., concurring) (“*Davis* did not answer this question precisely, leaving liability limited in general terms to cases involving ‘an official decision by the [Title IX] recipient not to remedy the violation.’”) (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999)).

183. *Id.* (quoting *Davis*, 526 U.S. at 679 (Kennedy, J., dissenting)).

184. 526 U.S. at 630.

was defined as a two-step inquiry into 1) whether a school took *any* steps to address the complaint of sexual harassment;¹⁸⁵ and if so, 2) whether the steps taken were *not clearly unreasonable* steps to address the complaint of sexual harassment.¹⁸⁶

However, in at least two losing Title IX student actions, the First and Sixth circuits only looked to whether the school took *any* remedial steps, without considering the effectiveness or timing.¹⁸⁷ In *Wills v. Brown University*,¹⁸⁸ because the university took some action after Wills's complaint, and because a second incident did not take place, the First Circuit found that the university did take action when it issued the chemistry teacher a letter of reprimand and instructed him not to do it again or be fired.¹⁸⁹ However, the crux of Wills's argument was that the only reason this incident occurred was because the university had failed to respond to previous students' complaints about the same teacher. Had the university responded to the sexual harassment at that time, the teacher would not have continued to harass students.¹⁹⁰ Additionally, Wills argued that because other students were subsequently harassed, she should be permitted to admit evidence that even after her complaint, still the university acted with deliberate indifference to the continued sexual harassment.¹⁹¹ The First Circuit, however, held that the incidents following Wills's complaint were irrelevant as to *her* claim, and because no second incident occurred *to her*, the university's letter of reprimand must have worked to protect Wills.¹⁹²

The Sixth Circuit in *Soper v. Hoben*¹⁹³ also held for the school district when remedial steps were taken after the rape of a special education student by three of her classmates at school and on the bus.¹⁹⁴ The Sixth Circuit in the *Soper* majority opinion stated that:

[P]laintiffs have failed to present any evidence of deliberate indifference attributable to defendants. Once they did learn of the inci-

185. See *Murrell*, 186 F.3d at 1248 (stating that the school "had actual knowledge . . . from almost the moment it began to occur, and not only refused to remedy the harassment but actively participated in concealing it").

186. See *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000) ("Spencer continued to use the same ineffective methods to no acknowledged avail. Although 'talking to the offenders' produced no results, Spencer continued to employ this ineffective method. . . . However, the harassing conduct not only continued but also increased as a result.").

187. See, e.g., *Wills v. Brown Univ.*, 184 F.3d 20 (1st Cir. 1999); *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999).

188. 184 F.3d 20.

189. *Id.* at 23.

190. *Id.* at 26.

191. *Id.*

192. *Id.* at 26-27.

193. 195 F.3d 845 (6th Cir. 1999).

194. *Id.*

dents, they quickly and effectively corrected the situation. Defendants immediately contacted the proper authorities, investigated the incidents themselves, installed windows in the doors of the special education classroom, placed an aide in Harmala's classroom, and created student counseling sessions concerning how to function socially with the opposite sex.¹⁹⁵

However, as the *Soper* partial dissent points out, these are admirable steps for the school to take, but they can be considered immediately responsive only if the final rape is considered the lone reported incident.¹⁹⁶ Prior to the rape, however, there were known incidents reported to teachers: earlier sexual advances on the plaintiff by one of the boys, and the victim's mother's requests for the two students to never be left alone together unsupervised.¹⁹⁷ Although the victim's mother was assured care would be taken, "no steps were actually taken to minimize or stop the harassment. The specific request that Renee not be alone in the presence of Boy A was ignored. Arguably, these actions amounted to deliberate indifference to the concerns about harassment brought to Renee's teachers by her mother."¹⁹⁸

The two-step process used in *Murrell* and *Vance* is superior for defining the *Davis* deliberate indifference standard. Courts must ask whether any response was made following the initial complaint of sexual harassment, and whether that response was effective in deterring continued sexual harassment. Otherwise, useless remedial efforts, or efforts that come too late to protect a student from seriously debilitating acts of sexual harassment, become a loophole through which schools may escape Title IX liability.

