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Subverting Title IX, by Emily Suski here.

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Article

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Emily Suski†

INTRODUCTION

By the time elementary school teacher Gary Stroup put his "hand down [fourth grade student John Doe's] pants and fondled hi[m]," school administrators had been receiving reports for six years of Stroup's inappropriate behavior with children.[1] That behavior included kicking students' buttocks, pinching their "chests and posteriors," touching a student's thigh, and, as one young student wrote in a letter to the principal, touching his pubic, or as the boy wrote, "public" area.[2] After learning of several instances of improper touching, the school merely admonished Stroup in two letters and in person not to touch students in those ways.[3] Then, shortly after the principal received the student's letter stating that Stroup touched the student's "public areas," the principal departed her job without informing her successor of the student's letter or any of the concerns regarding Stroup.[4] Given the fecklessness of the school's responses to reports of Stroup's behavior, Stroup's subsequent abuse of John Doe hardly seems surprising.[5] Yet, when John Doe brought a Title IX claim against the school for failing to adequately address Stroup's behavior and

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1. McCoy v. Bd. of Educ., 515 F. App'x 387, 389–90 (6th Cir. 2013).
2. *Id.* at 389.
3. *Id.*
4. *Id.*
5. *Id.*

consequently putting Doe at risk for the abuse he ultimately suffered, the claim failed.[6] The court found that the school district had not transgressed Title IX's deliberate indifference standard and, therefore, did not violate Title IX.[7]

Title IX prohibits sex discrimination, including in the form of sexual harassment and assault, in the public schools.[8] It has powerful potential to require schools to protect students from sexual harassment and abuse.[9] Its potential, though, is largely unrealized in the K–12 public school context.[10] John Doe's case is not an outlier.[11]

This Article argues that the lower federal courts' evaluations of the deliberate indifference standard in K–12 public school students' Title IX claims drastically circumscribe the standard's meaning.[12] The courts consequently permit K–12 public schools to respond to student sexual harassment in virtually any way other than not at all, including in ways that put students at risk for and indirectly cause sexual harassment.[13] Through their crabbed evaluations of the deliberate indifference standard, the courts allow the K–12 public schools to mete out the very kinds of harms the standard can protect against.[14]

To determine whether a public school violated Title IX, the Supreme Court has said that courts must inquire into whether the school had actual notice of sexual harassment, and if so, acted with deliberate

6. *Id.* at 391.

7. *Id.*

8. 20 U.S.C. § 1681.

9. *See infra* Part II.A.

10. *See infra* Parts I.A–C.

11. *See infra* Parts I.A–C.

12. *See infra* Part I.D. This Article focuses on federal courts of appeals' decisions in no small part because their determinations generally bind subsequent decisions in the same circuit. *See, e.g.*, United States v. Rodríguez, 527 F.3d 221, 224 (1st Cir. 2008) (explaining that the "law of the circuit" doctrine is a corollary of the principle of stare decisis and that it preserves and protects the judiciary's commitment to finality, stability, and certainty in the law). This Article focuses on K–12 public school students' claims because the federal courts of appeals consistently apply the deliberate indifference standard in the vapid ways identified here in evaluating those students' claims but, counterintuitively, do not consistently do so in college and university students' Title IX claims. *See infra* notes 74, 231 and accompanying text. That discrepancy in the courts' treatment of Title IX claims merits deeper analysis but is beyond the scope of this Article.

13. *See infra* Part I.D. For simplicity, unless otherwise noted references to "sexual harassment" generally in this Article include sexual harassment of any sort, including sexual assaults.

14. *See infra* Part II.A.

indifference to it.[15] The deliberate indifference standard, therefore, sets the minimum bar for schools' responses to sexual harassment that they know has occurred.[16] Scholars have rightly critiqued this standard as enabling outcomes like those in John Doe's case.[17] What has thus far gone overlooked in those critiques, however, is how the lower courts' evaluations of the deliberate indifference standard do much of this enabling work in K–12 public school students' claims.[18] The deliberate indifference standard need not preclude recovery in cases like John Doe's.[19] To the contrary, federal courts could work within the standard's parameters to articulate Title IX's obligations forcefully and impose liability when public schools act as vacuously as in John Doe's case.[20] Instead, the lower courts' assessments send the message that Title IX contains almost no obligations that the K–12 public schools are bound to respect.[21] The deliberate indifference standard as outlined by the Supreme Court may be imperfect, but it can require far more of the public schools than the lower courts' evaluations of it do.[22]

Explaining the deliberate indifference standard, the Supreme Court said that "at a minimum" it precludes schools' responses to known sexual harassment that "'cause [students] to undergo' [additional] harassment or 'make them liable or vulnerable' to it."[23] The standard, therefore, can inquire into whether schools acted in

15. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292–93 (1998); Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 647 (1999).

16. *Gebser*, 524 U.S. at 292–93; *Davis*, 526 U.S. at 647.

17. *See, e.g.*, Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2091–92 (2016) ("The concept of deliberate indifference, which centers on conscious choice and is measured in unreasonableness of procedural steps rather than in substantive equality outcomes, produces an incentive for schools to go through the motions with an eye primarily to looking as if action is being taken, rather than to redressing the injury, stopping the abuse, or addressing the climate in the environment that produced and permitted it."); Emily Suski, *The School Civil Rights Vacuum*, 66 UCLA L. REV. 720, 740 (2019) (arguing both that the actual notice and deliberate indifference prongs of the Title IX standard for evaluation "create high thresholds for school Title IX liability, and students struggle to hold schools liable for peer sexual harassment" and that those liability limits are based on misconceptions).

18. *See* MacKinnon, *supra* note 17 and accompanying text; Suski, *supra* note 17 and accompanying text; *infra* Part II.B.2.

19. *See infra* Part II.A.

20. *See infra* Part II.A.

21. *See infra* Parts I.A–C.

22. *See infra* Part II.A.

23. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999).

response to student sexual harassment in ways that protected students from suffering further sexual harassment or even just the risk of, or vulnerability to, it.[24] Given that Title IX's purpose is to protect students from sexual harassment, this conceptualization of deliberate indifference makes sense.[25]

Yet, in evaluating the deliberate indifference standard in K–12 public school students' Title IX claims, the lower courts disregard this meaning.[26] Instead, they rely almost solely on the Supreme Court's further guidance that schools are not deliberately indifferent if they act in a manner that is "not clearly unreasonable."[27] Rather than evaluating the reasonableness, or more accurately the unreasonableness, of schools' responses to student sexual harassment by examining whether those responses indirectly caused or put students at risk for more sexual harassment, the lower courts take this "not clearly unreasonable" language entirely out of the context in which the Court offered it.[28] They evaluate schools' responses to student sexual harassment for clear unreasonableness alone, as they independently conceive of it.[29] They thus void the deliberate indifference standard of its complete content.[30] Consequently, K–12 public schools can evade Title IX liability by offering essentially any response at all to student sexual harassment and assault, since practically any response negates deliberate indifference.[31]

Although the courts allow K–12 public schools to respond to student sexual harassment in virtually any way other than not at all, these permitted responses can nevertheless be classified into one of three types.[32] First, the courts permit schools to intermittently not respond to reports of student sexual harassment.[33] Second, they allow schools to repeat failed or otherwise inadequate responses to sexual harassment.[34] Third, the courts sanction schools' responses that blame and punish the survivors of sexual harassment.[35]

24. *See infra* Part II.A.

25. Cannon v. Univ. of Chi., 441 U.S. 677 (1979); *see infra* note 60 and accompanying text.

26. *See infra* Part II.B.2.

27. *Davis*, 526 U.S. at 648.

28. *See infra* Part II.B.2.

29. *See infra* Part II.B.2.

30. *See infra* Part II.B.2.

31. *See infra* Parts I.A–C, II.B.2.

32. *See infra* Parts I.A–C.

33. *See infra* Part I.A.

34. *See infra* Part I.B.

35. *See infra* Part I.C.

These responses both put students at risk for and indirectly cause them to actually suffer more sexual harassment.[36] These responses effectively allow student sexual harassment to recur unchecked by the public schools.[37] Further, they work more direct harms. Schools' responses that punish and blame survivors directly cause students secondary traumas and institutional betrayals.[38] Secondary traumas and institutional betrayals occur when an individual or institutional response to sexual harassment and assault itself causes additional trauma to the survivors.[39] Such trauma can be as or more severe than the trauma of the harassment itself.[40] If the courts applied the deliberate indifference standard with fidelity to the Supreme Court's full explanation of it, they could proscribe schools' responses to student sexual harassment that both indirectly cause students to suffer further harassment and directly cause these related traumas.[41] Instead, through their evaluations of deliberate indifference, the courts effectively allow the K–12 schools to act as instruments of these harms.[42] The courts, thus, subvert Title IX in purpose and effect.

Were sexual harassment and assault in the public schools a rare occurrence, the courts' evaluations of deliberate indifference might be of relatively little moment. To the contrary, sexual harassment occurs by the thousands each year in the public schools.[43] From 2011 to 2015, at least 17,000 K–12 public school students reported experiencing sexual assault.[44] When the courts assess schools' responses to

36. *See infra* Part I.D.

37. *See infra* Part I.D.1.

38. *See infra* Part I.D.3.

39. *See* Lindsay M. Orchowski & Christine A. Gidycz, *To Whom Do College Women Confide Following Sexual Assault? A Prospective Study of Predictors of Sexual Assault Disclosure and Social Reactions*, 18 VIOLENCE AGAINST WOMEN 264, 266 (2012); *see also* Shana L. Maier, *Sexual Assault Nurse Examiners' Perceptions of the Revictimization of Rape Victims*, 27 J. INTERPERSONAL VIOLENCE 287, 289 (2012); Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH. 575, 578 (2014).

40. *See* Orchowski & Gidycz, *supra* note 39; *see also* Maier, *supra* note 39; Smith & Freyd, *supra* note 39.

41. *See infra* Part II.B.

42. *See infra* Parts I.D, II.B.2.

43. *See infra* notes 44–45 and accompanying text.

44. Likely the number is far higher than that as much of the sexual harassment and assault in school goes unreported. One study found that only nine percent of students in grades seven through twelve who experienced some form of sexual harassment in school reported it. CATHERINE HILL & HOLLY KEARL, AM. ASS'N OF UNIV. WOMEN (AAUW), CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2 (2011), https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf [https://perma.cc/SGD4-6MZB]. As further illustration of how the aggregate numbers of reported sexual assault underrepresent the problem, a recent journalistic

sexual harassment, therefore, they determine the degree of protection, or lack thereof, that schools must provide for the thousands of students who suffer it annually.[45] Through their evaluations of the deliberate indifference standard, the courts have determined that K–12 public school students have very little protection under Title IX.[46]

In making these arguments, this Article contributes to the scholarly literature on Title IX by offering an original taxonomy of K–12 public schools' responses to student sexual harassment that courts deem permissible.[47] Further, it is the first to point out how the lower courts' interpretations of the law go beyond just requiring very little to demonstrate how they legitimize schools' actions that both risk and actually cause students' sexual harassment as well as related trauma.[48] Although other scholars have critiqued the deliberate indifference standard on different bases[49] and a number have separately analyzed the ways laws impose secondary harms, none have explored

investigation found thousands of incidences of sexual harassment and assault in the Nashville Public Schools alone over a five-year period. Anita Wadhwani & Dave Boucher, *Special Report: Court Filings Reveal Thousands of Sexual Misconduct Cases in Nashville Schools*, TENNESSEAN (May 14, 2018), https://www.tennessean.com/story/news/2018/05/14/sexual-misconduct-nashville-schools-lawsuits/587588002 [https://perma.cc/5YPV-9TR3].

45. HILL & KEARL, *supra* note 44. More recent research finds similar results. The Let Her Learn Survey reports that twenty-one percent of girls in elementary and secondary schools report being "kissed or touched without consent." KAYLA PATRICK & NEENA CHAUDHRY, NAT'L WOMEN'S L. CTR., LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO HAVE SUFFERED HARASSMENT AND SEXUAL VIOLENCE 3 (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_HarassmentViolence.pdf [https://perma.cc/C9QD-MS9B]. The percentages are even higher when broken down by sexual orientation, race, and ethnicity. Thirty-eight percent of LGBTQ girls, twenty-three percent of Native American girls, and twenty-two percent of Black girls report such unwanted touching. *Id.*

46. *See infra* Parts I, II.B.2.

47. This Article builds upon my previous scholarship analyzing the ways that the courts' assessments of Title IX's actual notice standard create a decisional paradox for students and how the courts more generally create stringent liability limits for students' civil rights claims based on misconceptions. Emily Suski, *The Title IX Paradox*, 108 CALIF. L. REV. 1147 (2020); Suski, *supra* note 17, at 725 ("[T]he courts unjustifiably limit public school liability under these Fourteenth Amendment and Title IX claims for students' verbal, physical, and sexual harassment and abuse. This jurisprudence is limited due in large part to courts' misconceptions about both families and schools.").

48. *See infra* Parts I.D, II.B.2.

49. Catharine MacKinnon has leveled an exacting critique of the deliberate indifference standard on the basis of equality principles. MacKinnon, *supra* note 17, at 2091–92; *see also* Suski, *supra* note 17, at 754–56.

the way the lower courts undermine the meaning of that standard and permit schools to impose more harm on students.[50]

To resurrect the right to be free from sexual harassment under Title IX, this Article makes three recommendations. First, it proposes recasting the judicially devised deliberate indifference standard in Title IX claims such that it expressly calls for schools to affirmatively protect students from sexual harassment.[51] To effectuate this change, this Article offers a framework for evaluating this recast standard and factors for grappling with its analysis so lower courts can no longer disregard the complete meaning of the deliberate indifference standard. [52] Second, this Article develops a new legal presumption to prompt schools' considered responses to reports of sexual harassment and assault.[53] More specifically, this presumption would operate such that upon proof of a school's repeated use of failed responses, the school would be presumed deliberately indifferent.[54] The burden of proof would then shift to the public schools to demonstrate otherwise.[55] Third, this Article recommends related policy and doctrinal changes that would require schools to implement a written plan for preventing sexual harassment and ameliorating its effects.[56]

This Article proceeds in three parts. Part I offers a tripartite taxonomy of K–12 schools' vapid, but permissible, responses to student sexual harassment and assault. It also demonstrates how these types of responses contravene Title IX's purpose of protecting students

50. Scholars have discussed the impact and significance of secondary trauma and institutional betrayal on domestic violence survivors. *E.g.*, Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 449 (2019) ("Survivors suffer a range of harms when they find that their experiences are repeatedly discredited and invalidated. . . . First, survivors develop *a sense of powerlessness and futility* . . . . This is a feeling akin to how numerous survivors eventually come to feel in their abusive relationships; there is nothing they can say or do that will make the perpetrator of violence hear or really 'see' me."). Others have discussed these harms in the context of hate crimes. *E.g.*, Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 99 (1997) (noting secondary trauma can contribute to a hate crime victim "undergo[ing] a change in self-image, tending to focus on his own deficiencies, rather than on how dangerous the world is"). Some have also considered secondary trauma in the context of child abuse matters. *E.g.*, Leonard P. Edwards & Inger J. Sagatun, *Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 76 (1995).

51. *See infra* Part III.A.

52. *See infra* Part III.A.

53. *See infra* Part III.B.

54. *See infra* Part III.B.

55. *See infra* Part III.B.

56. *See infra* Part III.C.

from sexual harassment and assaults in school. First, they put students at risk for further sexual harassment such that they then lose educational benefits even if they never actually endure further sexual harassment. Second, they indirectly cause students to in fact suffer further sexual harassment and assaults. Third, schools' interventions that blame and punish survivors directly cause students to undergo secondary traumas as well as institutional betrayals. Part II explains that these consequences are far from the inevitable result of the necessary application of the deliberate indifference standard. To the contrary, the deliberate indifference standard as described by the Supreme Court comports with Title IX's protective purpose and can require that schools act to prevent the very harms that the lower courts now permit. This Part contends, however, that the lower courts eviscerate the deliberate indifference standard's protective potential in evaluating K–12 public school students' claims by cleaving the standard's full meaning from their assessments of it. Further, the courts' failure to require more of schools in response to student sexual harassment is particularly problematic for K–12 public school students. These students already have fewer structural protections and a higher likelihood of negative long-term outcomes from sexual harassment than do older students.[57] As a remedy, Part III proposes reworking the deliberate indifference standard and a framework for its evaluation as well as a new legal presumption and regulatory revisions. All of these recommended changes hold the promise of revitalizing Title IX's purpose and protections.

I. UNDERMINING TITLE IX'S CENTRAL PURPOSE: A TAXONOMY OF SCHOOLS' VAPID, YET PERMISSIBLE, RESPONSES TO STUDENT SEXUAL HARASSMENT

In a quartet of cases decided in the two decades following Title IX's enactment, the Supreme Court laid out the contours and meaning of the law's blunt mandate that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in publicly funded educational programs.[58] In the first of those cases, *Cannon v. University of Chicago*, the Court identified Title IX's purpose as protecting students from sex

57. *See infra* notes 308, 310 and accompanying text.

58. 20 U.S.C. § 1681; Davis *ex rel.* Lashonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292–93 (1998); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992); Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979).

discrimination in the public schools.[59] It said that Congress enacted Title IX because it "wanted to provide individual citizens effective protection against those [discriminatory] practices."[60] The Court also concluded that Title IX has an implied private right of action.[61] In *Franklin v. Gwinnett County Public School*, the Court then held that damages are available for Title IX's violation.[62]

In the final two of those cases, *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*, the Supreme Court determined that sexual harassment of students by peers as well as teachers constitutes sex discrimination, and public schools could be liable for both.[63] In both *Gebser* and *Davis*, the Court established deliberate indifference as the standard for assessing public schools' liability for such harassment and assault.[64] More precisely, the Court said that once schools have actual notice of sexual harassment or assault, they would be liable if they then act with deliberate

59. *Cannon*, 441 U.S. at 704.

60. *Id.* The Court drew on Title IX's legislative history to discern and distill these two purposes, noting this protective purpose was "repeatedly identified in the debates on the two statutes." *Id.*

61. *Id.* at 717. The Court reasoned:

> [The public remedy through the United States Department of Education] may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred. . . . [I]n that kind of situation it makes little sense to impose on an individual . . . the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate.

Id. at 704–05.

62. *Franklin*, 503 U.S. at 76.

63. *Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 643. Although Title IX prohibits sex discrimination by any school employee, for the sake for simplicity here all such harassment no matter whether it is carried out by a staff member, teacher, or administrator is referred to as "teacher," as distinguished from peer, sexual harassment. *See Gebser*, 524 U.S. at 292–93.

64. *Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 643. The Court drew on recent police failure to train and inadequate employee screening cases when it adopted deliberate indifference as the measure of schools' responses to student sexual harassment. *Gebser*, 524 U.S. at 291. In one of those cases, *City of Canton v. Harris*, the Court held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. 378, 388 (1989). In *Board of Commissioners v. Brown*, the Court said:

> Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute [the requisite] "deliberate indifference."

520 U.S. 397, 411 (1997).

indifference to it and the child is deprived of access to the educational benefits or opportunities at school.[65] The deliberate indifference standard, therefore, operates as the vehicle for assessing schools' responses to sexual harassment and realizing Title IX's protective purpose.[66]

Because the Supreme Court dispensed with *Gebser* on the basis of the actual notice prong of this test, it did more to explain deliberate indifference a year later in *Davis*.[67] In *Davis*, fifth grade student Lashonda Davis was subjected to a "prolonged pattern of sexual harassment" by a classmate.[68] Although the school knew about the harassment, it "made no effort whatsoever either to investigate or to put an end to the harassment."[69] The Court therefore found that the school acted with deliberate indifference.[70] The Court did not explicitly say, however, what types of responses other than the total non-response by the school in *Davis* would constitute deliberate indifference.[71] In the twenty years since the Court adopted the deliberate indifference standard in *Davis*, though, the lower courts have had occasion to consider this question.[72] They regularly find that any response by K–12 public schools to student sexual harassment other than none at all satisfies the deliberate indifference standard.[73]

Given that the lower courts tolerate virtually any response by K–12 public schools to sexual harassment and assault, those myriad

65. *Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 650 ("We thus conclude that [schools] are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.").

66. *See Davis*, 526 U.S. at 643.

67. *Gebser*, 524 U.S. at 291 ("Applying the framework to this case is fairly straightforward, as petitioners do not contend they can prevail under an actual notice standard."); *Davis*, 526 U.S. at 643–45.

68. *Davis*, 526 U.S. at 633.

69. *Id.* at 654.

70. *Id.*

71. *See id.*

72. *See infra* Parts I.A–C.

73. *See infra* Parts I.A–C; *infra* note 289 and accompanying text. In the early years after the Supreme Court decided *Gebser* and *Davis*, at least one scholar presciently recognized that the lower courts' Title IX jurisprudence could develop in this way such that only the most severe sexual harassment would be covered by its protections. Deborah L. Brake, *School Liability for Peer Sexual Harassment After* Davis*: Shifting from Intent to Causation in Discrimination Law*, 12 HASTINGS WOMEN'S L.J. 5, 27–28 (2001) ("There is a danger that courts will apply the deliberate indifference test so strictly as to exclude from liability all but those most egregious cases where schools take no action whatsoever in the face of the most severe forms of harassment.").

responses might seem immune to classification.[74] To the contrary, they can be classified into three general types.[75] First, the courts allow schools to intermittently not respond to student sexual harassment.[76] Second, they permit schools to repeatedly implement the same failed responses to it.[77] Third, they sanction schools' inverted responses that blame and punish survivors of sexual harassment.[78] Because in the courts' assessments all three types of responses suffice to show that the public schools have not acted with deliberate indifference, K–12 public school students' Title IX claims based on all three types of responses regularly fail.[79]

These claims fail even though each of these three types of responses has real, harmful consequences for students.[80] All three types put students at risk for more sexual harassment in ways that deny the students the educational benefits of school.[81] They also indirectly cause students to actually suffer further sexual harassment.[82] In addition, these inverted responses inflict direct harms on students.[83] They cause students to undergo secondary trauma and institutional

74. *See supra* Parts I.A–C. Courts have been at least somewhat more willing to find deliberate indifference in the college and university context. *See, e.g.*, Farmer v. Kan. State Univ., 918 F.3d 1094, 1103–04 (10th Cir. 2019); Williams v. Bd. of Regents, 477 F.3d 1282, 1296 (11th Cir. 2007) (stating that the University of Georgia's "failure to inform its student-athletes about the applicable sexual harassment policy and failure to supervise its student-athletes subjected Williams to this further harassment and caused Williams to be the victim of a conspiracy between Cole, Brandon Williams, and Thomas to sexually assault and rape her"). Courts are generally, though unjustifiably, reticent to hold K–12 schools liable for harms that happen to children, including sexual harassment and assault. *See* Suski, *supra* note 17 and accompanying text.

75. *See infra* Parts I.A–C.

76. *See infra* Part I.A.

77. *See infra* Part I.B.

78. *See infra* Part I.C.

79. *See infra* notes 90, 92, 98, 102–03, 131, 136, 140 and accompanying text. To be sure, the courts do find some Title IX claims at least make out a colorable claim of deliberate indifference. *See* Hill v. Cundiff, 797 F.3d 948 (11th Cir. 2015); *infra* note 223 and accompanying text. However, many more Title IX claims do not. *See* MacKinnon, *supra* note 17, at 2069 ("[A] close reading of all the Title IX cases decided in the federal courts in 2015 that substantially discuss the deliberate indifference standard, together with an assessment of the many brought in the years since *Gebser*, shows a vast disproportion between the number of cases that have lost on deliberate indifference and those that have won.").

80. *See infra* Part I.D.

81. *See, e.g.*, Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114 (10th Cir. 2008); *infra* notes 157, 164 and accompanying text.

82. *See infra* Parts I.D.1–2.

83. *See infra* Part I.D.3.

betrayals.[84] By allowing these three types of responses, therefore, the courts undermine Title IX's animating purpose of protecting students from sex discrimination, including sexual harassment, in the public schools.[85]

A. SCHOOLS' INTERMITTENT FAILURES TO RESPOND TO STUDENT SEXUAL HARASSMENT

Courts regularly allow schools to respond only intermittently to student sexual harassment. If a school does anything in response to student sexual harassment, even if only sporadically, the lower courts find that such occasional responses inoculate schools' other instances of not responding to sexual harassment.[86] The courts come to these conclusions both in cases where multiple students serially engage in months- and even years-long sexual harassment of another student and in cases in which an individual teacher or student repeatedly harasses one or more students.[87] In either set of circumstances, the courts find schools' intermittent failures to respond to student sexual harassment not deliberately indifferent.[88]

When multiple students engage in a veritable tag-team of harassment against another student over months or even years, some courts treat the harassment as one wide-ranging experience that is simply comprised of many instances.[89] By treating many individual instances of harassment as one whole, these courts use a school's only occasional response to sexual harassment as sufficient to address the entirety of it.[90] Other courts do the opposite and treat such harassment

84. *See infra* Part I.D.3.

85. *See infra* Part I.D.

86. *See infra* notes 90, 92, 98, 100, 102 and accompanying text.

87. *See infra* notes 90, 92, 98, 100, 102 and accompanying text.

88. *See infra* notes 90, 92, 98, 100, 102 and accompanying text.

89. In cases in which a student is repeatedly harassed by multiple individuals, the perpetrators are typically other students. *See, e.g.*, K.S. v. Nw. Indep. Sch. Dist., 689 F. App'x 780 (5th Cir. 2017); Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834 (6th Cir. 2016); Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114 (10th Cir. 2008). When one individual repeatedly harasses another or others, both teachers and students commit that repeated harassment. *See, e.g.*, Doe v. Bd. of Educ., 605 F. App'x 159 (4th Cir. 2015); McCoy v. Bd. of Educ., 515 F. App'x 387 (6th Cir. 2013); Doe *ex rel.* Doe v. Dall. Indep. Sch. Dist., 220 F.3d 380 (5th Cir. 2000).

90. The Fifth and Tenth Circuits, for example, stretched the concept of one-to-one correspondence in this way. *K.S.*, 689 F. App'x at 785; *Rost*, 511 F.3d 1114. In *K.S. v. Northwest Independent School District*, sixth grade student K.S. suffered sexual harassment by multiple students on the bus, in school hallways, and in locker rooms. 689 F. App'x at 781. The other students called him "names such as 'titty boy' and 'Teddy titty baby'" and "would touch and even twist his breasts." *Id.* Although the school sometimes

as merely a succession of separate and isolated incidents.[91] By treating broader patterns of harassment as only a series of atomized instances, those courts avoid concluding that schools' inconsistent responses should have more comprehensively addressed the larger pattern.[92] Under either treatment, the courts find that schools' only intermittent responses to student sexual harassment are not deliberately indifferent.[93]

The Sixth Circuit Court of Appeals, in a feat of doublethink, has treated repeated sexual harassment both as one over-arching experience and as a succession of disconnected incidents, all to the end of finding no deliberate indifference on the part of the school.[94] In *Stiles v. Grainger County*, multiple students repeatedly verbally harassed middle school student D.S. over the course of two school years.[95] Among other things, the students called him "bitch," "faggot," and

responded to the harassment "but not always," the Fifth Circuit found the school was not clearly unreasonable and therefore not deliberately indifferent because it took "some action" and "took relatively strong action to deal with the overall situation." *Id.* at 784–85. By relying on the school's "overall" response, therefore, the court demonstrates its treatment of the sexual harassment as a whole. *Id.* In *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*, seventh grade student K.C. was subjected to multiple instances of harassment by other students. 511 F.3d at 1117. Although the school turned the investigation over to law enforcement, when the prosecutor's office declined to prosecute, the school then did nothing at all at school itself to address the harassment. *Id.* at 1123. In finding the school's failure to do anything at that point not "deliberately indifferent," the Tenth Circuit noted that the school need not have engaged in any particular discipline of the students, but it did not analyze why no discipline or other response by the school to the sexual harassment sufficed. *Id.* It thereby arguably treated the law enforcement investigation as a sufficient response to the whole months-long pattern of harassment. *Id.*

91. *See infra* notes 92, 98 and accompanying text.

92. *See infra* note 102 and accompanying text. For example, in *Doe v. Board of Education*, student J.D. endured repeated harassment and assaults by student M.O. over two school years. 605 F. App'x at 161–62. At times, the school did nothing in response to reports of the harassment. *Id.* J.D. argued, among other things, that the school acted with deliberate indifference by failing to treat the harassment as "part of an escalating pattern." *Id.* at 167. The court rejected that argument and instead affirmed the lower court's finding that "each instance of sexual harassment was an isolated incident rather than part of an escalating pattern." *Id.* Yet the court neither explained why those many individual incidents should not have been treated as part of a broader pattern nor addressed why the failures to respond to some such individual incidents did not constitute a deliberately indifferent response. *See id.*

93. *See supra* notes 90, 92 and accompanying text; *infra* notes 98, 102 and accompanying text.

94. Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834 (6th Cir. 2016). *Stiles* represented a repeat of this feat. The Sixth Circuit first accomplished such doublethink three years earlier in *McCoy v. Board of Education*. 515 F. App'x 387 (6th Cir. 2013).

95. 819 F.3d at 841–45.

"queer" almost every day and physically harassed him, including by shoving and punching him.[96] All told, at least eleven students harassed D.S. during his seventh and eighth grade years in school.[97] Sometimes the school responded to reports of the harassment, but other times it did nothing at all.[98]

In evaluating these non-responses to D.S.'s extensive harassment, the Sixth Circuit justified its conclusion that the school was not deliberately indifferent to D.S.'s sexual harassment by noting that the school did investigate some of the sexual harassment and discipline some of the students involved.[99] Effectively, then, the response to some harassment served as a response to what the court called D.S.'s "overall" experience of harassment.[100] While that might consequently suggest that a broader response would be required to address the broader nature of the harassment, the court avoided such a conclusion by also treating the harassment as a series of isolated incidents.[101] Noting that "the record in this case reveals almost no repeat perpetrators, nor any connection or conspiracy among the reported perpetrators," it found that the school needed not have undertaken any comprehensive response to the harassment to demonstrate it did not act in a deliberately indifferent way.[102]

96. *Id.* at 841–42.

97. *Id.* at 841–45.

98. *Id.* at 841. The school did nothing in response to some of student C.B.'s harassment of D.S. even though he harassed D.S. at least three times in the space of a few months. *Id.* The school also did not discipline or otherwise address student S.P.'s harassment of D.S. because the school believed that S.P. "was truly remorseful." *Id.* at 842. In addition, the school did not implement a response to student B.M.'s harassment of D.S. because the principal "assumed . . . mom handled the situation." *Id.* at 845.

99. *Id.* at 850.

100. *Id.* (positively evaluating the school's "overall response[s]" as not deliberately indifferent by not distinguishing between multiple incidents over two years).

101. *Id.*

102. *Id.* The court also said the school's inconsistent, partial responses were sufficient because they involved "one-and-a-half years of similar, but not rote, responses." *Id.* at 851. The court's reasoning therefore suggests that only by meting out the exact same discipline in both kind and length repeatedly can schools potentially demonstrate deliberate indifference. *See id.* Further, while that's an unlikely set of facts for a student to prove, even if a student could make such a showing, the court did not suggest any comprehensive response to the overall harassment might even then be required. *See id.*

B. SCHOOLS' REPEATED USE OF FAILED OR OTHERWISE INADEQUATE RESPONSES TO STUDENT SEXUAL HARASSMENT

Beyond determining whether schools have at least occasionally addressed a student's sexual harassment, the courts generally do not otherwise evaluate the quality or substance of a school's response to student sexual harassment.[103] They essentially inquire only into whether a response occurred, not whether the response was in any way designed to address or prevent the harassment.[104] Consequently,

103. Although in *Stiles* the Sixth Circuit insisted it was evaluating the "strength of the school's remedial response," it really did nothing more than count responses. *Id.* at 850. It merely catalogued a list of the school's responses as consisting of "multiple investigations, several in-school suspensions, and class scheduling that separated DS from his harassers" to find no clearly unreasonable and therefore deliberately indifferent actions or inactions. *Id.* In doing so it also sought to distinguish two previous Sixth Circuit cases, *Vance v. Spencer County Public School District* and *Patterson v. Hudson Area Schools*, which stand out as exceptions to the general approach courts take of not evaluating the substance of the school's responses. 231 F.3d 253 (6th Cir. 2000); 551 F.3d 438 (6th Cir. 2009). In both *Vance* and *Patterson*, the Sixth Circuit found the school's repeated ineffective responses to student sexual harassment constituted deliberate indifference. 231 F.3d at 261–62; 551 F.3d at 448–49. With its subsequent decisions in *McCoy* and *Stiles*, however, the Sixth Circuit has taken a jurisprudential turn away from such evaluations. *See Stiles*, 819 F.3d 834; *supra* note 102 (explaining the *Stiles* court's approach); McCoy v. Bd. of Educ., 515 F. App'x 387 (6th Cir. 2013); *infra* note 130 and accompanying text (explaining the *McCoy* court's approach). To make this turn, the *Stiles* court distinguished *Vance* and *Patterson* by noting, without any apparent sense of irony, that D.S.'s school "never abandoned an effective solution." *Stiles*, 819 F.3d at 850. The school, however, never implemented an effective solution that it could abandon, as the court noted when it said, "We acknowledge that the school's remedial measures did not eliminate DS's problems with other students." *Id.* at 849.

104. Although courts are more commonly called to consider whether schools' repetition of failed responses to student sexual harassment constitute deliberate indifference, they also have evaluated whether other kinds of poorly designed responses violate the standard. For example, in *Gabrielle M. v. Park Forest-Chicago Heights*, the Seventh Circuit found that the school's incompletely implemented response to kindergartener Gabrielle M.'s sexual harassment and assaults by student Jason was not clearly unreasonable and therefore not deliberately indifferent. 315 F.3d 817, 819–20, 824 (7th Cir. 2003). Although the school determined that it should separate the students, including by putting them in different kindergarten classes, it did not always or fully separate the children. *Id.* at 819–20. For example, the school permitted Gabrielle and Jason to have lunch and recess together, where they came into contact and Gabrielle said that Jason "wanted to play with me funny ways." *Id.* at 820. The school did instruct a supervisor to "ensure that the two students did not interact at recess," but they nonetheless came in contact given that they were not fully separated. *Id.* at 824. Further, that they came into contact hardly should have surprised the school because at least two kindergarten classes played at the same time at recess. *Id.* at 820. With so many children to supervise, it would have been a challenge for one recess monitor to watch all of those children and ensure Jason did not come into contact with Gabrielle. *See id.* Yet the court found this partially implemented response to Gabrielle's abuse not deliberately indifferent. *Id.* at 824.

courts regularly conclude that when schools repeat failed responses or implement responses otherwise inadequate to address the sexual harassment, those responses satisfy the deliberate indifference standard.[105]

For example, in *Porto v. Town of Tewksbury*, the First Circuit found a school was not deliberately indifferent despite its repeated use of the same failed response to the harassment of eight-year-old student S.C.[106] S.C., who had generalized developmental delays, suffered six years of sexual harassment and assault by student R.C.[107] R.C.'s harassment of S.C. began in S.C.'s first grade year in school and lasted through seventh grade, when S.C. left the school and tragically attempted suicide.[108] S.C.'s mother reported the problems with R.C. as she learned of them, including her report in S.C.'s fifth grade year that R.C. had oral sex with S.C. on the school bus.[109] In response to all of this harassment, the school repeatedly imposed limited physical separations on R.C. and S.C. that failed to stop the ongoing pattern of harassment.[110] Instead, the school's interventions allowed the harassment to reoccur at other times and in other locations in school.[111] Then, in the fall of S.C.'s seventh grade year, despite this six-year long history of R.C. sexually harassing S.C., the school put R.C. and S.C. in the same classroom.[112] With such easy access to S.C., R.C. again inappropriately touched S.C. multiple times in the month of October alone.[113] To address R.C.'s behavior, the school once again physically separated the boys but only very partially.[114] School staff moved the boys' classroom seats away from each other but kept the boys in the same classroom.[115] Then, just two months later, R.C. committed his

105. *See supra* notes 103–04 and accompanying text; *infra* note 129 and accompanying text.

106. 488 F.3d 67, 69 (1st Cir. 2007).

107. *Id.* at 70.

108. *Id.* at 70, 72.

109. *Id.* at 70.

110. *Id.* at 70–72.

111. *Id.* For example, in response to the report that the boys had oral sex on the bus, the school separated the boys by putting them on different buses but then did not separate them elsewhere or during the following school year. *Id.* at 70. R.C. then continued to sexually harass S.C. the following year by inappropriately touching him. *Id.* In response to this continued harassment, the school again physically separated R.C. from S.C., but the harassment still continued. *Id.*

112. *Id.* at 70–71.

113. *Id.*

114. *Id.* at 71.

115. *Id.*

final and one of his most severe assaults on S.C.[116] On that morning both boys obtained permission to leave their classroom in short succession of each other.[117] When neither boy returned after a few minutes, a school staff member went to the bathroom to look for the boys.[118] There he discovered that R.C. had sexually assaulted S.C.[119] At that point, S.C. brought a Title IX claim against the school based on this long pattern of sexual harassment and the school's insistent use of failed responses to it.[120]

However, S.C.'s Title IX claim failed.[121] It failed because the First Circuit rejected S.C.'s assertion "that the school system . . . should have done more" than repeatedly use limited physical separations to address R.C.'s recurring abuse of S.C.[122] Almost inexplicably, given R.C.'s multi-year history of sexually harassing S.C., the court found that the school had a basis for believing the partial physical separations of the boys had stopped the harassment.[123] It determined that because weeks and sometimes months went by without reports of more sexual harassment, the school had cause to conclude that its interventions had worked.[124] With this reasoning, however, the court ignored that those periods without reported harassment were nothing more than temporary breaks in the years-long pattern of ongoing harassment.[125] That is, at some point during this six-year period, it arguably should have become apparent to the school that the limited physical separations were insufficient to address the persistently recurring harassment.[126] By disregarding the full, ongoing nature of the harassment, though, the court avoided evaluating the inadequacy of the school's repeated partial separation interventions in this way.[127] Declining to measure the school's response against the complete pattern of

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* Although the school asserted as a defense that S.C. consented to these assaults, the school principal acknowledged that S.C. lacked capacity to consent because his disability left S.C. unable to distinguish right from wrong in the context of sexual activity. *See* Plaintiff's Memoranda of Law Regarding Title II of the Americans with Disabilities Act, Porto v. Town of Tewksbury, No. 04-CV10003, 2005 WL 3173614 (W.D. Mass. Oct. 11, 2005).

120. *Porto*, 488 F.3d at 71.

121. *Id.* at 76.

122. *Id.* at 73–74.

123. *Id.* at 73.

124. *Id.* at 73–74.

125. *Id.* at 71.

126. *Id.*

127. *Id.* at 73–74.

harassment, the court did not consider whether the school should have attempted alternative interventions to at least try to better address the harassment.[128] By not making such an evaluation, the court effectively reduced the assessment of deliberate indifference to a matter of merely counting whether any response occurred.[129] With such reductive evaluations, the First Circuit, along with other courts, finds schools' repeated use of failed responses to student sexual harassment not deliberately indifferent.[130]

C. SCHOOLS' INVERTED RESPONSES TO STUDENT SEXUAL HARASSMENT THAT BLAME AND PUNISH SURVIVORS

Finally, courts have also considered schools' inverted responses to student sexual harassment.[131] Instead of being designed to address the behavior of the wrongdoer, this response type blames and punishes the survivors.[132] In evaluating these responses to student sexual

128. *See id.*

129. *See id.*

130. In *McCoy v. Board of Education*, the Sixth Circuit considered whether a school's repeated use of reprimands—both verbal and written—in response to multiple reports that teacher Gary Stroup had inappropriately touched elementary school students demonstrated deliberate indifference. 515 F. App'x 387, 389 (6th Cir. 2013). When the school received a written report from a student that Stroup had molested him, the principal discussed the matter with Stroup, just as she had done in response to previous reports of his inappropriate touching of students, but she did nothing else. *Id.* When Stroup then molested John Doe, who brought a Title IX claim based on his assault, however, the court did not grapple with, and instead ignored, evidence of the school's prior use of failed responses to address Stroup's abuse. *Id.* at 391. The court said that because the school had knowledge of only "several instances of physical contact that were ostensibly non-sexual but could have served as potential indicia for sexual malfeasance," its letters and verbal admonishments satisfied the deliberate indifference standard. *Id.* at 392. The court did not explain, though, how a student's letter saying that Stroup had touched him in his "'public' areas" did not require more of a response under this rationale. *Id.* at 389. By disregarding this evidence, the court failed to engage in any substantive assessment of the school's responses, including a determination of whether the school's repetition of those failed responses was clearly unreasonable and therefore deliberately indifferent. *See id.* It therefore, like the First Circuit in *Porto v. Town of Tewksbury*, 488 F.3d 67 (1st Cir. 2007), turned the evaluation of deliberate indifference into a matter of simply counting whether a response occurred. The *McCoy* court consequently concluded that because the school had responded in some way to Stroup's prior abuse, it did not act with deliberate indifference and so was not responsible for the assault John Doe suffered. *See McCoy*, 515 F. App'x at 392.

131. *See infra* notes 135, 139 and accompanying text.