V. CONCLUSION: LINGERING QUESTIONS AFTER DAVIS

Justice O'Connor's majority opinion in *Davis* sets forth a standard under which students have had difficulty winning their Title IX peer sexual harassment claims.¹⁹⁹ While reiterating the Court's rejection of the use of agency principles, O'Connor concluded that for federally funded educational institutions to be liable for peer sexual harassment, they must have actual notice of, and act deliberately indifferent to, sexual harassment that is so severe, pervasive and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.²⁰⁰ O'Connor stated that the notice requirement "cabins the range of

195. *Id.* at 855.

196. *Id.* at 857 (Moore, J., dissenting in part).

197. *Id.* at 848.

198. *Id.*

199. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

200. *Id.* at 650.

misconduct that the statute proscribes”²⁰¹ and that all of the required factors under this new standard “combine to limit a recipient’s damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.”²⁰²

While the symbolic significance of granting students the ability to be awarded monetary damages for being subjected to sexual harassment is great, the practical reality is that the federal circuit courts have been careful to construe O’Connor’s standard narrowly, constructing a high hurdle for students to overcome. This has led to the dismissal of many students’ Title IX claims even though the student has been subjected to what should amount to actionable sexual harassment.

Distillations of the *Davis* standard vary from circuit to circuit, and questions remain unanswered as to the form of the actual notice necessary, to whom the notice must be given, and the level of control required by the school official. Additionally, courts will continue to struggle with determining whether one incident, even if a severe sexually violent act, can ever be sufficient under *Davis*, and whether the severity requirement should be viewed through a reasonable student perspective, the eyes of the school official accepting the complaint, or an objective standard based on tangible injury to the harassed student. How extreme post-notice harassment must be to show that an educational institution has acted with deliberate indifference remains a disturbingly high threshold, and whether the *Davis* standard is dependent on educational level or age remains unclear.²⁰³

201. *Id.* at 644.

202. *Id.* at 645.

203. In *Gabriele M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817, 821-23 (7th Cir. 2003), the court stated that “[t]here is a threshold question, altogether reasonable and rational, of whether a five or six year old kindergartener can ever engage in conduct constituting ‘sexual harassment’ or ‘gender discrimination under Title IX. Common sense, at least, would reject any such extension of Title IX.” While the Seventh Circuit determined it need not answer this question and assumed *arguendo* that the conduct alleged was sexual harassment, the concurrence took issue with the majority’s comment. While *Davis* did acknowledge simple acts of teasing and name calling, and actionable ages of the children involved and the likelihood they were unaware of the sexual nature of their behavior, with whether the harassment had a “concrete, negative effect” on the victim’s education. The majority concluded that because the children “were” not engaging in knowingly sexual acts . . . (at a minimum) [this] detracts from the severity and offensiveness of their actions.” *Id.* The concurrence compellingly attacks the majority’s proposition on three grounds. First, “[i]t is the school district, not [the harasser], that is charged with liability . . . whatever the children’s comprehension may have been, the adults charged with their care and education had the ability to appreciate the inappropriate and potentially harmful nature of the conduct.” *Id.* at 826-27 (Rovner, J., concurring). This appreciation that a student is harassing another student is what triggers the school district’s liability, not the harasser’s intent or full awareness of the inappropriateness of the behavior. Second, while children may not fully appreciate the sexual nature of the conduct, “harassing conduct need not be motivated by sexual desire, nor must it be overtly

Until Congress defines the true nature of Title IX,²⁰⁴ *Davis* will continue to spawn inconsistency and subjectivity in the federal circuit courts and will continue to serve as more of an obstacle than a tool for student victims of sexual harassment in federally funded educational institutions.

sexual in nature, in order to support a claim of sex discrimination." *Id.* at 826 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)). Lastly, while the majority claimed the children lacked appreciation for the sexual conduct to be sufficiently severe, the court in *Gabrielle M.* clearly found them to be unwelcome and inappropriate, as seen through her manifestation of symptoms, including anxiety, bed-wetting, nightmares, and loss of appetite. *Id.* at 827.

204. See generally *Grove City Coll. v. Bell*, 465 U.S. 555, 573-74 (1984); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. §§ 1681-88 (2000)).