132. *See infra* notes 135, 139 and accompanying text.

harassment, the courts regularly find they do not establish deliberate indifference.[133]

Saying that the courts evaluate schools' survivor-blaming responses, though, arguably overstates the matter.[134] More accurately, they use those survivor-blaming responses to justify their conclusions that schools did not act with deliberate indifference.[135] For example, in *K.S. v. Northwest Independent School District*, after middle school student K.S. suffered repeated instances of harassment by his peers, he finally physically pushed back one day when "three students verbally harassed and pushed" him in the hallway.[136] Assessing K.S.'s Title IX claim, the court concluded that the school's punishment of K.S. did not demonstrate deliberate indifference because K.S.'s suspension resulted from "his own misconduct."[137] Disregarding the harassment by others that prompted K.S.'s actions and instead blaming K.S. for his own self-defensive response, the court justified its finding that the school's response to his sexual harassment was not deliberately indifferent.[138]

Schools not only blame survivors of sexual harassment, but they also punish them for it.[139] In *K.F. v. Monroe Woodbury Central School*

133. *See infra* notes 135, 139 and accompanying text.

134. *See infra* notes 135, 139 and accompanying text.

135. When the Sixth Circuit assessed middle school student D.S.'s Title IX claim in *Stiles v. Grainger County*, the court not only found the school's occasional non-responses not deliberately indifferent, but it also found its punishment and blame of D.S. not deliberately indifferent. 819 F.3d 834, 852–53 (6th Cir. 2016). The court described how in the middle of the two school years of harassment endured, a police official working with the school on the harassment "blam[ed] D.S. for the incidents, stating that D.S. could defend himself, and recommending that D.S. learn martial arts." *Id.* at 843. The official also minimized D.S.'s harassment, "warn[ing] D.S. not to . . . report [other students] for trivial teasing." *Id.* Although this response both focused on D.S. and failed to address the perpetrators of the harassment, the court minimized these problems. *See id.* It acknowledged that the school "made rude or critical comments [and] offered unhelpful suggestions," but it then concluded that such responses were irrelevant and not clearly unreasonable. *Id.* at 849. It snidely explained that the deliberate indifference standard "does not require that [a defendant] . . . have a pleasant demeanor." *Id.* at 853 (alterations in original) (quoting Williams v. Port Huron Sch. Dist., 455 F. App'x 612, 620 (6th Cir. 2012)).

136. 689 F. App'x 780, 782 (5th Cir. 2017).

137. *Id.* at 785.

138. *Id.*

139. In *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*, the school resource officer questioned K.C., a student with a brain injury, at the request of the school about K.C.'s report of sexual harassment. 511 F.3d 1114, 1117 (10th Cir. 2008). The questioning lasted between one to two hours. *Id.* at 1118. The length of that questioning, particularly coupled with the nature of K.C.'s disability, arguably operates as a form of punishment. *See infra* Parts II.B.1–2. Nevertheless, without specifically

District, for instance, middle school student C.F. suffered "intense and prolonged teasing—indeed 'bullying'—and on two occasions was sexually assaulted" by other students.[140] In response, the school offered to send C.F. to an out-of-district program for "students with serious disciplinary records."[141] In other words, the school proposed to send C.F. to a disciplinary school placement, effectively punishing her for the sexual harassment and assaults she suffered.[142] Yet, because the school offered "alternatives to CF attending high school," the court found that the school did not act with deliberate indifference.[143] Ignoring that these types of interventions amount to a form of punishment, courts, like the Fifth Circuit in *K.F.*, permit schools to punish students in response to sexual harassment without transgressing the deliberate indifference standard.[144]

D. TITLE IX'S LOSS OF PURPOSE AND EFFECT

When schools fail to respond even intermittently to student sexual harassment, repeat failed responses to it, or punish and blame the survivors, they do the opposite of fulfilling Title IX's purpose of protecting students.[145] Instead, these three types of responses put students at risk for further sexual harassment such that they lose educational benefits even when the risk does not culminate in further harassment.[146] In addition, these responses indirectly cause students

addressing this interview, the court insisted that nothing the school did in response to K.C.'s harassment rose to the level of deliberate indifference. *Rost*, 511 F.3d at 1123–24. In *Doe v. Board of Education*, in response to some of the sexual harassment and abuse that fourth grade student J.D. endured by student M.O., the school provided J.D. with a bathroom escort. 605 F. App'x 159, 163 (4th Cir. 2015). The bathroom escort, though, caused students to make "'horrible jokes' about [J.D.'s] use of the escort." *Id.* Effectively, then, the school implemented a form of punishment in response to J.D.'s harassment and abuse because the intervention resulted in further suffering for J.D., but the court found the school did not act with deliberate indifference. *See id.* Similarly, in *Doe v. Dallas Independent School District*, the school responded to the report that teacher John McGrew molested third grade student J.H. by meting out a kind of punishment to J.H. when it interrogated him in the presence of McGrew, including by asking him to "repeat his accusation to McGrew." 220 F.3d 380, 387 (5th Cir. 2000). The court, though, did not find these responses deliberately indifferent. *Id.*

140. 531 F. App'x 132, 133 (2d Cir. 2013).

141. *Id.*

142. *See id.*

143. *Id.* at 134.

144. *See infra* Part I.D.1.

145. *See* Cannon v. Univ. of Chi., 441 U.S. 677 (1979); *supra* note 60 and accompanying text.

146. *See infra* Part I.D.1.

to actually suffer more sexual harassment.[147] Further, schools' inverted responses directly cause students to suffer secondary trauma and institutional betrayals.[148] Far from holding schools to account for failing to fulfill Title IX's purpose of protecting students from sexual harassment, the courts thus permit schools to act as enablers of student sexual harassment.[149] They transform the deliberate indifference standard into a vehicle for allowing schools to respond in ways that cause students more harm.

1. Allowing Schools To Put Students at Risk for Additional Sexual Harassment

When schools intermittently respond to student sexual harassment with inaction, repeat failed or otherwise inadequate responses to it, and blame and punish survivors, they put students at risk of suffering further sexual harassment. They do so by signaling that the harassment can continue because the schools will not act to end it.[150] By intermittently not responding to student harassment, schools do little or nothing to stop it and therefore risk its recurrence.[151] By repeatedly implementing failed responses to sexual harassment, the schools also do little more than nothing to end it and so put students at risk of its recurrence.[152] By punishing and blaming the survivors of sexual harassment and assault, schools focus their behavioral concerns on the survivor and not the perpetrator.[153] They therefore send the message that the perpetrator's behavior is not the problem and so can continue.[154]

When schools put students at risk of further sexual harassment in these ways, it does not, of course, mean that they will suffer more sexual harassment.[155] That schools fail to protect against this risk, though, means that students are left to the mercy of the perpetrator or sheer luck to avoid it. Even if students only suffer the risk of further sexual harassment but no more actual harassment, the risk can result in their loss of educational benefits at school, not to mention likely

147. *See infra* Part I.D.2.
148. *See infra* Part I.D.3.
149. *See infra* Parts I.D.1–3.
150. *See supra* Part I.A.
151. *See supra* Part I.A.
152. *See supra* Part I.B.
153. *See supra* Part I.C.
154. *See supra* Part I.C.
155. *See* Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1117 (10th Cir. 2008); *infra* notes 157, 164 and accompanying text.

generalized trauma, fear, and the possibility of negative mental health consequences.[156] Such was the case in *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*, where the Tenth Circuit denied the claim of middle school student K.C., a student with a brain injury, who was repeatedly sexually harassed and assaulted by fellow students.[157] Among other things, the other students called her names, "continuously pestered her for oral sex," and "threatened to distribute naked photographs of her."[158] In response, the school did nothing in the school setting to address the harassment.[159] It only turned the investigation over to law enforcement, which declined to prosecute the boys who harassed K.C., in part out of concern for the toll it would take on K.C.[160] Even then, though, the school still did nothing at all to address the effects of K.C.'s harassment or the behavior of the boys who harassed and assaulted her.[161]

The school's failure to do anything to address the harassment in the school setting put K.C. at risk of suffering further sexual harassment.[162] Its lack of a response to the harassment in school signaled that such harassment could continue unabated by the school.[163] Precisely because of this risk, K.C. refused to return to school and so for that reason did not suffer any further sexual harassment.[164] She did, though, consequently suffer the loss of educational benefits at school.[165] Evidence showed

> that the school's non-response to the boys' sexual harassment is what kept [K.C. from returning to school]. K.C.'s psychiatrist advised [K.C.'s mother] Ms. Rost that it was important "to help [K.C.] find a safer environment, especially considering that if she goes back to the exact same high school, she will be around [the boys]."[166]

156. *See Rost*, 511 F.3d at 1117 (noting that one survivor feared to attend class due to sexual harassment); Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 634 (1999) (noting a survivor's drop in grades due to sexual harassment); *infra* notes 157, 164 and accompanying text.

157. 511 F.3d at 1117.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *See infra* note 164 and accompanying text.

163. *See infra* note 164 and accompanying text.

164. 511 F.3d at 1117. When asked why she had refused to send K.C. back to school, Ms. Rost testified that she was relying on the psychiatrist's recommendation not to return. *Id.* at 1131 (McConnell, J., concurring in part).

165. *Id.* at 1117 (majority opinion).

166. *Id.* at 1131 (McConnell, J., concurring in part). Although K.C. ultimately moved out of state with her family, "[t]he record suggests that it was the undeterred presence of the boys that kept K.C. from returning to school." *Id.*

Yet, even though the school put K.C. at such risk and K.C. consequently lost the benefit of her education, the Tenth Circuit found the school had not acted with deliberate indifference.[167]

2. Allowing Schools To Indirectly Cause Students To Suffer Additional Sexual Harassment

Schools do not just put students at risk for sexual harassment with these vapid responses to student sexual harassment; they also indirectly cause students to actually suffer additional sexual harassment. When schools only occasionally respond or repeat failed responses to student sexual harassment, they indirectly cause students to suffer further harassment by effectively allowing it to continue unhindered by the school.[168] The result is that students then do suffer more, sometimes escalating, sexual harassment.[169] First, they suffer additional harassment by their original perpetrators.[170] Second, they suffer harassment by others.[171] The harassment can go on for months and even years.[172] Once it goes on without any or any adequate response from the schools, the harassment also intensifies in severity.[173] Given that schools' non-responses and repeated use of failed responses can give the perpetrator a veritable green light to continue

167. *Id.* at 1117 (majority opinion).

168. *See supra* Part I.A.

169. *See supra* notes 90, 92, 98, 100, 102 and accompanying text.

170. *See, e.g.*, Gabrielle M. v. Park Forest-Chi. Heights Sch. Dist. 163, 315 F.3d 817, 818–21 (7th Cir. 2003); *supra* note 104 and accompanying text; Porto v. Town of Tewksbury, 488 F.3d 67, 70 (1st Cir. 2007); *supra* note 111 and accompanying text; Doe v. Bd. of Educ., 605 F. App'x 159, 161–62 (4th Cir. 2015); *supra* note 92 and accompanying text.

171. *See, e.g.*, K.S. v. Nw. Indep. Sch. Dist., 689 F. App'x 780, 781–83 (5th Cir. 2017); Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 840–45 (6th Cir. 2016); *infra* note 174 and accompanying text. Such unchecked harassment can, for example, inspire other students to join the harassment or more generally permit a climate where harassment is tolerated and so occurs more often and more severely. *See infra* note 174 and accompanying text.

172. In *McCoy v. Board of Education*, for example, teacher Gary Stroup molested multiple students over a period of six years. 515 F. App'x 387, 389 (6th Cir. 2013). In *Porto v. Town of Tewksbury*, student R.C. repeatedly harassed and assaulted student S.C. for approximately six years. 488 F.3d at 70–71.

173. For example, in *Doe v. Board of Education*, student J.D. suffered three years of sexual harassment by M.O. 605 F. App'x at 162–63. The school's failures to respond or poorly designed responses left J.D. exposed to more assault that culminated in a sexual assault in the bathroom. *Id.* In *Porto v. Town of Tewksbury*, S.C.'s years of harassing R.C. led to both an assault on the bus and later in the school bathroom. 488 F.3d at 70–71.

the harassment, these outcomes seem not just likely but almost inevitable.[174]

For example, in *McCoy v. Board of Education*, when the Columbus City Schools learned that Gary Stroup had inappropriately touched elementary school students, a school district official warned Stroup by letter not to touch students in those ways even though a prior such letter had not stopped that same behavior.[175] Then, when principal Dora Kunz later received a letter from a student stating that teacher Gary Stroup had touched his "public" areas, Kunz left her position without informing her successor, Theresa Tracy, of the problems.[176] With nothing but these minimal responses to constrain him, Stroup unsurprisingly went on to molest student John Doe.[177]

It was not the school's first letter to Stroup, as weak a response as it arguably was, that indirectly caused Stroup's later sexual abuse of John Doe.[178] By continuing to use that same response even though it had not stopped Stroup's behavior, though, the school effectively allowed Stroup's behavior to continue and so indirectly caused it.[179] Knowingly implementing a response that does not work to address sexual harassment does little, if anything, more to stop it than does a total failure to respond at all.[180] It essentially allows the harassment to happen again.[181] Similarly, because Principal Kunz did not inform Principal Tracy of the problems with Stroup, this non-response to

174. *See supra* note 173 and accompanying text. In *Stiles*, when middle school student D.S. suffered three years of repeated harassment by at least eleven different students over the course of those years, and the school did nothing in response, predictably, those failures did not stem the tide of harassment, and D.S. continued to suffer harassment by other students. 819 F.3d at 841–45. The school's failures to respond at times, therefore, not only exposed D.S. to this additional harassment, but it paved the way, or indirectly caused, the pervasive harassment he then did suffer. *Id.* In *K.S. v. Northwest Independent School District*, by not always disciplining students who harassed sixth grade student K.S., the school sent the message that such behavior could continue without certain repercussion, and it did continue. 689 F. App'x at 781. The harassment began with name-calling and escalated to slapping and pushing, sometimes by multiple students at one time. *Id.* at 781–82. Similarly, kindergartener Gabrielle M.'s elementary school effectively allowed student Jason to continue harassing Gabrielle M. by its decision to separate the children but then only actually separating them sometimes. *Gabrielle M.*, 315 F.3d at 819–20. Allowed access to Gabrielle in this way, Jason could and did continue to sexually assault her. *Id.* at 820.

175. *McCoy*, 515 F. App'x at 389.

176. *Id.*

177. *Id.*

178. *Id.*; *see infra* note 370 and accompanying text.

179. *See McCoy*, 515 F. App'x at 389.

180. *See infra* note 348 and accompanying text.

181. *See infra* note 348 and accompanying text.

Stroup's assaults left Tracy unable to address or prevent them.[182] Kunz's failure to apprise Tracy of Stroup's abusive behavior permitted Stroup to continue that behavior without even the potential to be checked by Tracy or anyone else.[183] Kunz's failure, therefore, also indirectly caused John Doe's assault.[184] The *McCoy* court, however, sanctioned the school's actions that indirectly caused John Doe's harm by finding the school's responses to Stroup's reported abuse to be not deliberately indifferent.[185] It thus allowed the school to indirectly cause Doe's further sexual harassment.[186]

3. Allowing Schools To Directly Cause Students To Suffer Secondary Harms and Institutional Betrayals

By allowing schools' inverted responses to sexual harassment, the courts also permit the public schools to work additional, more direct harms on students.[187] First, students suffer secondary traumas as a direct result of schools' responses to their sexual harassment.[188] Secondary trauma, also called "second assault" or "second victimization," refers to the "[n]egative responses to disclosure" of sexual harassment and abuse, including responses that "blame, stigmatize, [and] attempt to . . . distract the victim from discussing the assault."[189] This

182. *McCoy*, 515 F. App'x at 389.

183. *Id.* at 389, 391–92.

184. *Id.*; *see infra* note 224 and accompanying text.

185. *McCoy*, 515 F. App'x at 391–92. Other courts also fail to find that schools' repeated use of failed responses to student sexual harassment has caused students to suffer more sexual harassment by permitting it to recur. For example, in *Doe v. Board of Education*, when student J.D.'s elementary school tried more than once to address his sexual harassment and abuse by student M.O. by simply talking to M.O., and that repeated use of a failed intervention did not stop the harassment, and so amounted to almost no response at all, the school nevertheless continued to use that intervention. 605 F. App'x 159, 161–62 (4th Cir. 2015). It therefore subjected J.D. to further sexual harassment and the sexual assault that he suffered by the school's use of that failed intervention. *See id.*; *supra* note 92 and accompanying text.

186. *See McCoy*, 515 F. App'x at 391–92.

187. *See infra* notes 197, 200–01 and accompanying text.

188. *See infra* notes 197, 200–01 and accompanying text; Orchowski & Gidycz, *supra* note 39, at 266; *see also* Maier, *supra* note 39, at 289 ("['Secondary traumas' or 'revictimization'] refers to the blame and stigmatizing responses to victims by the criminal justice, legal, and medical systems, as well as friends and family. It also refers to the trauma, distress, and alienation that victims may experience after the assault as a result of [those] responses.").

189. Orchowski & Gidycz, *supra* note 39, at 266.

secondary trauma can be more acute than the trauma that results from the original harassment or assault.[190]

Second, students suffer institutional betrayals when schools punish and blame them for their sexual harassment.[191] Institutional betrayals happen "when an institution causes harm to an individual who trusts or depends upon that institution."[192] They can "occur via omission of protective, preventative, or responsive institutional actions."[193] More precisely, they happen when an institution blames or does not believe the report of a person who has suffered a sexual assault or harassment.[194] They also occur when institutions "pressure [victims] to recount the events multiple times to multiple people, [fail] to give them adequate information, or [refuse] to help."[195]

190. *See* Maier, *supra* note 39; Barbara Ryan, Cynthia Bashant & Deena Brooks, *Protecting and Supporting Children in the Child Welfare System and the Juvenile Court*, 57 JUV. & FAM. CT. J. (SPECIAL ISSUE) 61, 62 (2006) (noting that in the child welfare and juvenile courts, children "can be exposed to additional stressful, frightening, and emotionally overwhelming experiences, resulting in additional layers of trauma"); NAT'L CRIME VICTIM L. INST., POLYVICTIMS: VICTIMS' RIGHTS ENFORCEMENT AS A TOOL TO MITIGATE "SECONDARY VICTIMIZATION" IN THE CRIMINAL JUSTICE SYSTEM 1 (2013), http://www.ncdsv.org/images/NCVLI_PolyvictimsVictimsRightsEnforcementAsATool_3-2013.pdf [https://perma.cc/VV59-TVGQ]. Studies show that children, like adults, experience these traumas. *See* Gail S. Goodman, Elizabeth Pyle Taub, David P.H. Jones, Patricia England, Linda K. Port, Leslie Rudy & Lydia Prado, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC'Y FOR RSCH. CHILD DEV. 1, 119–20 (1992).

191. Smith & Freyd, *supra* note 39, at 578.

192. *Id.*

193. *Id.* at 579.

194. NAT'L CRIME VICTIM L. INST., *supra* note 190; Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences with Military and Civilian Social Systems*, 29 PSYCH. WOMEN Q. 97, 97 (2005) ("[V]ictim-blaming attitudes, behaviors, and practices . . . [result] in additional trauma for sexual assault survivors."); Maier, *supra* note 39, at 291; *see also* SHRIVER CTR., ENSURING SUCCESS IN SCHOOL, SUPPORTING SURVIVORS 1, 20 (2018), https://news.wttw.com/sites/default/files/article/file-attachments/Shriver%20report_draft%204%20(1).pdf [https://perma.cc/PR32-2FNT] ("Participants also reported feeling revictimized when school officials place the blame for the violence on the survivor.").

195. Maier, *supra* note 39, at 297. Such harms occur in children and adults. Studies show that when children who suffer sexual trauma then have to testify repeatedly in court and confront their abuser, they experience emotional distress. *See* Goodman et al., *supra* note 190; Ryan et al., *supra* note 190. The Supreme Court has also noted the impact of this kind of trauma. Maryland v. Craig, 497 U.S. 836, 852, 857 (1999) (noting that the Court "ha[s] of course recognized that a State's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one" and acknowledging the possibility that for the child "trauma . . . [could] be caused by testifying in the physical presence of the defendant" (citations omitted)); CASEY FAM. PROGRAMS, WHY SHOULD CHILD PROTECTION AGENCIES BECOME TRAUMA-INFORMED? 1, 2 (2018), https://caseyfamilypro-wpengine.netdna-ssl.com/media/SComm_Trauma

Schools directly impose secondary traumas and cause students to suffer institutional betrayal when they respond in inverted ways to reports of student sexual harassment.[196] When schools blame and punish the students who have suffered sexual harassment and assault or force them to recount their experiences in front of the perpetrators, the students, predictably, endure more trauma.[197] They suffer depression, anxiety, and even suicide attempts.[198] Middle school student K.S., whose Title IX claim was rejected by the Fifth Circuit, experienced these traumas.[199] When K.S.'s school punished him because he fought back after enduring multiple instances of harassment, K.S. poignantly stated that the school's response made him feel that "nothing ever happened" as a result of his report and "like nobody cared about him."[200] This institutional betrayal and K.S.'s secondary trauma contributed to his suicide attempt.[201]

-informed-1.pdf [https://perma.cc/2392-24DT] (advocating for trauma-informed child welfare practices because "the system's interactions with children and families might inadvertently make them feel unsafe, either physically or emotionally").

196. The courts' interpretations not only permit schools to directly and indirectly cause student sexual harassment and related trauma, but they also arguably incentivize it. *See* MacKinnon, *supra* note 17.

197. *See, e.g.*, Doe *ex rel.* Doe v. Dall. Indep. Sch. Dist., 220 F.3d 380, 388 (5th Cir. 2000) (describing when elementary school student J.H. reported his sexual assault by teacher John McGrew, the school made J.H. recount his accusations in person to McGrew, thereby forcing him to relive the trauma by telling the perpetrator); Doe v. Bd. of Educ., 605 F. App'x 159, 163 (4th Cir. 2015) (describing when a middle school student suffered repeated sexual harassment and assault by student M.O., the school effectively punished him by requiring that he have another student escort him to the bathroom, which caused him further trauma because "other students 'made horrible jokes' about his use of the escort" and had "resultant stomach pains" (citations omitted)); Appellant's Brief in Chief at 8, KF *ex rel.* CF v. Monroe Woodbury Cent. Sch. Dist., 551 F. App'x 132 (2d Cir. 2013) (No. 13-516-CV), 2013 WL 1621950 (describing that in response to K.F.'s two years of sexual harassment and assault, the school offered to send K.F. to a disciplinary placement, and although she attended for a short period of time, she was "uncomfortable . . . and did not remain there").

198. *See infra* notes 200–01 and accompanying text.

199. Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834 (6th Cir. 2016).

200. Appellant's Brief on the Merits, K.S. v. Nw. Indep. Sch. Dist., 689 F. App'x 780 (5th Cir. 2016) (No. 16-40093), 2016 WL 1715073, at *8 (internal quotation marks omitted). When students of color face such responses, their trauma can be compounded still further. *See* Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 181 (1997) (arguing that the convergence of racial and gender stereotypes of Asian Pacific American women constitutes a racialized sexual harassment and that kind of intersectional sexual harassment exacerbates the harm of the harassment).

201. K.S.'s brief on appeal stated:

> [I]t was the feeling that there was nobody there to help, that people felt he was the cause of the problems he was experiencing, that finally caused him

Further, to get any potential help from a school following sexual harassment or assault, the courts effectively require students to subject themselves to these secondary traumas and institutional betrayals.[202] Because the actual notice standard under the Supreme Court's Title IX test relieves schools of any obligation to respond to sexual harassment if they do not have very specific notice of it, students must report their sexual harassment to have any hope of getting help for or redress from it.[203] However, when schools then do respond, the lower courts permit schools' inverted responses that cause secondary traumas and institutional betrayals.[204] Under the lower courts' assessments, therefore, these two prongs of the Title IX standard work together to essentially require students to subject themselves to these harms.[205]

Courts thus not only allow K–12 public schools to intermittently fail to respond to student sexual harassment, repeat failed responses to it, and punish and blame the survivors of it, but by doing so, they also allow schools to harm students. By not finding these types of responses by schools deliberately indifferent, the courts allow schools to put students at risk for and indirectly cause them further sexual harassment. They also permit schools to wreak additional harms in the form of secondary traumas and institutional betrayals. Instead of

> to overdose and attempt suicide because [school administrators] said that he was the cause of all the problems he was experiencing and had been nothing but trouble.

Appellant's Brief on the Merits, *supra* note 200. Similarly, in *Stiles v. Grainger*, middle school student D.S. endured extensive bullying over three years, and the school blamed him. D.S. could not comprehend the school's failure to help him, stating, "This attempt to turn the tables on D.S. upset and frustrated him; 'I was too little to be a bully. It wasn't fair of him to do that.'" Brief of Appellant at 12, Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834 (6th Cir. 2015) (No. 15-5438), 2015 WL 4910738. He further stated that when he reported to a school principal "[i]t seemed like she didn't care about what happened and just wanted me out of her office." *Id.* at 27.

202. Because, as the Supreme Court said in *Davis* that a school need only act to meet the deliberate indifference standard if the sexual harassment is actually known to the school, if the school does not have that requisite degree of notice, the school need not do anything at all. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 641, 643, 645, 647 (1999).

203. *See supra* note 202 and accompanying text; *see also* Suski, *supra* note 47 (explaining how the courts' assessments of the actual notice requirement under Title IX demands that students not only report but report with particularity their sexual harassment and assault).

204. *See supra* notes 197, 200–01 and accompanying text.

205. *See supra* notes 197, 200–01 and accompanying text.

interpreting Title IX in concert with its protective purpose, then, the courts' assessments of the statute gut its purpose.[206]

II. THE TITLE IX SUBVERSION

On first consideration, Title IX's loss of purpose and K–12 students' lack of protection from sexual harassment in school might seem as inevitable as it is tragic. If the courts were simply applying with fidelity a vacuous standard, then that would be true. Instead, this loss of purpose and protection is far from the inescapable result of the necessary application of the deliberate indifference standard.[207]

The deliberate indifference standard, as articulated by the Supreme Court, has far more potential to achieve the law's protective purpose than the lower courts' assessments suggest.[208] When the Supreme Court found that Title IX prohibits peer sexual harassment in *Davis v. Monroe County Board of Education*, it explained the deliberate indifference standard as proscribing more than total and complete indifference in the general sense of the word.[209] Consistent with the Title IX's protective purpose, the Court described the standard as precluding schools' responses to known sexual harassment that indirectly cause or put students at risk for further such harassment.[210] The deliberate indifference standard can, therefore, hold schools to account for their intermittent failures to respond to student sexual harassment, their repeated use of failed responses to it, and their responses that punish and blame survivors because all such responses put students at risk for and indirectly cause their sexual harassment.[211]

Yet, in evaluating these responses by K–12 public schools for deliberate indifference, the lower courts regularly fail to make such assessments.[212] Instead, they evaluate deliberate indifference based on the Supreme Court's additional guidance in *Davis* that schools need to respond to student sexual harassment in a "not clearly unreasonable" way.[213] Rather than reading this guidance in the full context in which the Court offered it, however, the lower courts take this language entirely out of context and apply it as they independently conceive of

206. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).
207. *See infra* Part II.A.
208. *See infra* Part II.A.
209. *See infra* note 293 and accompanying text.
210. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999).
211. *See infra* Parts II.A–B.
212. *See infra* Part II.B.
213. *Davis*, 526 U.S. at 649.

it.[214] They thus avoid any determination of why K–12 public school students continue to suffer sexual harassment and whether the school's response risked or caused it.[215] They consequently void the deliberate indifference standard's complete meaning and conclude that any response by the K–12 public schools other than none at all satisfies Title IX.[216] The courts thus subvert Title IX. The ramifications of the courts' evaluations have particular significance for K–12 public school students because they already have fewer structural protections from sexual harassment than college and university students.[217] This Title IX subversion is, therefore, a matter of particular urgency.[218]

A. WHAT THE DELIBERATE INDIFFERENCE STANDARD CAN REQUIRE OF THE PUBLIC SCHOOLS

Although the public schools rarely operate under any obligation to affirmatively protect students, Title IX's deliberate indifference standard can require such protections from sexual harassment and assault, at least once schools know some harassment has occurred.[219]

214. *See infra* Part II.B.2.

215. *See infra* Part II.B.2.

216. *See infra* Part II.B.

217. *See infra* notes 300–02, 304, 306 and accompanying text.

218. *See infra* Part II.C.

219. Tort law does call for schools to provide some degree of protection because it imposes a duty of care in some circumstances, but those duties are significantly undercut by, among other things, broad-reaching immunities available to the public schools. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 259 (2d ed. 2011) ("The general duty of care defendants owe to strangers is the duty to use reasonable care in the defendant's active conduct. However, the defendant who does nothing at all often owes no duty of care to strangers. This means, for example, that he need not throw a rope to a drowning person, even if reasonable care would require such an action . . . . [But because of the special relationship doctrine] a high school has a special relationship with its students, at least in connection with school, so it would be under a duty of reasonable care to take positive steps to save a student drowning at a school event."). Even though tort law does offer this potential for individual redress for students who have suffered sexual harassment in school, schools can avoid liability by claiming immunity. JAMES A. RAPP, 5 EDUCATION LAW § 12.07 (2020). Even without immunity, schools can defend themselves using numerous, generous other defenses. *Id.* § 12.14(5). For example, negligent supervision claims for failing to properly protect students require "standards of knowledge [that] are significant and . . . a foreseeable risk of harm." *Id.* § 12.14(5)(b)(iii). Public schools, therefore, successfully avoid responsibility in tort-based claims on that lack of foreseeability. *See, e.g.*, Conklin v. Saugerties Cent. Sch. Dist., 966 N.Y.S.2d 575 (App. Div. 2013) (finding that a school could not foresee that one student would assault another student even though the school knew the assaulting student had threatened to have the fight). Even when students have been shot or stabbed and schools have warnings that the fights might occur, they still successfully use the lack of foreseeability to evade liability in tort. RAPP, *supra*,

Explaining the standard, the Supreme Court said that schools are deliberately indifferent when they either "at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[220] The standard, therefore, can demand that schools act affirmatively to protect against indirectly causing or even merely putting students at risk for sexual harassment.[221]

That said, since schools need not act at all in response to sexual harassment until they have actual notice that some has occurred,

§ 12.12(2)(b). The same holds true for other sorts of tort claims, such as those brought on theories of vicarious liability, including *respondeat superior* claims. *See, e.g.*, John Doe 1 v. Bd. of Educ., 955 N.Y.S.2d 600, 602 (App. Div. 2012) (finding the public school not liable in tort when a teacher's aide engaged in a sexual relationship with a student because, among other things, the activity was outside the scope of employment). *But see* Booth v. Orleans Par. Sch. Bd., 49 So. 3d 919 (La. Ct. App. 2010) (concluding that when a janitor assaulted a student, the school board could be held liable in tort). Student claims based on the duty of care in tort, therefore, often fail. *See, e.g.*, Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641 (2004) (analyzing the ways that tort serves as a limited recourse and means of redress for bullying); *see also* Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1145–47 (2002) (describing how state immunity doctrines limit or preclude disability harassment claims by students).

220. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999) (citations omitted). With the adoption of this standard the court rejected alternative vicarious liability theories. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290–91 (1998); *Davis*, 526 U.S. at 641. Instead, the Court sought to hold schools liable under Title IX for their own actions in response to student sexual harassment. *Gebser*, 524 U.S. at 291; *Davis*, 526 U.S. at 641 ("We disagree with respondents' assertion, however, that petitioner seeks to hold the Board liable for G.F.'s actions instead of its own. Here, petitioner attempts to hold the board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools."). To that end, in *Gebser*, the Court quoted its § 1983 police liability cases, including *Board of Commissioners v. Brown*, when settling on the deliberate indifference standard for determining such liability. *Gebser*, 524 U.S. at 291. In doing so, it said that "[c]omparable considerations [to those in the Title IX context] led to our adoption of a deliberate indifference standard for claims under § 1983." *Id.* In those § 1983 police cases, the standard seeks to hold municipalities liable for their "actions in failing to prevent a deprivation of federal rights." *Id.*

221. *See infra* notes 224, 232 and accompanying text. With this standard, the Court sets Title IX liability apart from other forms of intentional discrimination in that the deliberate indifference standard does not require scrutiny of a school's subjective intent to discriminate in evaluating its response to sexual harassment. *See* Brake, *supra* note 73, at 18 (noting the deliberate indifference standard in Title IX claims is not about "a specific state of mind or an intent to violate the rights of others"); Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358, 380 (2008) (arguing that Title IX jurisprudence does not abandon intentionality as a requirement but arguing the concept is expanded so that "intent can be established with evidence short of race or gender motivation on the part of the [school]").

schools can only indirectly cause or directly put students at risk for recurrent harassment.[222] Once they have that actual notice, though, if the public schools' responses indirectly cause or directly put students at risk for further sexual harassment, then courts can find that those responses demonstrate deliberate indifference.[223]

The Supreme Court was explicit on the point that Title IX holds schools to account for indirectly causing students' sexual harassment.[224] It explained that schools would be held liable for causing sexual harassment even though schools "[do] not engage in the harassment directly." [225] This limitation on the causal component of deliberate indifference is the natural result of the Court's formulation of the actual notice prong of its actual notice-deliberate indifference test for Title IX claims.[226] In describing actual notice, the Court said that even if a teacher or other school staff member directly causes the harassment, the knowledge of the wrongdoer does not establish actual notice.[227] Not only, then, does some school staff member need actual notice of the sexual harassment to trigger any obligation on the part of the school to act at all, let alone without deliberate indifference,

222. *Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 643. The actual notice requirement itself operates as a significant limitation on the protections of Title IX. *See supra* note 47 and accompanying text.

223. *See supra* notes 220, 222 and accompanying text; *Davis*, 526 U.S. at 643–44.

224. *See Davis*, 526 U.S. at 644–45; *see also* Brake, *supra* note 73, at 11 ("[The *Davis* Court's] conclusion that the school's response 'causes' the discriminatory harm finds substantial support in the reality of peer sexual harassment. When a school reacts indifferently to sexual harassment by students, despite notice of the harassment, the school 'effectively causes' the discrimination in two ways: (1) it intensifies the harm inflicted on harassment victims and (2) increases the likelihood that the frequency and severity of the harassment will escalate." (citations omitted)); Black, *supra* note 221.

225. *Davis*, 526 U.S. at 644. Under the actual notice prong, the notice of sexual harassment must be received by a person with "authority to address the alleged discrimination." *Gebser*, 524 U.S. at 290.

226. *See Gebser*, 524 U.S. at 291. The Court effectively abandoned any school liability under Title IX based on direct causation when it rejected the notion that the actions of the wrongdoer, even if a school employee, sufficed to supply actual notice under Title IX. *See id.*; *supra* note 225 and accompanying text.

227. The Court said, "[T]he knowledge of the wrongdoer himself is not pertinent to the analysis." *Gebser*, 524 U.S. at 291. In *Hill v. Cundiff*, the school came perhaps closest to directly causing student sexual harassment when a school staff member devised a scheme to catch one student in the act of sexual assault by using another student as bait. 797 F.3d 948, 961–62 (11th Cir. 2015). However, an administrator, and not just the school staff member who concocted this scheme, needed notice of the harassment to be liable for causing it. *Id.* at 971–72. Consequently, even when the harassment the school was potentially being held responsible for was almost directly caused by the school, the school was still not liable for it. *See id.*

but that person also has to be someone other than the wrongdoer.[228] When that other person's deliberate indifference causes further sexual harassment, therefore, it indirectly causes it.[229] To that point, the Court therefore said that a school is deliberately indifferent when it "effectively" causes or "subjects" a student to sexual harassment as opposed to directly causes it.[230]

In addition, by proscribing schools' responses that make students "vulnerable" or "liable" to sexual harassment, the standard can also proscribe schools' actions, or lack thereof, that put students at risk for but do not in fact cause further sexual harassment.[231] Because a

228. *See supra* notes 225, 227 and accompanying text; *infra* note 230 and accompanying text.

229. *See supra* notes 225, 227 and accompanying text; *infra* note 230 and accompanying text.

230. *Davis*, 526 U.S. at 642, 644. In *Gebser*, the Court explained:

> When a teacher's sexual harassment is imputed to a school district or when a school district is deemed to have "constructively" known of the teacher's harassment, by assumption the district had no actual knowledge of the teacher's conduct. Nor, of course, did the district have an opportunity to take action to end the harassment or to limit further harassment.

524 U.S. at 289. That said, this reasoning is open to substantial critique. Notably, in his dissent, Justice Stevens argued that agency principles should govern liability in part because "[teacher] Waldrop's sexual abuse of his student . . . was made possible only by Waldrop's affirmative misuse of his authority as her teacher." *Id.* at 300. However, the person or persons responsible for addressing the harm can directly cause secondary trauma and institutional betrayal and in this way exacerbate the harm. *See supra* Part I.D.3.

231. Because a student can be vulnerable to or liable for sexual harassment but then not actually experience any harassment, some courts have articulated the deliberate indifference standard this way. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172 (1st Cir. 2007) (rejecting the district court's interpretation of deliberate indifference because it incorrectly said "that a Title IX defendant could not be found deliberately indifferent as long as the plaintiff was not subjected to any acts of severe, pervasive, and objectively offensive harassment *after* the defendant first acquired actual knowledge of the offending conduct" when instead deliberate indifference can also take "the form of a failure 'to take any precautions that would prevent future attacks'" (quoting Williams v. Bd. of Regents, 477 F.3d 1282, 1297 (11th Cir. 2007))). That said, despite articulating the standard this way, these courts do not then apply it such that they in fact evaluate for risk or cause. *See id.*; *infra* note 256 and accompanying text; *see also* Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114 (10th Cir. 2008); KF *ex rel.* CF v. Monroe Woodbury Cent. Sch. Dist., 531 F. App'x 132 (2d Cir. 2013); *infra* note 259 and accompanying text. Although the Tenth Circuit both described deliberate indifference as prohibiting schools' responses that make students vulnerable to, or risk, further sexual harassment and applied the standard that way, it did so in the context of a university student's claim. Farmer v. Kan. State Univ., 918 F.3d 1094, 1103–04 (10th Cir. 2019) ("We conclude, then, that Plaintiffs can state a viable Title IX claim for student-on-student harassment by alleging that [Kansas State

student can be vulnerable or liable to sexual harassment but then not actually experience any harassment, the standard can hold schools to account for such risk.[232] That said, this risk that the standard can preclude is more than the abstract potential for sexual harassment that any student faces given the high rate at which it occurs in public schools.[233] This risk is a particularized one in that it exists only because of a school's response to previously occurring sexual harassment.[234] In addition, it cannot be a vague, nascent risk that has no real effect but instead must deprive students of the benefits and opportunities of school.[235]

University's] deliberate indifference caused them to be 'vulnerable to' further harassment without requiring an allegation of subsequent actual sexual harassment.").

232. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999); *Fitzgerald*, 504 F.3d 165; *supra* note 231 and accompanying text. The meaning of the words "liable" and "vulnerable" involve potential, as opposed to actual, occurrences. "Liable" means "being in a position to incur" as opposed to having something actually occur. *Liable*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/liable [https://perma.cc/J4PD-TGHS]. "Vulnerable" means "capable of being physically or emotionally wounded" as opposed to actually being so wounded. *Vulnerable*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/vulnerable [https://perma.cc/2AZY-W9ZM].

233. *See supra* notes 44–45 and accompanying text. This conceptualization of deliberate indifference as inquiring into and precluding risk finds roots in Justice O'Connor's opinion in *Board of County Commissioners v. Brown*. 520 U.S. 397, 411 (1997) ("A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision."); *see also* Brake, *supra* note 73, at 18–19 (reviewing the deliberate indifference standard in other contexts, including police misconduct and failure to train cases). Courts have rejected the argument that schools' notice of the risk of sexual harassment alone when none has yet occurred satisfies the notice prong of the Title IX analysis that triggers schools' obligation to act in ways that are not deliberately indifferent. *See, e.g.*, *Fitzgerald*, 504 F.3d at 178; *supra* note 220 and accompanying text; *see also* Ray v. Bowers, 767 F. Supp. 2d 575, 580–81 (D.S.C. 2009) ("'Title IX's actual notice requirement *cannot* be satisfied by 'actual notice of a substantial risk of ongoing sexual abuse.' Rather, the Court held that '*Gebser* is quite clear, however, that Title IX liability may be imposed only upon a showing that the [school] officials possessed actual knowledge of the discriminatory conduct in question.'" (citations omitted) (quoting Baynard v. Malone, 268 F.3d 228, 237–38 (4th Cir. 2001))). Once schools have actual notice that some sexual harassment has occurred, however, then the deliberate indifference standard requires risk mitigation. *Davis*, 526 U.S. at 646–47 (noting that schools "may be liable for 'subject[ing]' their students to discrimination where the [school] is deliberately indifferent to known acts of student-on-student harassment").

234. *See supra* notes 220, 225, 230 and accompanying text.

235. *Davis*, 526 U.S. at 650; *supra* note 65 and accompanying text; *see Rost*, 511 F.3d 1114; *supra* notes 157–66. Although when schools are deliberately indifferent by causing student sexual harassment the student also must show a loss of educational benefit, the courts rarely reach this issue. Instead, they deny claims more commonly on the actual notice and deliberate indifference prong. *See, e.g.*, Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 849–50 (6th Cir. 2016) ("To establish a prima facie case

Further, both the causal and the risk facets of deliberate indifference implicitly require that schools take affirmative steps to avoid causing or putting students at risk for further sexual harassment.[236] Because the only way for a school to avoid putting students at risk for or indirectly causing further sexual harassment is to take action to that end, the standard implicitly demands such affirmative protective steps.[237] By essentially requiring schools to act affirmatively to protect students in these ways, the deliberate indifference standard is almost exceptional in what it can require schools to do.[238] However exceptional the standard's requirements may arguably be, though, these affirmative protections are not unlimited. The deliberate indifference standard does not mandate that schools' interventions remedy the harassment.[239] It can, though, require schools to attempt to protect against risking or causing its recurrence.[240]

B. SUBVERTING TITLE IX: HOW THE COURTS CIRCUMSCRIBE ALMOST COMPLETELY THE MEANING OF DELIBERATE INDIFFERENCE

The lower courts' assessments of deliberate indifference in K–12 public school students' Title IX claims, however, disregard these explanations offered by the Supreme Court.[241] Rather than examining whether schools' responses to student sexual harassment put students at risk for or caused further sexual harassment, the courts evaluate students' Title IX claims solely on the basis of the Supreme Court's additional guidance that schools' responses cannot be "clearly

of student-on-student sexual harassment, [a student] must demonstrate the following elements: (1) sexual harassment 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 harassment," but then disposing of the case by finding "that Plaintiffs failed to create a triable issue as to whether Defendants exhibited deliberate indifference.").

236. *See infra* note 237 and accompanying text.

237. *See Davis*, 526 U.S. at 645–46. The Court's descriptions of how schools' liability results from their own responses to sexual harassment underscore this demand for affirmative action. *Id.* The Court said that the school does not violate Title IX because the wrongdoer's actions are "treated" as those of the school's. *Id.* at 645. Instead, the school is "directly liable for its *own* failure to act." *Id.* at 645–46. In other words, Title IX requires that schools act, and they must act to prevent students' vulnerability to, or risk of, sexual harassment and assault.

238. *See supra* note 219 and accompanying text.

239. The Supreme Court made plain that the standard did not require proof that a school remedied the sexual harassment. *See Davis*, 526 U.S. at 648.

240. *See supra* notes 219, 237 and accompanying text.

241. *See infra* Part II.B.2.

unreasonable."[242] The lower courts thus annul the deliberate indifference standard's full meaning and permit schools to respond in any way other than not at all.[243] They therefore undermine almost entirely the standard's protective capacity.[244]

1. "Clear Unreasonableness" in Context

After explaining the deliberate indifference standard in *Davis ex rel. D. v. Monroe County Board of Education* as prohibiting schools' responses to student sexual harassment that both cause students to undergo and make them vulnerable to further harassment, the Supreme Court went on to offer further guidance about the standard.[245] Responding to the dissent's objections about the implications of imposing Title IX liability for peer sexual harassment, the Court said that deliberate indifference requires schools to respond to sexual harassment in ways that are "not clearly unreasonable."[246] Because this additional guidance was both provided in response to the *Davis* dissent and on the heels of the Court's causal and risk descriptions of deliberate indifference, however, this "not clearly unreasonable" language cannot be read out of that full context.[247] Read in that context, a deliberately indifferent response is one that is not clearly unreasonable because it neither makes a student vulnerable to nor indirectly causes further sexual harassment.[248] Put the other way, a clearly unreasonable response is one that puts students at risk for or causes their further sexual harassment.[249]

More specifically, when the Supreme Court offered this "not clearly unreasonable" guidance,[250] it was addressing the *Davis* dissent's strenuously voiced predictions that holding schools liable for peer sexual harassment would require them to both remedy the harassment and ensure that all students conform to particular modes of conduct.[251] In response, the Court said that the deliberate indifference

242. *Davis*, 526 U.S. at 648.

243. *See infra* notes 264–65, 278–79, 284 and accompanying text.

244. *See infra* Part II.B.2.

245. *Davis*, 526 U.S. at 648.

246. *Id.* at 649.

247. *Id.*; *see infra* notes 251–53 and accompanying text.

248. *See infra* notes 251–53 and accompanying text.

249. *See infra* notes 251–53 and accompanying text; *see also supra* note 231 and accompanying text; *infra* note 260 and accompanying text.

250. *Davis*, 526 U.S. at 648.

251. *Id.* at 666, 668 (Kennedy, J., dissenting). The dissent was nearly apoplectic in its warnings about the catastrophes that would result from holding schools responsible for peer sexual harassment. *Id.* It argued that the majority was requiring schools to

standard requires neither.[252] It explained that school administrators would "continue to enjoy the [disciplinary] flexibility they require" because they need only respond to peer sexual harassment in a manner not "clearly unreasonable in light of known circumstances."[253]

As much as the Court in *Davis* thus limited deliberate indifference by precluding any requirement that schools remedy a student's sexual harassment or ensure conformity with particular modes of conduct, however, the Court did not supersede its description of deliberate indifference as prohibiting schools' responses that cause or make students vulnerable to further sexual harassment.[254] To the contrary, after offering the idea that schools' responses to sexual harassment need be "not clearly unreasonable," the Court then reiterated and applied the deliberate indifference standard to the facts of the case without any mention at all of clear unreasonableness.[255] It concluded that student Lashonda Davis "may be able to show both actual knowledge and deliberate indifference on the part of the [school], which made no effort whatsoever to investigate or put an end to [her] harassment."[256]

"ensur[e] that thousands of immature students conform their conduct to acceptable norms," and that unlike the requirements of the majority opinion, "[o]ur decision in *Gebser* did not, of course, recognize some ill-defined, free-standing legal duty on schools to remedy discrimination by third parties." *Id.* It further warned that holding schools liable for peer sexual harassment would leave them devoid of disciplinary flexibility. *Id.* at 657–58 ("The only certainty flowing from the majority's decision is that scarce resources will be diverted from educating our children and that many school districts, desperate to avoid Title IX peer harassment suits, will adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose upon them." (footnote omitted)). The dissent's consternation was misplaced. Its reasons for wanting to avoid holding schools responsible for peer sexual harassment under Title IX were based on misconceptions. *See* Suski, *supra* note 17, at 752 ("[D]espite the *Davis* dissent's predictions that any Title IX liability would usher in a flood of litigation, no such flood has come to pass. Although sexual assault occurs at alarmingly high rates in public schools, complaints and lawsuits against schools based on them do not. Thousands of sexual assaults were reported in public schools from 2011 to 2015, but in 2016, the U.S. Department of Education Office of Civil Rights opened only 83 sexual harassment investigations in public elementary and secondary schools.").

252. *Davis*, 526 U.S. at 648–49 ("The dissent consistently mischaracterizes this standard to require funding recipients to 'remedy' peer harassment and to 'ensur[e] that . . . students conform their conduct to' certain rules. Title IX imposes no such requirements." (alterations in original) (citations omitted)).

253. *Id.* at 648 ("We thus disagree with respondents' contention that, if Title IX provides a cause of action for student-on-student harassment, 'nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages.'").

254. *Id.* at 654.

255. *Id.* at 648–49.

256. *Id.* at 654.

This application of deliberate indifference in the evaluation of Davis's claim without any discussion of clear unreasonableness demonstrates that far from supplanting the Court's explanation of deliberate indifference as embracing risk and causal dimensions, the Court's clear unreasonableness language operates in conjunction with those concepts. [257] Clearly unreasonable responses, therefore, are those responses that put students at risk for or indirectly cause further sexual harassment.[258] Assessing for clear unreasonableness in this way, therefore, requires courts to inquire into what, if any, role a school's response to student sexual harassment had in putting that student at risk for or causing further sexual harassment.[259]

2. Reducing Deliberate Indifference to a Decontextualized Determination of Clear Unreasonableness

The lower courts, however, do not apply the "clearly unreasonable" benchmark in light of this context and meaning when evaluating K–12 public school students' claims. [260] Instead, they evaluate

257. *See id.*

258. *See supra* note 231 and accompanying text; *infra* note 260 and accompanying text.

259. *See supra* notes 253, 258 and accompanying text; *infra* note 260 and accompanying text.

260. In *KF ex rel. CF v. Monroe Woodbury Central School District*, the Second Circuit almost considered whether the public school caused sexual harassment when it evaluated the claim of middle school student C.F., who endured two years of sexual harassment and assault by multiple students. 531 F. App'x 132, 133 (2d Cir. 2013). It said that deliberate indifference calls for an inquiry into "whether the school 'cause[d C.F.] to undergo harassment or [made her] . . . vulnerable to it.'" *Id.* at 134 (citing *Davis*, 526 U.S. at 645). Yet the court then did not assess cause or vulnerability when it concluded that the school was not deliberately indifferent when it offered C.F. a disciplinary placement or at-home tutoring in response to her sexual harassment and assault. *Id.* Likewise, in *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*, the Tenth Circuit suggested it evaluated for risk and cause when it said that the school's failure to address middle school student K.C.'s sexual harassment and assault "did not cause K.C. to undergo harassment or make her liable or vulnerable to it." 511 F.3d 1114, 1123 (10th Cir. 2008). Yet the Tenth Circuit then neglected to apply that standard in any meaningful way, or at all. *See id.* at 1123–24; *supra* notes 156–67 and accompanying text. Instead, it simply said that the school "was not clearly unreasonable [because] school officials immediately contacted law enforcement officials, cooperated fully in the investigation, and kept informed of the investigation." *Rost*, 511 F.3d at 1121. As if to emphasize the sufficiency of the school's response, the court also insisted that schools "need not expel every student accused of sexual harassment" and therefore no particular action is required of the schools. *Id.* at 1123. Although the Supreme Court did say that schools do not need to take any particular disciplinary action to satisfy the deliberate indifference standard, it did not say that a school could take no action to address the cause or effects of a student's sexual harassment in the school setting. *Davis*, 526 U.S. at 648. As the dissent in *Rost* noted, "[i]t is a bit unclear why the majority concludes

deliberate indifference on the basis of clear unreasonableness alone, as they independently conceive of it, and without regard for whether a school's response to a student's sexual harassment indirectly caused or put the student at risk of further sexual harassment.[261] In doing so, some courts explicitly develop their own definitions of clear unreasonableness and others do not.[262] Either way, the lower courts avoid entirely an analysis of the relationship between schools' responses to initially reported sexual harassment and students' subsequent sexual harassment.[263]

One way courts explicitly develop their own definitions of clear unreasonableness is by describing clear unreasonableness exclusively in terms of what it is not.[264] These courts say that a clearly unreasonable response to sexual harassment is not the same as an ineffective

that this total inaction was reasonable under the circumstances." 511 F.3d at 1129 (McConnell, J., concurring in part and dissenting in part). The discrepancies between these courts' descriptions of the deliberate indifference standard and their application of it may reflect some ambivalence about school liability more generally in the same way it may, as one scholar has argued, reveal an ambivalence underlying the courts' treatment of municipal liability for civil rights violations. *See* Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 389 (2018). To put a finer point on the root of that potential ambivalence, the courts' rationales for limiting school liability in both Title IX and certain Fourteenth Amendment claims are rooted in a number of misconceptions. *See* Suski, *supra* note 17 and accompanying text.

261. *See infra* notes 264–65, 278–79, 284 and accompanying text.

262. *See infra* notes 264–65, 278–79, 284 and accompanying text.

263. *See infra* notes 264–65, 278–79, 284 and accompanying text.

264. Other courts have developed definitions of "clear unreasonableness" that evaluate the relationship between a school's response and the degree of notice it received. In *McCoy v. Board of Education*, for example, in rejecting elementary school student John Doe's Title IX claim based on his sexual molestation by teacher Gary Stroup, the Sixth Circuit said that a school's repeated use of verbal and written reprimands in response to reports that Stroup molested a student and inappropriately touched others were not clearly unreasonable because the reported harassment was not "more discernable and explicit." 515 F. App'x 387, 392 (6th Cir. 2013). The court held:

> [I]t was not clearly unreasonable for the school district to have issued letters directing Stroup not to engage in such physical contact. Had there been a more discernible and explicit form of sexual harassment, in the form of verbal or physical sexual contact, the district's decision to repeat its measures may have constituted deliberate indifference.

Id. The court thus defined a clearly unreasonable response in proportion to the specificity of the notice the school received and so did not evaluate the school's response for risk or cause. *Id.* Consequently, it found the repeated use of failed responses that risked John Doe's assault not deliberately indifferent even though those responses all but signaled the harassment could continue and so indirectly caused its recurrence. *See id.*

one.[265] They thus find that schools' ineffective responses, without limitation, satisfy the deliberate indifference standard.[266] By categorically deeming ineffective responses not clearly unreasonable without any limiting principle, these courts thus define "not clearly unreasonable" responses to mean all ineffective as well as effective responses—or, any response at all—to sexual harassment.[267]

For example, in *Porto v. Town of Tewksbury*, the First Circuit declined to find a school's repeated use of the same failed responses to address student R.C.'s ongoing sexual harassment of elementary school student S.C. clearly unreasonable.[268] In doing so, the court failed to assess whether those responses indirectly caused S.C.'s continued sexual harassment.[269] In response to student R.C.'s persistent

265. *See* K.S. v. Nw. Indep. Sch. Dist., 689 F. App'x 780, 784, 786 (5th Cir. 2017) (considering that the school "took some action in response to" sixth grade student K.S.'s repeated sexual harassment, the court found the school did not act clearly unreasonably and therefore with deliberate indifference because "a [school] is liable only when its responses to such harassment are clearly unreasonable in light of known circumstances. The [school] cannot be liable because its disciplinary choices were not effective." (citation omitted)). Instead of defining "clearly unreasonable" responses as not ineffective responses, the Fifth Circuit defined "clearly unreasonable" responses as not inadequate responses. *See* Doe *ex rel.* Doe v. Dall. Indep. Sch. Dist., 220 F.3d 380, 388 (5th Cir. 2000). There, the court considered evidence that John Earl McGrew molested elementary school student J.H., among other students, over a four-year period, culminating in his arrest, conviction on sex abuse charges, and life sentence in prison. *Id.* at 381. To establish the school's deliberate indifference, J.H. presented evidence that the principal responded to his report of molestation by meeting with J.H. and McGrew together and then warning McGrew not to repeat the behavior. *Id.* at 388. The court noted the shortcomings in the principal's response, including that the principal did not "tell McGrew not to spank a child again, failed to monitor McGrew further or make him attend additional training, and failed . . . to ever raise the issue of sexual abuse with him again until his arrest." *Id.* Additionally, the principal told McGrew, "I don't think [the accusation is] true, but we have to meet with the parent and discuss it," and McGrew described the principal's "demeanor toward him as 'supportive.'" *Id.* In determining deliberate indifference, however, the court concluded that without more "we cannot say . . . that these actions, though ineffective in preventing McGrew from sexually abusing students, were an inadequate response to J.H.'s allegation." *Id.* Consequently, it found the school did not act with deliberate indifference. *Id.* Further, the court did not even fully assess the inadequacy of the school's response. The court neglected to explain why failing to do anything more than mete out a half-hearted warning coupled with reassurances that the principal did not believe the reports were not inadequate. *Id.*

266. *See supra* note 265 and accompanying text.

267. *See K.S.*, 689 F. App'x 780; *supra* note 265 and accompanying text; Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114 (10th Cir. 2008); *supra* notes 156–67 and accompanying text; Doe v. Bd. of Educ., 605 F. App'x 159 (4th Cir. 2015); *infra* note 278 and accompanying text.

268. 488 F.3d 67, 74–76 (1st Cir. 2007).

269. *Id.* at 74.

harassment of student S.C. over a period of six years, the school repeatedly separated the students in limited ways to virtually no avail.[270] Assessing the school's continued use of these failed responses, the court concluded, without more, that those responses did not "establish . . . the steps taken [by the school] were clearly unreasonable in light of the circumstances known [because] . . . [t]he test for whether a school should be liable under Title IX for student-on-student harassment is not one of effectiveness by hindsight."[271] To be sure, ineffectiveness alone does not suffice to demonstrate clear unreasonableness or deliberate indifference.[272] A student could suffer further sexual harassment either because of the school's intervention or despite it.[273] Without inquiring further, though, the court failed to make this determination and so did not assess for whether the school risked or indirectly caused R.C.'s continued harassment of S.C.[274]

Had the court made this assessment, it could have easily determined that the school's repeated use of a failed intervention both put S.C. at risk for and indirectly caused his additional sexual harassment.[275] By knowingly and repeatedly implementing this failed response, the school did virtually nothing to prevent R.C.'s continued harassment and allowed, or indirectly caused, its recurrence.[276] Consequently, the court could have found the school acted clearly unreasonably and with deliberate indifference.[277] Yet, by avoiding such a nuanced evaluation, the First Circuit effectively concluded that both ineffective and effective responses, or any non-action at all, are sufficient to show a school did not act in a clearly unreasonable, and therefore deliberately indifferent, manner.[278]

270. *Id.* at 70.

271. *Id.* at 74.

272. *See infra* note 348 and accompanying text.

273. *See infra* note 348 and accompanying text; *Porto*, 488 F.3d at 74.

274. *See Porto*, 488 F.3d at 74.

275. *See id.* at 70–71.

276. *See id.*

277. *See supra* Part II.A.

278. *See Porto*, 488 F.3d 67. Similarly, in *Doe v. Board of Education*, the Fourth Circuit rejected the claim of fourth grade student J.D., who was sexually harassed and assaulted by fellow student M.O., even though the school sometimes did not respond at all to J.D.'s reports of harassment. 605 F. App'x 159, 162 (4th Cir. 2015). In rejecting J.D.'s claim that the school violated Title IX with its responses to his reports of harassment, the court did not assess whether the school's responses put J.D. at risk of further harassment or indirectly caused any of it in order to find that they were not deliberately indifferent. *Id.* at 168. Instead, it insisted that the school's responses, including simply talking to the boys repeatedly, were "not clearly unreasonable" just because they were not effective. *Id.*

Other courts do not so explicitly define, or more accurately redefine, clear unreasonableness.[279] In *Gabrielle M. v. Park Forest-Chicago Heights School District 163*, for instance, when kindergarten student Gabrielle suffered multiple sexual assaults by fellow kindergartner Jason, the school decided the children needed to be separated.[280] However, the school then continued to put both students together at recess, and Jason continued to assault Gabrielle.[281] The Seventh Circuit found the school's incompletely implemented response not clearly unreasonable, saying, "The record reveals that the school district's response to Jason's inappropriate conduct was not clearly unreasonable. After each reported or observed instance involving Jason and other students . . . steps were taken to prevent future inappropriate conduct."[282] However, the court did not explain how the school's failure to fully execute its chosen response could protect Gabrielle against the risk of future attacks and so did not constitute a clearly unreasonable response.[283] Avoiding this evaluation, the court sanctioned the school's response that allowed Jason access to her and enabled, or indirectly caused, her continued harassment.[284] Under the court's reasoning, the fact that the school took some steps, any at all, therefore, sufficed to show its response was not clearly unreasonable.[285] It did not matter that the school's response was not designed or implemented in a way that would avoid risking or indirectly causing further harassment.[286]

Whether the courts explicitly or implicitly develop their own definitions of what constitutes a "clearly unreasonable" response to student sexual harassment, they consistently forego an evaluation of whether such responses indirectly caused or put students at risk for more sexual harassment.[287] Reducing deliberate indifference to an

279. For example, in *Stiles v. Grainger County*, the Sixth Circuit concluded that Rutledge Middle School's repeated use of reprimands to address student D.S.'s peer sexual harassment was not clearly unreasonable and so not deliberately indifferent. 819 F.3d 834, 851 (6th Cir. 2016). Its only justification for this conclusion, however, was that the responses "were reasonably tailored to the findings of each investigation" into the harassment, without explaining how some repeating ineffective responses could be so tailored and therefore not clearly unreasonable. *Id.*

280. 315 F.3d 817, 819–20 (7th Cir. 2003).

281. *Id.*

282. *Id.* at 824.

283. *Id.* at 825.

284. *See id.*

285. *See id.*

286. *See id.*

287. *See supra* notes 269–70, 282–83 and accompanying text.

assessment of clear unreasonableness alone, as they independently conceive of it, the lower courts circumscribe almost completely the standard's meaning.[288] Consequently, they find that virtually any response by the public schools to student sexual harassment, other than none at all, satisfies the standard, even when those responses both put students at risk for and cause their further sexual harassment.[289] If the courts instead applied deliberate indifference consistent with its full potential, however, they could proscribe these responses and their consequent harms.[290]

To be sure, the lower courts do require that K–12 schools do something in response to student sexual harassment and hold them accountable when they do nothing at all.[291] They do, therefore, proscribe schools' complete indifference to student sexual harassment in the general sense of the word.[292] Had the Supreme Court intended deliberate indifference to only require any response other than none at

288. To be fair, the assessment of deliberate indifference is not a simple or easy one. The Supreme Court acknowledged as much in the § 1983 line of cases from which it drew the deliberate indifference standard as the vehicle for determining Title IX claims. In *Board of Commissioners v. Brown*, the Court noted that "[c]laims not involving an allegation that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights, present much more difficult problems of proof." 520 U.S. 397, 406 (1997). However, it has also expressed confidence in courts' ability to navigate these difficulties. City of Canton v. Harris, 489 U.S. 378, 391 (1989) ("Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.").

289. *See supra* notes 269, 275–76 and accompanying text. When a school does in fact do nothing at all in response to a report of a student's sexual harassment or assault, courts have found that those complete failures to respond demonstrate deliberate indifference. In *J.M. ex rel. Morris v. Hilldale Independent School District No. 1-29*, for example, the Tenth Circuit found that because the school did nothing at all in response to a band teacher's sexual relationship with high school student J.M., the school acted with deliberate indifference. 397 F. App'x 445, 454 (10th Cir. 2010). The court noted, "[I]t was undisputed that after [the] report, no school official conducted any investigation of [the band teacher]." *Id.* Similarly, in *Doe v. School Board*, the Eleventh Circuit found that when a school "effectively did nothing other than obtain a written statement" and conducted "no investigation, formal or informal" of allegations of a teacher's sexual harassment of a student, that failure to do anything could constitute deliberate indifference. 604 F.3d 1248, 1261 (11th Cir. 2010).

290. *See supra* Part I.D.3.

291. *See supra* note 289 and accompanying text.

292. "Indifferent" is defined as, among other things, "neutral." *Indifferent*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/indifferent [https://perma.cc/AE9T-GEG8]. Under this meaning of the word, a school would be indifferent if it remained neutral, or did nothing, in the face of known sexual harassment.

all to sexual harassment, however, it surely would have said that. Instead, it described a far more complex standard.[293] By disregarding the full conceptualization of deliberate indifference, the lower courts redefine the standard such that it is satisfied by any action by schools, no matter what it is or whether it serves Title IX's protective purpose. The lower courts' interpretations of the deliberate indifference standard, therefore, subvert Title IX's purpose and its potential protective effects.[294]

C. THE TITLE IX SUBVERSION: A MATTER OF PARTICULAR URGENCY FOR K–12 PUBLIC SCHOOL STUDENTS

Although Congress enacted Title IX to fill the gap left where other laws failed to provide students protection from sexual harassment and other forms of sex discrimination in the public schools, the lower courts' assessments of the deliberate indifference standard allow the very harm the law seeks to prevent.[295] Further, because courts' assessments particularly affect K–12 public school students' claims, the courts' problematic interpretations are a matter of urgency because these students face unique vulnerabilities.[296] Other laws offer additional protections from sexual harassment and assault to college and university students, but younger students do not have these same structural protections.[297] Further, younger students are more likely than older students to suffer certain long-term harms from sexual harassment and assault.[298]

While federal laws, notably the Clery Act, require colleges and universities to specifically act to prevent and protect students from sexual harassment and assault, these laws do not apply to K–12 public

293. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–48 (1999); *supra* Part II.A.

294. *See Davis*, 526 U.S. 629; *supra* note 60 and accompanying text; *supra* Part II.B.2.

295. Although other laws, including the Fourteenth Amendment and tort law, could have offered protections against sexual harassment, sexual assault, and other forms of sex discrimination, they did not. *See* U.S. CONST. amend. XIV; *supra* note 219 and accompanying text. As Senator Birch Bayh, who sponsored Title IX, said in introducing the amendment in Congress,

> [O]ne of the greatest failings of the educational system in the continuation of corrosive and unjustified sex discrimination against women. It is clear to me that sex discrimination reaches all facets of education . . . [and t]he only antidote is a comprehensive amendment such as the one now before the Senate.

118 CONG. REC. S5803 (daily ed. Feb. 28, 1972) (statement of Sen. Birch Bayh).

296. *See infra* notes 302, 304, 306, 308, 310 and accompanying text.

297. *See infra* notes 299–304 and accompanying text.

298. *See infra* notes 308, 310 and accompanying text.

schools.[299] The Clery Act require colleges and universities to, among other things, report instances of crimes, including forcible and non-forcible sex offenses that occur on campus, in campus buildings off campus, and on public property.[300] In addition, colleges and universities must develop and implement affirmative programs to prevent sexual violence on campus.[301]

Public K–12 schools, however, operate under none of these Clery Act requirements.[302] Consequently, unless state or local laws require it, public schools do not need to report any sexual harassment and assault that occurs within their walls.[303] For many schools, that means either little or no reliable information exists on the incidences of sexual assault in schools.[304] In addition, unlike college and university students, students in K–12 public schools do not have the benefit of any affirmative preventative programs aimed at deterring sexual harassment.[305] By draining Title IX of its ability to protect students through their assessments of deliberate indifference, the courts therefore

299. 20 U.S.C. § 1092(f).

300. *Id.* § 1092(f)(1)(F). Colleges and universities must comply with these requirements as a condition of participation in federal financial assistance programs. *Id.* § 1092(f).

301. *Id.* § 1092(f)(8). Such programs must include information on the definitions of consent, "safe and positive options for bystander intervention . . . information on risk reduction to recognize warning signs of abusive behavior . . . [and] ongoing prevention and awareness campaigns for students and faculty." *Id.*

302. *See id.* § 1092(f). Discussing the difference in protections available in colleges and universities as compared to the K–12 public schools, civil rights advocate and frequent Title IX litigator Adele Kimmel has said, "What you see most commonly is that colleges are far ahead of K–12 schools in the development of their sexual-misconduct policies and procedures, their training, and their education of staff and students, making sure that students know who the Title IX coordinator is." Mark Keierleber, *The Younger Victims of Sexual Violence in School*, ATLANTIC (Aug. 10, 2017), https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418 [https://perma.cc/38J5-S4WQ].

303. *See* 20 U.S.C. § 1092(f).

304. A survey conducted by the Associated Press found:

> [Although] 32 states and the District of Columbia track student sexual assaults . . . some did so only if incidents led to discipline like suspension or expulsion; the other states, including Maine, did not. . . . [Consequently s]ome of the nation's largest school districts reported zero sexual assaults over a multi-year period, and some state education officials told AP they doubted their districts' numbers.

Robin McDowell, Reese Dunklin, Emily Schmall & Justin Pritchard, *Hidden Horror of School Sex Assaults Revealed by AP*, ASSOCIATED PRESS (May 1, 2017), https://www.ap.org/explore/schoolhouse-sex-assault/hidden-horror-of-school-sex-assaults-revealed-by-ap.html [https://perma.cc/ZZK5-5XFV].

305. *See* 20 U.S.C. § 1092(f).

further weaken the already relatively low threshold of protections available to K–12 public school students.[306]

Not only do K–12 public school students lack these more comprehensive legal protections, but K–12 public school students who are sexually assaulted also face a higher likelihood of suffering sexual assault again later in life.[307] Children who suffer a sexual assault are almost fourteen times more likely to "experience a rape or attempted rape in their first year of college."[308] Because under the courts' interpretations of deliberate indifference Title IX requires schools to do almost nothing to prevent sexual assaults, the consequences of the courts' evaluations thus represent both an immediate problem and a long-term risk of further harassment.[309]

Further, children who have been sexually abused are more likely to themselves become abusive as they age into adolescence.[310] Yet, interventions can work to stop the cycle.[311] By failing to require schools

306. Although the Clery Act has not been without implementation problems, it still provides more information and protection to college and university students than to K–12 students, for whom it provides nothing. *See, e.g.*, Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 74 (2019) ("The Clery Act's effectiveness in disseminating information about gender-based violence has been hampered by various factors.").

307. *See supra* note 302 and accompanying text; *infra* note 308 and accompanying text.

308. Kevin Lalor & Rosaleen McElvaney, *Child Sexual Abuse, Links to Later Sexual Exploitation/High-Risk Sexual Behavior, and Prevention/Treatment Programs*, 11 TRAUMA VIOLENCE & ABUSE 159, 163 (2010) ("Respondents who had an experience of rape or attempted rape in their adolescent years were 13.7 times more likely to experience rape or attempted rape in their first year of college."); *see also Child Sexual Abuse Statistics*, NAT'L CTR. FOR VICTIMS CRIME, https://victimsofcrime.org/child-sexual-abuse-statistics [https://perma.cc/JBC2-N7YH] (referencing the same statistic).

309. *See supra* Part I.D; *supra* note 306 and accompanying text.

310. One study of child sex abuse victims found that they were "7.6 times more likely to [later] be charged with sexual offences than the general population." JAMES R.P. OGLOFF, MARGARET C. CUTAJAR, EMILY MANN & PAUL MULLEN, AUSTRALIAN INST. OF CRIMINOLOGY, TRENDS & ISSUES IN CRIME & CRIM. JUST. NO. 440, CHILD SEXUAL ABUSE AND SUBSEQUENT OFFENDING AND VICTIMISATION: A 45 YEAR FOLLOW-UP STUDY 1, 5 (2012), https://www.aic.gov.au/sites/default/files/2020-05/tandi440.pdf [https://perma.cc/3YTH-CEND]. A prior study found that between one-quarter and one-third of child sex offenders report a history of child sex abuse. R.K. Hanson & S. Slater, *Sexual Victimization in the History of Sexual Abusers: A Review*, 1 ANNALS OF SEX RSCH. 485, 495 (1988).

311. *E.g.*, Elizabeth J. Letourneau & Charles Borduin, *The Effective Treatment of Juveniles Who Sexually Offend: An Ethical Imperative*, 18 ETHICS & BEHAV. 286, 298–99 (2008). This study described the positive outcomes for reducing recidivism among sexual aggressive juveniles with the use of multisystemic therapy (MST). *Id.* In the MST model, "the youth is viewed as being nested within a complex of interconnected systems that include the individual youth, the youth's family, and various extrafamilial

to adequately address these issues, the courts' evaluations of the deliberate indifference standard allow schools to cause more sexual harassment and assault, and therefore do practically nothing to address that cycle.[312] The courts not only leave most students suffering sexual assault and trauma in school with almost no remedy, but they also allow schools to do more harm to them in the long as well as the short term.[313] For K–12 public school students, therefore, Title IX represents a particularly hollow promise.

III. REMEDYING THE "ABSURDITY"

When the Supreme Court determined that a remedy in damages is available under Title IX's private enforcement scheme, it said that a contrary conclusion would result in a "monstrous absurdity."[314] It explained that such a decision would undermine the law and its purpose by "giving judges the power to render inutile causes of action authorized by Congress through a decision that no remedy is available."[315]

(peer, school, neighborhood, community) contexts." *Id.* at 297. Therefore,

> the youth's behavior is seen as the product of the reciprocal interplay between the youth and these systems and of the relations of the systems with each other. . . . It is assumed, then, that youth behavior problems such as sexual aggression can be maintained by problematic transactions within any given system or between some combination of pertinent systems.

Id. This study explained that three years post-treatment the recidivism rate for sexual crimes among those who had received MST was only 12.5% as compared to a 75% such rate for those who did not, and was 12.5% compared to 41.7% at an 8.9-year post-treatment point. *Id.* at 298–99.

312. *See supra* Parts I.A–D, II.B (describing schools' failure to address student sexual harassment and courts' subversion of the Title IX deliberate indifference standard).

313. *See supra* Parts I.A–D, II.C (describing the negative impact of sexual harassment on school children).

314. Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 67 (1992) ("[T]he power to enforce the performance of the [Title IX] must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well-organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist." (quoting Kendall v. Stokes, 37 U.S. (12 Pet.) 524, 624 (1838))).

315. *See id.* at 74–75 ("Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."). When it found that Title IX has an implied private right of action, the Supreme Court rejected the argument that only equitable relief should be available for its violation. *Id.* On the topic, the Court only said:

> [I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate. . . . Moreover, in this case, the equitable remedies suggested by respondent and the Federal Government are clearly inadequate. Backpay does nothing for

Now, though, that monstrous absurdity has all but come to pass. By draining the deliberate indifference standard of its meaningful content when assessing K–12 public school students' Title IX claims, the courts not only preclude a damages remedy for all but the most egregious Title IX claims, but they have also therefore effectively rendered Title IX's protections largely inutile.[316]

To resolve this legal absurdity and revive Title IX's power to protect students, this Part proposes recasting the deliberate indifference standard such that its implicit demand for schools to affirmatively protect students from sexual harassment and assault is made explicit.[317] This Part also offers a framework for the evaluation of this recast standard.[318] This standard and framework ensure that schools' failures to respond even intermittently to reports of sexual harassment, their repeated use of failed responses without justification, and their responses that punish or blame survivors violate Title IX.[319] In addition, this Part develops a new legal presumption aimed at prompting schools to meaningfully design their responses to student sexual harassment.[320] Finally, to support that same end, it recommends regulatory changes to strengthen schools' responses to sexual harassment.[321] Such changes would force courts to hold not only K–12 schools to account when they put students at risk for and cause them further sexual harassment, but they would also apply to and strengthen Title IX's protections for any survivor of sexual harassment in any public school, no matter their school level.

> petitioner, because she was a student when the alleged discrimination occurred. Similarly, because Hill—[the teacher that high school student Franklin] claims subjected her to sexual harassment—no longer teaches at the school and [Franklin] herself no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all.

Id. at 75–76. That said, there is much value in plaintiffs bringing claims for damages as well as injunctive relief. By ordering injunctive relief, courts can require schools to take some of the specific fault-fixing steps that damages may prompt but do not require. *See, e.g.*, Adele Kimmel, *Title IX: An Imperfect but Vital Tool To Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2025–26 (2016) ("[L]awsuits generally have a greater impact when they also seek injunctive relief. This is because injunctive relief, whether by judgment or settlement, allows bullied LGBT students to obtain broad reforms that can change the climate in their schools.").

316. *See supra* Part II.B (discussing how changes to the application of the deliberate indifference standard would better protect students and meet the goals of Title IX).

317. *See infra* Part III.A.

318. *See infra* Part III.A.

319. *See supra* Parts I.A–C; *infra* Part III.A.

320. *See infra* Part III.B.

321. *See infra* Part III.C.

As a threshold matter, however, it is worth addressing the question of whether such changes and the consequent increased potential for the award of money damages to students could have an effect on remedying or preventing student sexual harassment. The Supreme Court's statements on that point notwithstanding, one might reasonably be skeptical.[322] Damages certainly cannot truly remediate a harm like sexual harassment that leaves deep, lasting wounds.[323] Yet, a damages remedy nevertheless serves at least two important functions. First, a damages remedy signals general social recognition of the injustice meted out by the state.[324] Second, it can prompt structural reforms that prevent future civil rights violations.[325] Even scholars

322. Scholars have expressed concerns with the value and efficacy of damages awards and the imposition of liability on the government in at least some kinds of § 1983 claims. *See, e.g.*, John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 75 (1998) (stating that government liability based on a failure to act creates perverse incentives because "[t]he causal connection between the plaintiff's injury and an officer's inaction may be indirect and obscure. Moreover, officers with discretionary authority, such as prosecutors, are protected from liability by the absence of any legally enforceable duty to act. In consequence, the risk of being sued for erroneous or improper action is vastly greater than is the risk of being sued for erroneous or improper (and perhaps equally costly) inaction. This imbalance increases the incentive to protect oneself by doing less.").

323. As Douglas Laycock said in his critique of the irreparable injury rule, "[b]ecause damages are almost never adequate, injury is almost always irreparable. . . . Plaintiffs cannot replace defective body parts, and awards for pain and suffering do not make the pain go away." Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 702, 709 (1990). Social science research also demonstrates as much. *See, e.g.*, Jefferey C. Schneider, Nhi-Ha T. Trinh, Elizabeth Selleck, Felipe Fregni, Sara S. Salles, Collen M. Ryan & Joel Stein, *The Long-Term Impact of Physical and Emotional Trauma: The Station Nightclub Fire*, PLOS ONE, Oct. 2012, at 1, 6 (comparing the effects of emotional and physical trauma on fire victims and concluding that "[s]urvivors [who] experienced physical and emotional trauma (those with burn injuries) demonstrate the same outcomes as those that experienced emotional trauma alone (those without burn injuries). Our analysis suggests that non-physical trauma is the primary determinant of these outcomes [including post-traumatic stress and depression]."); *see also* City of Riverside v. Rivera, 477 U.S. 561, 562 (1986) ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.").

324. *See Riverside*, 477 U.S. at 574 ("'[T]he public as a whole has an interest in the vindication of the rights conferred by [civil rights statutes] . . . over and above the value of a civil rights remedy to a particular plaintiff. . . .' Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards." (quoting Hensley v. Eckerhart, 461 U.S. 424, 444 n.4 (1983))).

325. *Id.* at 575 ("In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future."). Myriam Gilles describes these effects as "fault-fixing functions" in the municipal liability context. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of*

who have questioned money damages as a vehicle for structural reform in some contexts acknowledge that a damages remedy can motivate such reforms in others.[326] They point out that when there is a correspondence between the prohibited misconduct and the injury suffered, damages can promote structural reforms.[327] The sexual harassment and assault that Title IX prohibits corresponds directly to the injury suffered.[328] Strengthening the availability of a damages remedy under Title IX, therefore, holds very real promise of prompting structural reforms in schools when they respond vacuously to student sexual harassment.[329]

Importantly, although the proposals here aim to achieve both structural and individual claims-based reforms, they are still modest. They do not call for a radical overhaul of the standard for evaluating Title IX claims established by the Supreme Court.[330] Instead, they offer a way to more firmly marry the full potential of the deliberate indifference standard as explained by the Supreme Court to its evaluation.[331] Despite their relative restraint, these proposals are not without potential critiques.[332] Because those critiques could apply to all the proposals made here, they will be addressed in the final Section.

Constitutional Tort Remedies, 35 GA. L. REV. 845, 862 (2001). She argues that "municipal liability claims serve a 'fault-fixing' function, localizing culpability in the municipality itself, and forcing municipal policymakers to consider reformative measures." *Id.* at 861.

326. *See, e.g.*, John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1405 (2007) ("[O]ne can say that money damages are more likely to prove effective when the harm to be compensated is injury of the sort that the particular constitutional guarantee was intended to prevent. That would be true, for example, in excessive force cases, where the physical consequences of excessive force are precisely what constitutional doctrine attempts to prevent . . . [as opposed to] an ordinary case of illegal search that discovers incriminating evidence leading to trial, conviction, and punishment. In a but-for sense, all of these harms flow from the illegal search, yet few would contemplate reimbursing the victim for the consequences of his or her own criminality.").

327. *See id.*; *supra* text accompanying note 326.

328. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) (finding that student-on-student sexual harassment is capable of triggering a damages claim under Title IX and noting that "[h]aving previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe can likewise rise to the level of discrimination actionable under the statute").

329. *See supra* notes 324–26 and accompanying text (noting the social benefit and "fault-fixing" function of damages suits that arise from civil rights issues).

330. *See infra* Part III.A.

331. *See infra* Part III.A.

332. *See infra* Part III.D.

A. RECASTING DELIBERATE INDIFFERENCE AND A FRAMEWORK FOR ITS ASSESSMENT

In the current analysis, the lower courts divorce the complete meaning of the deliberate indifference standard from their evaluations of it and thereby strip Title IX of its power to protect students.[333] The deliberate indifference standard, therefore, needs to explicitly demand the affirmative protection it now only implicitly requires.[334] It should mandate that upon notice of student sexual harassment, schools must take affirmative steps to protect against causing or even just putting students at risk for further harassment.[335] Under this refined standard, a clearly unreasonable response to known sexual harassment would be one that failed to take such affirmative measures and so either caused students' continued sexual harassment or put them at risk for it such that they lost educational benefits.[336]

To evaluate this revised standard, courts need operative descriptions of what it means to affirmatively protect students in these ways.

333. *See supra* Parts I.D, II.B.2 (explaining the risk of further harm that is imposed on students under the current standard of review).

334. *See supra* notes 58–60 and accompanying text (discussing the protections that Title IX is intended to afford to students).

335. This standard is triggered on notice of an instance of harassment, which is itself a standard in need of revision. The extraordinary particularity required under the courts' assessments of Title IX's actual notice requirement creates almost impossible hurdles for students to overcome. *See supra* note 203 and accompanying text. The proposals I have made previously to remedy the problems with the actual notice prong of the Title IX test work in conjunction with the proposals made here. *See supra* note 203 and accompanying text; *see also* MacKinnon, *supra* note 17, at 2069 ("The lack of effectiveness and absence of realism of the deliberate indifference standard begin with the requisite notice. . . . [T]he contours of the knowledge required for Title IX liability [are] not notable for transparency or consistency.").

336. At least two federal courts of appeals, the Court of Appeals for the First and Eleventh Circuits, have articulated a standard approximating the one proposed here, without, however, any explicit articulation of an affirmative duty on the part of schools to protect students from known sexual harassment. *See* Hill v. Cundiff, 797 F.3d 948, 973 (11th Cir. 2015); Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172–73 (1st Cir. 2007) (noting that deliberate indifference can take "the form of a failure to take any precautions that would prevent future attacks," but finding that the facts of the case negated the claim of deliberate indifference (quoting Williams v. Bd. of Regents, 477 F.3d 1282, 1297 (11th Cir. 2007))); *supra* note 231 and accompanying text. While the First Circuit did not find that the institution's response in question was so deficient as to be unreasonable, the Eleventh Circuit did and found facts sufficient to make out a Title IX claim. *Fitzgerald*, 504 F.3d at 174; *Hill*, 797 F.3d at 975. In *Hill v. Cundiff*, the court said that a "clearly unreasonable response causes students to undergo harassment or makes them more vulnerable to it." 797 F.3d at 973. Although it then found facts sufficient to satisfy the standard, the facts were so outrageous—involving the school using a student as rape bait—that it is difficult to extrapolate to even slightly less egregious facts. *Id.* at 975; *see supra* note 210 and accompanying text.

First, courts should evaluate schools' responses to student sexual harassment and assault to determine whether they are reasonably designed to protect students against risking or causing more harassment. Absent such reasonable design, schools' responses are inadequate to the task of preventing or addressing further sexual harassment and so do not affirmatively protect against it.[337] Second, courts should evaluate any non-action by schools to reported sexual harassment as a categorical failure to take affirmative action to protect against students' suffering further harassment and so as not reasonably designed. Courts, therefore, should find any such non-action categorically clearly unreasonable and deliberate. Third, courts should also categorically conclude that schools' responses to sexual harassment that blame and punish survivors are also not reasonably designed to affirmatively protect against sexual harassment. They too, then, should be found clearly unreasonable and deliberately indifferent.

1. Assessing for Reasonably Designed Responses to Sexual Harassment

The Supreme Court said in *Gebser v. Lago Vista Independent School District* that schools act with deliberate indifference when they "ha[ve] actual knowledge of discrimination . . . and fail[] adequately to respond."[338] Yet, the Court did not offer guidance on precisely what constitutes an inadequate response.[339] If the deliberate indifference standard explicitly requires schools to affirmatively protect students from risking or causing additional sexual harassment, as proposed here, then a school's response to any report of student sexual harassment is inadequate when it fails to affirmatively protect students in these ways. Taken further, if a school's response to student sexual harassment is not reasonably designed to protect them from further harassment, or if it indirectly causes more harassment, the response is

337. *See supra* Parts I.A, I.D.2.

338. 524 U.S. 274, 290 (1998). The § 1983 cases the Supreme Court draws on in establishing the deliberate indifference standard in Title IX claims also describe deliberate indifference as occurring by inadequate responses. City of Canton v. Harris, 489 U.S. 378, 390 (1989) ("The issue in a case like this one, however, is whether that training program is adequate . . . . [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."); *see also* Brake, *supra* note 73, at 14 ("The remaining component of the standard measures the objective adequacy of the school's response to the harassment.").

339. *See Gebser*, 524 U.S. at 290–93.

inadequate and therefore clearly unreasonable and deliberately indifferent.[340]

First, factors for assessing such a reasonable design should include inquiring into whether the school made reasonable efforts to identify the source of the problem and address it. Only once the source of the problem is discovered can the school's intervention truly be aimed at preventing further harassment. The source of the problem could be individual, as was likely the case in *Gabrielle M. v. Park Forest-Chicago Heights*. In that case, kindergartner Gabrielle M. was assaulted by another kindergartner, who, chances are, had been victimized himself.[341] Alternatively, the source of the problem could be a broader school climate issue, as seemingly was the case in *Stiles v. Grainger County*, where a middle school student, D.S., suffered repeated harassment over two school years by over ten students.[342]

Once a school has made reasonable efforts to determine the source of the problem, its response should be reasonably designed to address the source. The response, therefore, might need to be individual, systemic, or both. Either way, the response must be fully implemented. Otherwise, it stands to lose features that render it reasonably designed. For example, in *Gabrielle M.*, because the student who harassed Gabrielle M. was also a kindergartner, he likely suffered abuse himself.[343] A reasonable response to Gabrielle M.'s harassment, therefore, would include uncovering and addressing her harasser's likely abuse. Such an individually-focused response alone, however, would not suffice to address a larger school climate problem as in *Stiles*, where D.S. suffered repeated harassment over two school years by more than ten different students.[344] In such cases, a school would have to address broader school climate concerns for the school's response to be reasonably designed.[345]

340. Elsewhere, I have broadly proposed that deliberate indifference be evaluated based on reasonableness. Suski, *supra* note 17, at 774 ("[I]nstead of evaluating deliberate indifference by inquiring into whether a school's response was not clearly unreasonable, courts should ask whether a school acted reasonably."). The recommendations here are in keeping with that recommendation but refine it to propose the reasonableness of the response be an evaluation of reasonable design.

341. *See* Gabrielle M. v. Park Forest-Chi. Heights Sch. Dist. 163, 315 F.3d 817, 818–20 (7th Cir. 2003); *see supra* note 310 and accompanying text.

342. *See* Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 841–45 (6th Cir. 2016).

343. *See supra* note 341 and accompanying text.

344. Repeated harassment spoke to a larger problem where it was acceptable, possibly even socially advantageous, for students to harass D.S. *See Stiles*, 819 F.3d at 841–45.

345. *See id.* Such school-wide programs already exist and have been evaluated by social science research as effective. The Positive Behavioral Interventions and

Finally, to prevent continuing trauma related to the sexual harassment, schools' responses need to seek to ameliorate these effects in order to be reasonably designed. These effects often include mental health and emotional trauma.[346] To be reasonably designed, therefore, interventions should include connecting students with counseling or other efforts to address the harm of the harassment when those harms exist.[347]

Importantly, the evaluation of an adequate, reasonably designed response is not an assessment of a response's effectiveness.[348] A well

Supports, or PBIS, model is one such model that can address bullying, among other problem behaviors in school, on a school-wide basis. *See, e.g.*, Catherine P. Bradshaw, Tracy E. Waasdorp & Philip J. Leaf, *Effects of School-Wide Positive Behavioral Interventions and Supports on Child Behavior Problems*, 130 PEDIATRICS e1136, e1136 (2012) ("Children in [school-wide positive behavioral interventions and supports (SWPBIS)] schools also were 33% less likely to receive an office discipline referral than those in the comparison schools. The effects tended to be strongest among children who were first exposed to SWPBIS in kindergarten.").

346. *See, e.g.*, Jim Duffy, Stacey Wareham & Margaret Walsh, *Psychological Consequences for High School Students of Having Been Sexually Harassed*, 50 SEX ROLES 811, 818–21 (2004) (discussing the negative psychological and academic impact of sexual harassment on high school students); HILL & KEARL, *supra* note 44, at 28 ("Most students who experienced sexual harassment felt that it had a negative effect on them. Many students said that they felt sick to their stomach or had trouble sleeping. Some students had trouble concentrating on their homework, and others said that they missed class, quit a school activity, or changed schools.").

347. For example, student K.S. suffered a severe depressive disorder related to the sexual harassment he suffered in middle school. K.S. v. Nw. Indep. Sch. Dist., 689 F. App'x 780, 782 (5th Cir. 2017). The harassment exacerbated his symptoms and contributed to K.S.'s suicide attempt. *See supra* notes 200–01 and accompanying text. In a similar case, a middle school student, K.C., also "suffered an acute psychotic episode that required hospitalization" following repeated sexual harassment and assault. Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1118 (10th Cir. 2008).

348. The one-time use of an ineffective response does not in and of itself prove the response was inadequate. However, if a school continues to use that unavailing response, then that continued use does demonstrate that the school used an inadequate response that indirectly causes sexual harassment and assault. *See supra* Part I.D.3. Again, this form of indirect causation finds its origins in § 1983 actions. *See* Bryan Cnty. Bd. of Comm'rs v. Brown, 520 U.S. 397, 407 (1997) (rejecting a claim that failure to screen one employee in hiring constituted a sufficient basis for municipal liability under § 1983 but still noting that "[i]f a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability."); *see also* Patterson v. Hudson Area Schs., 551 F.3d 438, 439 (6th Cir. 2009) (finding that there was a genuine issue of material fact as to whether the school was deliberately indifferent to the student-on-student sexual harassment at issue); Vance v. Spencer Cnty. Sch. Dist., 231 F.3d 253, 256–64 (6th Cir. 2000) (holding that a sixth grader had established sufficient evidence that the school

designed, more than adequate response could still fail. It is easy to imagine a scenario in which a school, upon learning of a student's sexual harassment, implements an intervention both designed to address the root of the problem and its effects on the student suffering the harassment, but the harassment continues.[349] For example, in *Stiles*, the school could have determined that the source of D.S.'s ongoing harassment did involve a school climate problem that allowed or even supported D.S.'s multiple years of repeated harassment by many different students.[350] It consequently could have also determined that elements of the school climate that contributed to that overall problem required school-wide training for teachers and students. A part of that training could have included explicit communication about the school's intolerance for such behavior as well as targeted individual training and counseling for the students who had harassed D.S. Further, such interventions could have addressed the negative psychological effects on D.S. by providing him counseling, the option of a school transfer to avoid seeing the students who harassed him, or both. Yet, despite such meaningfully designed interventions, a student, for example, could still find D.S. at a school sporting event and harass him. The fact that the reasonably designed interventions did not prevent that harassment does not negate their reasonableness and so would not demonstrate deliberate indifference. Thus, this inquiry into what constitutes

board was deliberately indifferent to her sexual harassment); *supra* note 103 and accompanying text.

349. Inadequate responses as conceptualized here also do not turn on negligence or whether a school could have done more. *See* City of Canton v. Harris, 489 U.S. 378, 391–92 (1989) ("To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident. Thus, permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell*. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism." (citations omitted)). A school could always do more, even when its approaches to dealing with sexual harassment are effective. Instead, the adequacy determination here examines the design of the approach. As such, it is a narrower inquiry than whether a school could have reasonably done more. That said, scholars as thoughtful and serious about Title IX's flaws as Catharine MacKinnon have made compelling arguments for something like a reasonableness standard. MacKinnon, *supra* note 17, at 2096–97 (calling for a due diligence standard to supplant the deliberate indifference standard in Title IX claims).

350. *See* Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 841–45 (6th Cir. 2016).

a reasonably designed response is both necessary to ensuring the affirmative protections posited here and necessarily case-specific.

2. Categorically Precluding Any Non-Response to Student Sexual Harassment

Under this revised framework, certain types of responses to student sexual harassment are categorically clearly unreasonable and deliberately indifferent. A one-time instance of non-action by schools to a report of student sexual harassment is not designed at all, let alone reasonably, to protect against risking or causing students further harassment.[351] Courts should therefore find that even a one-time failure by schools to respond to known student sexual harassment is a failure to affirmatively act to protect students. Courts should categorically conclude such non-responses are clearly unreasonable and deliberately indifferent.[352] Such a categorical prohibition on inaction by schools would, as with the reasonable design framework itself, not require specific actions, but it would require schools to do something reasonably designed to address student harassment. The objective here is to compel some response by the schools to every report of student sexual harassment, where the law now allows schools to intermittently do nothing.[353] By prohibiting any non-response by schools to reports of sexual harassment in this way, the courts could no longer use a school's occasional response to sexual harassment to inoculate their other non-responses to it.[354]

Significantly, identifying this category of responses, or non-responses, as sufficient to establish deliberate indifference finds footing in the Supreme Court Title IX jurisprudence. In *Davis*, the Court said that when schools "refuse[] to take action,"[355] "remain idle,"[356] or decide "not to remedy the violation," they have acted with deliberate indifference.[357] The Court did not limit this prohibition on non-

351. *See supra* Part I.D.1 (discussing how non-response to sexual harassment puts students at risk for future harassment).

352. Importantly, because students need to show that their sexual harassment was severe and pervasive to have a viable Title IX claim, if a school fails to respond to a minor incident of sexual harassment, for example, the claim will still not prevail. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 631 (1999) (explaining that the sexual harassment must be "sufficiently severe" to rise to the level of "discrimination" actionable under Title IX); *supra* note 65 and accompanying text.

353. *See supra* Part I.A.

354. *See supra* Part I.A.

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

356. *Davis*, 526 U.S. at 641.

357. *Gebser*, 524 U.S. at 290.

responses to schools' complete and total failures to respond.[358] When a school fails to act in response to a report of student sexual harassment, therefore, it puts the student at risk for, or indirectly causes, or both, the student's further sexual harassment.

3. Categorically Precluding Responses to Student Sexual Harassment that Cause Secondary Harms and Institutional Betrayals

Finally, schools' inverted responses to student sexual harassment that inflict secondary harms and institutional betrayals on students do the opposite of affirmatively protecting them. Courts, therefore, should categorically conclude that schools' responses that inflict secondary trauma or institutional betrayals are clearly unreasonable responses under this framework. These harms happen when schools blame the survivor, including by suggesting the survivor could have done something to stop, change, or prevent the harassment.[359] They also occur when schools respond to student sexual harassment by effectively punishing the survivors.[360] Consequently, courts should find any school response to student sexual harassment that causes these harms transgresses this revised deliberate indifference standard.

4. Changed Outcomes

Under this revised standard and framework for determining deliberate indifference, the outcomes of cases such as *Rost ex rel. K.C. v. Steamboat Springs*,[361] *Gabrielle M. v. Forest Park-Chicago Heights*,[362] and *K.F. ex rel. C.F. v. Monroe Woodbury Central School District* would change.[363] Because a school could no longer merely make a referral to law enforcement but do nothing in the school setting to address the sexual harassment and assault that middle school student K.C. suffered, that non-response would violate the deliberate indifference standard.[364] Likewise, although kindergartner Gabrielle M.'s school did not fail to intervene in response to her harassment by another kindergarten student, its decision to intervene by separating Gabrielle from her abuser but then not fully implementing that response would

358. *See id.* (comparing deliberate indifference to "an official decision . . . not to remedy the violation").

359. *See supra* notes 135, 139, 194–95, 197, 200–01 and accompanying text.

360. *See supra* notes 135, 139, 194–95, 197, 200–01 and accompanying text.

361. 511 F.3d 1114 (10th Cir. 2008).

362. 315 F.3d 817 (7th Cir. 2003).

363. 531 F. App'x 132 (2d Cir. 2013).

364. *See Rost*, 511 F.3d at 1114, 1117–18.

not satisfy the reasonable design requirement.[365] It would fail on that count because even if the response could be called reasonably designed to address the source of the harassment, the fact that it was not fully implemented means its implementation eliminated elements of its reasonable design.[366] It therefore was inadequate to the task of protecting Gabrielle.[367] Finally, when the school responded to student C.F.'s harassment by offering her a disciplinary school placement, effectively punishing her for her own harassment and so meting out secondary trauma and institutional betrayals, this response would be categorically clearly unreasonable. [368] Consequently, it too would contravene the revised deliberate indifference standard and violate Title IX.

B. A PRESUMPTION OF DELIBERATE INDIFFERENCE

One goal underlying these recommended changes is to prompt schools to meaningfully consider how to respond to student sexual harassment in order to protect against and address it. Achieving such meaningful responses would do substantial work to accomplish Title IX's purpose of protecting students from sexual harassment in the public schools.[369] A new legal presumption in Title IX cases aimed at schools' repeated use of failed responses to student sexual harassment would further that goal.[370] Under this presumption, if a student could demonstrate that a school repeated a failed intervention in response to sexual harassment, such evidence would create the presumption of deliberate indifference. The burden of proof would shift to the school to either disprove the repetition of that response or to demonstrate that it had a reasonable justification for repeating the response at the time it did so.

The fact of repeating a failed response is critical to this presumption. Because a reasonably designed response can still fail to protect

365. 315 F.3d at 820–21.

366. *See id.* at 820 (explaining that the school failed to ensure that Jason was completely separated from Gabrielle or that the harassment had stopped).

367. *See id.*; *supra* Part III.A.2.

368. *K.F.*, 531 F. App'x at 133.

369. *See supra* Part I.A; *supra* note 60 and accompanying text.

370. *See supra* note 348 and accompanying text. In both *Doe v. Board of Education* and *McCoy v. Board of Education*, for example, both elementary schools' repeated use of responses—talking and issuing a letter of reprimand, respectively, to the accused harasser—did not stop student sexual harassment and abuse. *Doe*, 605 F. App'x 159, 161–62 (4th Cir. 2015); *McCoy*, 515 F. App'x 387, 389 (6th Cir. 2013). The students suffered more harassment after the school repeated those ineffective responses. *Doe*, 605 F. App'x at 161–63; *McCoy*, 515 F. App'x at 389.

against sexual harassment, the fact of its initial failure does not demonstrate that the response is deliberately indifferent.[371] The continued use of that response, though, does support such a finding. Once a school knows that its response to sexual harassment has failed to prevent more sexual harassment, its reuse of that same response holds little hope of preventing or addressing the sexual harassment.[372] The repeated implementation of failed responses to student sexual harassment therefore puts students at risk for and can indirectly cause more harassment.[373] They therefore should be presumptively deemed clearly unreasonable and deliberately indifferent.

More specifically, to have the benefit of this presumption, a student would need to make three showings. First, the student would have to demonstrate evidence of the school's initial response to the student's report of sexual harassment. Then, the student would have to show that she or he suffered more sexual harassment after the implementation of that response and the school knew about it.[374] Third, the student would then have to show that the school repeated that failed intervention again.

Upon making these three showings, the school would also be presumed to be deliberately indifferent. It could, however, rebut the presumption in one of two ways. First, it could rebut the presumption with evidence disproving its repeated use of that failed response. To do so, a school could not just show a small difference in the responses used but a difference in the kind or magnitude of the responses. For example, in *Porto v. Town of Tewksbury*, the school could not rebut this presumption of deliberate indifference by showing that it separated S.C. and R.C. on the bus and in the classroom because such separations are not different in kind or magnitude.[375]

Second, a school could rebut the presumption of deliberate indifference by showing that it had a reasonable justification for repeating its failed response at the time it reimplemented the failed response. To establish such a reasonable justification, the school would first have to produce evidence to demonstrate that it considered

371. *See supra* notes 348–49 and accompanying text.

372. *See* Bryan Cnty. Bd. of Comm'rs v. Brown, 520 U.S. 397, 407 (1997) ("Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability.").

373. *See supra* Parts I.B, I.D.1; *supra* note 348 and accompanying text.

374. It bears repeating that what constitutes notice is currently highly specific and problematic. *See supra* note 203 and accompanying text.

375. *See* Porto v. Town of Tewksbury, 488 F.3d 67, 70–71 (1st Cir. 2007).

alternatives to the failed response at the time it decided to use the failed response again. Then, it would have to show that it had a reasonable basis for reusing the failed response at the time it decided to reuse it. Those alternatives and that reasonable basis would show that the school did not unthinkingly apply the same failed intervention again. Only after making both showings could a school successfully rebut the presumption of deliberate indifference. For example, a school might be able to rebut the presumption of deliberate indifference by showing that because of the child's young age, the repetition of some specific response was necessary because young children do not learn without such repetition. The school could further produce evidence that it therefore repeated the intervention because, at the time it did so, the school sought to reinforce earlier messages about the wrongs of inappropriate touching before implementing more drastic interventions, again given the child's young age. Such showings would establish a reasonable basis for the repeated use of the failed response and therefore would rebut the presumption of deliberate indifference.

This proposed legal presumption, like the standard and framework it serves, would change the outcomes in some Title IX cases. For example, in *Porto*, after the elementary school learned that student R.C. harassed and assaulted S.C., the school repeatedly separated the boys' classroom seats in addition to separating them on the bus.[376] The repetition of this failed physical separation response would trigger the presumption of deliberate indifference.[377] Absent any evidence to rebut the proof of the intervention's repetition, the school's consideration of alternative interventions, or a reasonable justification for its repeated use of those physical separations, the court would be constrained to find that the school acted with deliberate indifference.[378] This presumption, coupled with the inquiry into whether schools' responses to sexual harassment are reasonably designed to protect students from further harassment, would not only upend the lower courts' subversion of the deliberate indifference standard but would also offer students significant recourse in Title IX when schools failed to provide the protections it demands.

376. *Id.*

377. *Id.*

378. Although the school district challenged the sufficiency of some of the evidence presented at the district court level, it did not include evidence presented on its repeated responses to the harassment in that challenge. *See* Porto *ex rel.* SC v. Town of Tewksbury, No. 04-10003, 2006 WL 1167782 (D. Mass. Apr. 28, 2006), *rev'd sub nom.* Porto v. Town of Tewksbury, 488 F.3d 67 (1st Cir. 2007). The school district, therefore, could not have rebutted the presumption on that basis. *See id.*

C. A TITLE IX REGULATORY OPPORTUNITY

Title IX's protections do not depend solely on the courts for their enforcement. Title IX has a regulatory scheme for its public enforcement by the U.S. Department of Education that can work in conjunction with its private enforcement system in the courts.[379] Although those regulations were just revised,[380] the change in presidential administrations offers the possibility that those regulations will be revised yet again.[381] Thus, the opportunity exists to amend the Title IX regulations such that they include provisions to better ensure schools will protect students from and address their harassment.[382] The regulations therefore should incorporate a requirement that schools

379. 34 C.F.R. §§ 106.1–.71 (2020).

380. *Id.* §§ 106.1–.82.

381. During his campaign for president, President Biden vowed a "quick end" to the new Title IX regulations. Michael Stratfor, *The Biden Agenda: For His Tuition-Free College Plans and More Money for Poor School Districts, Biden Needs Congress on Board*, POLITICO (Nov. 7, 2020), https://www.politico.com/news/2020/11/07/joe-biden-policies-education-433633 [https://perma.cc/4WVR-VPV5].

382. In the fall of 2018, the U.S. Department of Education proposed new regulations for its public enforcement of Title IX, which have not yet been made final. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,408, 61,433–66 (proposed Nov. 29, 2018). The proposed regulations received strong criticism. *See, e.g.*, Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 311 (2019) (arguing that the changes to standards under the proposed Title IX rules constitute an "attempt to replace the historically used civil rights preponderance standard with the quasi-criminal C&C [clear and convincing] evidence standard" and is part of a "larger and longer war against civil rights and equal educational opportunity"); Janet Napolitano, *Don't Let the Trump Administration Undermine Title IX*, WASH. POST (Dec. 4, 2018), https://www.washingtonpost.com/opinions/janet-napolitano-don't-let-the-trump-administration-undermine-title-ix/2018/12/04/6c91f316-f7fc-11e8-863c-9e2f864d47e7_story.html [https://perma.cc/U85E-4XET] ("The Education Department's proposed rules threaten to reverse this hard-won progress by unraveling critical protections for individuals who are sexually harassed and undermining the very procedures designed to ensure fairness and justice."). That said, some advocates criticize the current standards and support the proposed changes. *E.g.*, Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 115 (2015) (describing the "dangers of an unthinkingly broad, advocacy-based definition of sexual harassment"); Lara Bazelon, *I'm a Democrat and a Feminist. I Support Betsy DeVos's Title IX Reforms*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html [https://perma.cc/H9VE-B33A] (arguing that racial implications of the current standards demand reform and noting that "[w]e have long oversexualized, over-criminalized and disproportionately punished black men. It should come as no surprise that, in [the Title IX enforcement] setting in which protections for the accused are greatly diminished, this shameful legacy persists."). Despite the many serious concerns that the proposed Title IX regulations give rise to, because they are not yet final, they may still be amended.

develop written plans detailing their responses to known student sexual harassment. The requirement that schools develop these written plans would help prompt schools to develop reasonably designed responses to reports of student sexual harassment. Such a change to the Title IX regulations would thus work in conjunction with and support both the deliberate indifference framework and presumption proposed here.

Such plans are not legal novelties. Other civil rights laws require schools to develop written plans, including, prominently, the Individuals with Disabilities Education Act (IDEA).[383] The Title IX regulations, like the IDEA, should mandate that schools develop a written plan upon a report of a student's sexual harassment. The schools should be required to identify the source of the problem in the plan and how they will address it in a manner that is reasonably designed to protect against its recurrence and ameliorate its effects. Further, the regulations should require that the school revise the plan as soon as possible after receiving notice that an intervention did not work to avoid the immediate risk of further sexual harassment.[384] These changes would strengthen both the private and public enforcement schemes by demanding meaningful, reasonably designed, consistent responses to every report of student sexual harassment.

D. CRITIQUES AND THEIR ANSWERS

Virtually any time a public system's potential for liability increases, so do concerns about moral hazard and informational error costs. [385] Proposals that require schools to take on more

383. *See* 34 C.F.R. §§ 300.320, .323 (2007) (defining written individualized education plans for students with disabilities and mandating that they be in effect for each child with a disability in a school district). Further, these proposed requirements could also trigger the discovery of disabilities under the IDEA's child find requirements and consequently the provision of needed special education and related services to some students. *Id.* §§ 300.111 (child find requirements), .101 (free appropriate public education requirements).

384. Although the Individuals with Disabilities Education Act requires that written IEPs be in effect for students with disabilities and that they include services that allow a child to make appropriate progress toward annual goals, it does not expressly preclude a school from repeating those goals and services year after year. *See id.* § 300.320. Advocates for students with disabilities who see their goals and services repeated year after year without change or progress, therefore, have to argue that the IEPs are not designed to make such progress. *See id.* That conclusion is not a given. *See id.*

385. The *Davis* dissent, for example, was explicit in its concerns about effecting a sort of moral hazard with the imposition of Title IX liability for peer sexual harassment, arguing that "[t]he cost of defending against peer sexual harassment suits alone could overwhelm many school districts . . . . A school faced with a peer sexual harassment

administrative efforts also raise concerns about the burdens placed on schools.[386] Because the recommendations here would both increase the potential for school liability and add administrative requirements, all of these concerns apply to the proposals made here, are serious, and warrant answers.[387]

Increasing schools' Title IX liability could generate a sort of moral hazard if it provided recompense, however inadequate,[388] to an individual student at the cost of diminishing the resources available to the broader population of students in that school district.[389] Such a moral hazard might occur if the damages award left the school district with fewer resources to serve its population of students more generally.[390]

Increased Title IX liability, however, has a relatively small likelihood of causing any such moral hazard for reasons based in loss-spreading principles. Loss-spreading principles seek to "identify the actors in the risk-producing transaction who, regardless of fault, are best suited institutionally to manage the loss."[391] Sometimes the institution or actor at fault is best equipped to bear that loss.[392] Such is the

complaint . . . may well be beset with litigation from every side." Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 680, 682 (1999) (Kennedy, J., dissenting). The *Davis* dissent, however, was incorrect in these predictions. *See* Suski, *supra* note 17.

386. *See supra* Part III.C.

387. I have addressed several of these same or similar critiques in previous scholarship on Title IX and public schools' liability more generally for harms to children. *See* Suski, *supra* note 17; *supra* note 203 and accompanying text. Because they are not insignificant and could be made here, they merit addressing.

388. *See supra* note 323 and accompanying text.

389. Tom Baker has defined a moral hazard as "the perverse consequences of well-intentioned efforts to share the burdens of life." Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 239 (1996). In the insurance regulation context, John Rappaport has explained moral hazard as "the propensity of insurance to reduce the insured's incentive to prevent harm." John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1543 (2017). Although a classic moral hazard may be thought of as occurring in circumstances such as when fire insurance coverage causes the insured to act carelessly with regard to fire hazards, Baker generalizes the concept, explaining that it occurs "any time that one party's actions have consequences for the risk of loss borne by another." Baker, *supra*, at 272.

390. *See* Baker, *supra* note 389 and accompanying text; Rappaport, *supra* note 389 and accompanying text.

391. John A. Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929, 1969 (1988) (examining the validity of loss-spreading concepts in tort).

392. *See id.* at 1977–78 ("[T]o the extent that loss spreading is accepted as a rationale, the product manufacturer is generally considered to be better equipped than the individual consumer to manage and spread accident costs . . . . [T]hese portrayals seem appropriate, and thus instrumental theory works in harmony with intuitive notions of the just outcome."); *see also* Robert L. Rabin, *Tort Recovery for Negligently*

case in the Title IX context. As compared to schools, individual students have little capacity to bear the loss of their education and psychological and physical well-being.[393] First, schools are institutionally designed to educate students.[394] So they are far better suited than students to remedy any educational losses students might suffer as a result of sexual harassment.[395] Second, compared to the majority of public school students, schools have the resources to address or pay to address the psychological and other effects of sexual harassment.[396] In any event, schools' resources are not likely to be stretched to the point of creating a moral hazard because many carry insurance to help offset the burden of such liability.[397]

Inflicted Economic Loss: A Reassessment, 37 STAN. L. REV. 1513, 1520–21 (1985) (arguing that "[a]ttorneys are better able to spread the cost of careless lawyering than random victim-beneficiaries who do not constitute an activity category for risk-spreading purposes. At the same time, a rule of liability can be justified from an economic efficiency perspective: Acknowledging liability creates an incentive to take greater care—what the court referred to as 'the social policy of preventing future harm.'" (quoting Heyer v. Flaig, 449 P.2d 161, 165 (Cal. 1969))).

393. *See supra* Part I.D; *infra* note 396 and accompanying text.

394. That is their purpose for being. *E.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))). Further, Michael Wells's argument that the constitutional tort context especially merits application of civil recourse principles has cogency here. Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1051–52 (2012). He contends that "the force of the argument for civil recourse norms is magnified in the constitutional tort context because the rights asserted are more vital and the defendants from whom redress is sought are more powerful and more dangerous." *Id.* at 1012. Given that Title IX operates to fill a gap left by the failure of federal and state common law to fully prevent discrimination on the basis of sex in schools, the rights enforced by Title IX are just as forceful as those enforced by constitutional torts.

395. *See Keyishian*, 385 U.S. at 603; Wells, *supra* note 394 and accompanying text.

396. More than half of the public-school population lives in poverty. A 2015 report by the Southern Education Foundation found that 51% of students in the public schools live in poverty. S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS NOW A MAJORITY IN THE NATION'S PUBLIC SCHOOLS 2 (2015), https://www.southerneducation.org/wp-content/uploads/2019/02/New-Majority-Update-Bulletin.pdf [https://perma.cc/3SVE-EZJS]. In some states, substantially more than 50% of students live in poverty. *Id.* at 2–3. For example, 71% of students in Mississippi and 68% of students in New Mexico live in poverty. *Id.*

397. Insurance itself spreads loss; that is its purpose. Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 649 (1996) ("Loss spreading, of course, is what insurance is all about . . . ."); Malia Herman, *Threat of Data-Privacy Litigation Fuels District Insurance Purchases*, EDUC. WEEK (Oct. 19, 2015), https://www.edweek.org/technology/threat-of-data-privacy-litigation-fuels-district

Loss-spreading principles and liability insurance, however, do not address concerns about informational error costs.[398] Such concerns focus on the costs involved with courts in developing the institutional capacity and knowledge needed to decide certain cases.[399] These costs include the increased decisional errors that can happen when making decisions if "information costs (or any other transaction costs) are high."[400]

In Title IX cases, courts express concerns about informational costs when they disclaim any basis for or authority to involve themselves in school pedagogy or discipline.[401] Yet, such qualms about the courts' institutional capacity are largely unfounded in the Title IX

-insurance-purchases/2015/10 [https://perma.cc/G77G-VCDN]; *see also* Dave Arnold, *Insuring Your Good Name*, NAT'L EDUC. ASS'N, http://web.archive.org/web/20200714040800/https://www.nea.org/home/14629.htm [https://perma.cc/4AVZ-UD5H]; *Risk Management Fund*, GA. SCH. BDS. ASS'N, https://gsba.com/member-services/risk-management/about-rms/risk-management-fund/#school [https://perma.cc/42DT-ST58]; *Errors & Omissions/General Liability Fund*, N.C. SCH. BDS. ASS'N, http://www.ncsba.org/risk-management/errors-omissionsgeneral-liability-fund [https://perma.cc/2KTD-4DNN]. That said, arguably, such insurance could create a more classic moral hazard. *See* Baker, *supra* note 389, at 272. With such insurance, schools' operating resources are not used to pay civil claims because they are paid by insurance policies. *See id.* It could incentivize schools to ignore student sexual harassment because they will not have to pay for any civil damages when they do. However, insurance companies can and do ward off those effects by not covering such claims. *See id.* at 281 ("[G]eneral controls over an insured's ability to recover loss reflect the widespread agreement that insurance has a significant effect on what people do to recover from loss.").

398. *See* Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1658 (2007) ("[When litigation involves] specialized knowledge, such as [with] schools and prisons, the information costs of adjudication may be especially high. Litigants must expend more time and expense explaining the case to the court, and the court must expend more time and effort learning the information necessary to make a good ruling. [In such cases,] 'error costs will be high as well, because with the courts likely having less information when making their rulings, the odds of erroneous rulings are greater.'").

399. *See id.*

400. *See id.*

401. In *Davis*, the dissent based its arguments against school Title IX liability for peer sexual harassment in part on strong concerns such as liability requiring courts to involve themselves in student discipline determinations, which it said the schools "are usually in the best position to judge." Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 678 (1999) (Kennedy, J., dissenting); *see also* Doe v. Bd. of Educ., 605 F. App'x 159, 165 (4th Cir. 2015) (approving of the lower court's rationale for rejecting the argument for more oversight of the school's responses to student sexual harassment because it would "deprive school administrators of the flexibility to employ tailored responses to sexual harassment and run counter to the strong national policy in favor of educating children").

context or with respect to the recommendations made here. The standard proposed here does not require courts to delve deeply into the substance of school pedagogy or discipline, as would be required, for example, if it called for them to decide whether a particular pedagogical method was best suited to teach students about sexual harassment.[402] Further, no such analysis is needed to evaluate schools' utter failures to respond to reports of sexual harassment or their repetition of known ineffective responses. Even in more complicated cases that would require courts to determine whether a school's response was reasonably designed, that inquiry requires a determination of whether schools made reasonable efforts to determine the cause of a problem and made reasonable efforts to address it.[403] It does not, for example, call for courts to evaluate whether the schools correctly determined the cause every time, which would be a more complicated evaluation that has more potential to lead to error costs.[404]

All that said, such institutional capacity concerns do not currently constrain the courts from effectively and bluntly eliminating a remedy for much of the sexual harassment students currently suffer.[405] Even though other institutions, including the legislative and executive branches, could arguably craft nuanced remedial solutions that would address the courts' underlying concerns about imposing liability on schools for sexual harassment, the courts nevertheless simply eliminate almost any remedy for such harassment without any apparent misgivings about institutional capacity.[406] If such institutional capacity concerns do not restrain the courts from purging remedies, they should likewise not then constrain them from requiring them.

402. *See supra* Part III.A.

403. *See supra* Part III.A.1.

404. Instead, the inquiry proposed here requires courts to do the kinds of fact-finding that they do in many other sorts of cases. Tort requires similar, if not more challenging, fact-finding in negligence claims. To determine whether a defendant is negligent, courts must determine the actual and proximate causes of harm. *See* DOBBS ET AL., *supra* note 219, § 206. Under the proximate cause, or "scope of liability," rules "the defendant [is] subject to liability if [s]he could reasonably foresee the nature of the harm done, even if the total amount of harm turned out to be quite unforeseeably large." *Id.* Consequently, juries and judges must determine what harm a defendant could foresee occurring as the result of his or her negligence. *See id.* The Supreme Court has required an at least as, if not more, onerous fact-finding in § 1983 cases when it has set courts to the task of determining whether better training would result in a hypothetical reasonable police officer acting to avoid injury to a person in custody. *See* City of Canton v. Harris, 489 U.S. 378, 391 (1989); *supra* note 288 and accompanying text.

405. *See supra* Parts I.A–C, II.B.2.

406. *See supra* Parts I.A–C, II.B.2.

Another possible critique of these proposals is that they increase the administrative burdens on the schools.[407] To be sure, they do require more administratively of schools. Such concerns are persuasive when the administrative burdens outweigh the benefit they seek to accomplish. [408] Because the administrative tasks proposed here, though, are to the end of meaningfully preventing and addressing the serious harm of sexual harassment, they are justified.[409]

Finally, these recommended changes could risk the overidentification and punishment of students by race. This concern has a strong foundation in schools' current disciplinary practices. Schools already discipline more students of color, particularly by way of suspending and expelling them, for all manner of school discipline code violations.[410] If the public schools face increased potential liability for failing to respond or respond adequately to student sexual harassment, they may, as Justice Kennedy feared in *Davis*, simply suspend and

407. Such concerns abound in education policy and reform, including in the civil rights context. For example, the findings and purposes section of the IDEA states that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities," but also states that it seeks to "[focus] resources on teaching and learning [and reduce] paperwork and requirements that do not assist in improving educational results." 20 U.S.C. § 1400(c)(1), (5)(G).

408. For a discussion of such cost-benefit analyses in other contexts, see generally M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517, 1552, 1568 (2009), which argues that "the nanny corporation may be superior to the nanny state at writing efficient rules . . . [such as taxing food to reduce obesity because] the administrative burden in trying to ascertain the costs and benefits of each food or each ingredient is likely to be daunting, if not impossible"; Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2101–02 (2004), which argues in the trademark context that "[e]nforcement costs are important to the design of trademark rules, because . . . . case-specific inquiry into the costs and benefits of trademark protection is likely to be administratively burdensome and error-prone"; and Stephen P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REGUL. 451, 451, 555 (1997), which argues that the Federal Advisory Committee Act, which "governs agency solicitation of policy advice from outside groups, . . . adds administrative burden and cost without benefit."

409. *See supra* note 408 and accompanying text.

410. *E.g.*, Halley, *supra* note 382, at 107 (arguing that "the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them"); Bazelon, *supra* note 382 (arguing that racial implications of the current title IX standards demand reform, noting "[w]e have long over-sexualized, over-criminalized and disproportionately punished black men. It should come as no surprise that, in [the Title IX enforcement] setting in which protections for the accused are greatly diminished, this shameful legacy persists.").

expel them at every report of harassment.[411] Such blanket responses could easily disproportionately affect students of color.[412] Nothing in these proposals, however, suggests that the method for addressing student harassment must, or even should, be punitive disciplinary measures. Quite to the contrary, students who sexually harass and assault other students often need mental health and other related interventions.[413] In those cases, suspending and expelling students would not meet the standard that calls for schools to reasonably design their interventions because it would not address the source of the problem.[414] While it would temporarily remove such children from school, such removals are not permanent.[415] Without connecting students to mental health services, therefore, schools can virtually expect the problems to recur.[416] Far from suspending and expelling those students, therefore, the public schools would do far more to avoid liability by treating it in those ways. While not insignificant, then, all of these critiques have answers, and as such, they do not obviate the need for the changes recommended here to better protect students from sexual harassment in school.

CONCLUSION

The deliberate indifference standard has largely unrealized potential to achieve Title IX's purpose of protecting students from sexual harassment in the public schools. By proscribing schools' responses to known student sexual harassment that both risk and indirectly cause

411. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 681 (1999) (Kennedy, J., dissenting) ("Title IX liability will, in all likelihood, breed a climate of fear that encourages school administrators to label even the most innocuous of childish conduct sexual harassment [and impose discipline for it]."); Doe v. Bd. of Educ., 605 F. App'x 159, 165 (4th Cir. 2015) (approving of the district court's rejection of the student's deliberate indifference argument in part because "nothing short of expulsion of every student accused of misconduct involving sexual overtones" would protect schools from liability (quoting *Davis*, 526 U.S. at 648)).

412. *See supra* note 410 and accompanying text.

413. *See supra* note 310 and accompanying text.

414. *See supra* Parts III.A–C.

415. Even expulsions generally do not last more than twelve months. In California, a school district cannot expel a student for more than one year. *See* CAL. EDUC. CODE § 48917(a) (1996). *See generally* CHILD TRENDS & EMT ASSOCS., INC., COMPENDIUM OF SCHOOL DISCIPLINE LAWS AND REGULATIONS FOR THE 50 STATES, DISTRICT OF COLUMBIA AND THE U.S. TERRITORIES (2020), https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf [https://perma.cc/549E-WRJP] (detailing states' expulsion lengths and limits).

416. *See supra* notes 310–11 and accompanying text.

students further sexual harassment, the standard can require that schools take affirmative steps to accomplish these ends. Yet in their evaluations of deliberate indifference, the lower courts jettison any assessment of either risk or cause. In doing so, they not only drain the deliberate indifference standard of its complete meaning and defeat Title IX's protective purpose, but they also permit schools' responses to sexual harassment that put students at risk for and actually cause their further sexual harassment. The courts therefore subvert Title IX in both purpose and effect.

To restore Title IX's purpose and achieve its intended effects, the deliberate indifference standard needs to explicitly require what it now only implicitly demands. The deliberate indifference standard should mandate that schools affirmatively protect students from known sexual harassment. In addition to recommending this recast standard, this Article proposes a framework for its evaluation. It also develops a new legal presumption such that when a school repeats the use of failed responses to sexual harassment, courts would presume that the school acted with deliberate indifference. Finally, this Article advances Title IX regulatory changes to reinforce the protections that the law seeks to provide. These proposals offer the promise of reinvigorating Title IX's purpose and preventing and addressing student sexual harassment in schools.