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DEFINING DELIBERATE INDIFFERENCE AND INSTITUTIONAL LIABILITY UNDER TITLE IX

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INTRODUCTION

When the Obama administration released a Dear Colleague letter in 2011, they sought to inform schools and universities of their responsibilities to address sexual harassment under Title IX.[1] Sexual harassment includes acts of sexual violence and are considered another form of sex discrimination occurring in educational programs and activities.[2] Incidents on college campuses, at this time, were so prevalent that a National Institute of Justice report found that about one in five women in college are victims of completed or attempted sexual assault.[3] Title IX requires educational institutions to prevent and promptly correct peer-to-peer sexual harassment with a notice of nondiscrimination, at least one designated employee to coordinate efforts to comply with the law, and adopt and publish grievance procedures for student and employee sex discrimination complaints.[4]

Unfortunately, the warnings and guidance provided by this Dear Colleague letter did not effectively address sexual harassment as seen by the survey report requested by Senator Claire McCaskill in 2014.[5] This report highlighted that

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1. Russlynn Ali, Assistant Secretary, *Dear Colleague Letter: Sexual Violence*, OFF FOR CIV RTS., U.S. DEP'T OF EDUC. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (Rescinded) [hereinafter *Dear Colleague Letter*].

2. U.S. DEP'T OF EDUC., OFF. FOR C.R., KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCHOOL, at 1 https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf (Rescinded). This article will use the terms sexual harassment, sexual violence, and sexual misconduct interchangeably to refer to actions that qualify as sex discrimination under Title IX.

3. *Dear Colleague Letter*, *supra* note 1.

4. *Id.*; *see also* 34 C.F.R. § 106.8 (2021); 34 C.F.R. § 106.9 (2021).

5. CLAIRE MCCASKILL, U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, SEXUAL

universities were failing to address sexual violence by not encouraging students to report assaults, lacking adequate training and services for survivors and failing to investigate claims that were reported.[6] Distressingly, the report uncovered that in the three years after the Dear Colleague letter warned educational institutions about the need to provide coordinated oversight to address sexual harassment on campus, more than 10% of the institutions covered in the national sample did not have a Title IX coordinator.[7]

The Department of Education (DOE) released two additional guidance documents to supplement the 2011 Dear Colleague letter: the 2014 *Questions and Answers on Title IX and Sexual Violence* and a 2015 Dear Colleague letter. These documents were intended to address a university's legal obligations related to sexual harassment and clarify the responsibilities of the required Title IX coordinator respectively.[8] While these documents were intended to provide clarity, the change in presidential administration in 2016 led to new interpretations of Title IX and growing uncertainty of responsibilities under the law. In 2017, the Trump administration rescinded all previous documents developed by the Obama administration under Title IX, including the 2011 and 2015 Dear Colleague letters and the 2014 Questions and Answers document.[9] New regulations were published in 2020 to replace those documents.[10] Finally, the Biden administration announced that they would be rewriting the Title IX sexual misconduct rules in June 2021.[11] These changing regulations could be

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VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS (July 9, 2014), https://www.hsgac.senate.gov/imo/media/doc/2014-07-09%20Sexual%20Violence%20on%20Campus%20Survey%20Report%20with%20Appendix.pdf.

6. *Id.* at 1.

7. *Id.* at 2.

8. *See generally* U.S. DEP'T OF EDUC., OFF. FOR C.R., QUESTION AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (Rescinded); Catherine E. Lhamon, Assistant Secretary, Office for Civil Rights, U.S. Department of Education, & Vanita Gupta, Acting Assistant Attorney General, Office for Civil Rights, U.S. Department of Justice, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents*, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., U.S. DEP'T OF JUST. (Jan. 7, 2015), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf (Rescinded).

9. Nick Anderson, *Trump Administration Rescinds Obama-Era Guidance on Campus Sexual Assault*, WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rescinds-obama-era-guidance-on-campus-sexual-assault/2017/09/22/43c5c8fa-9faa-11e7-8ea1-ed975285475e_story.html.

10. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. at pt. 106); *See also* U.S. DEP'T OF EDUC., OFF. FOR C.R., QUESTIONS AND ANSWERS REGARDING THE DEPARTMENT'S FINAL TITLE IX RULE (Sept. 4, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf.

11. Lauren Camera, *Education Department Begins Sweeping Rewrite of Title IX Sexual Misconduct Rules*, U.S. NEWS & WORLD REP. (June 7, 2021), https://www.usnews.com/news/education-news/articles/2021-06-07/education-department-begins-sweeping-rewrite-of-title-ix-sexual-misconduct-rules.

viewed as the primary cause for the failure of educational institutions to address sexual misconduct and the consistent statistics highlighting sexual misconduct as a growing problem. However, the 2017 and 2020 changes did not remove legal responsibility but changed the focus to complaints of misconduct occurring within an educational program instead of any misconduct involving students and provided stricter standards for proving those claims.[12]

Failure to properly follow Title IX guidelines or have the correct systems in place can lead to systemic failures at many institutions. Recently, some of the more infamous examples of these failures involve athletic department employees or student-athletes.[13] Their public-facing nature makes it appear as though these issues are solely focused on sport, but often sport is just the lens used to view a systemic campus-wide problem. A USA Today investigation into sexual misconduct allegations at Louisiana State University (LSU) uncovered athletic department officials ignoring abusers while also denying victim requests for protections.[14] This was only one layer of the problem. Even when those accused of sexual misconduct were investigated and found guilty by the university, their punishments were lenient.[15] Three male students, not athletes, received deferred sanctions when expulsion or suspension would have been appropriate.[16] An independent report from Husch Blackwell noted that the LSU Title IX system was built to fail because of their failure to adequately address any of the legal requirements for preventing and promptly correcting sexual misconduct under Title IX.[17]

Highly publicized cases of systemic failures to address sexual misconduct on campus are costly in terms of goodwill and public trust, along with any financial penalties. Michigan State University received a $4.5 million fine from the Department of Education after fumbling their response to a serial predator

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12. Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations.

13. *See, e.g.*, JESSICA LUTHER, UNSPORTSMANLIKE CONDUCT: COLLEGE FOOTBALL AND THE POLITICS OF RAPE (2016); Kenny Jacoby, Nancy Armour & Jessica Luther, *LSU Mishandled Sexual Misconduct Complaints Against Students, Including Top Athletes*, USA TODAY (Nov. 16, 2020, 5:00 AM), https://www.usatoday.com/in-depth/sports/ncaaf/2020/11/16/lsu-ignored-campus-sexual-assault-allegations-against-derrius-guice-drake-davis-other-students/6056388002/; Jeremy Bauer-Wolf, *A Record Fine for Underreporting Sex Crimes*, INSIDE HIGHER ED (Sept. 6, 2019), https://www.insidehighered.com/news/2019/09/06/education-department-fines-michigan-state-45-million-not-reporting-nassar-crimes.

14. Jacoby, Armour & Luther, *supra* note 13.

15. *Id.*

16. *Id.*

17. HUSCH BLACKWELL, LOUISIANA STATE UNIVERSITY TITLE IX REVIEW 3-4 (Mar. 3, 2021), https://bloximages.newyork1.vip.townnews.com/theadvocate.com/content/tncms/assets/v3/editorial/b/65/b657e612-7dd4-11eb-8b0a-b7159915b29b/604264e32d74f.pdf.pdf.

working in the athletic department.[18] This fine is the largest ever given under the Clery Act, legislation requiring institutions to publicize violent acts and provide crime data.[19] Additionally, Michigan State University was required to rework their Title IX office including an independent review of their strategies to determine if those processes complied with legal standards under Title IX.[20] The $4.5 million fine was in addition to $500 million set aside as a civil settlement for more than 300 of Nassar's victims.[21] The university is still being sued by more than 100 women.[22]

The financial impact of Title IX sexual assault lawsuits can be burdensome to a university, especially when budgets are tight. United Educators, a member-owned insurance cooperative, studied about 1,000 cases of student reported sexual assault from 2011 to 2015 and found that fewer than 100 cases led to monetary losses for the university.[23] But those that did, cost the universities over $21 million with several singular incidents, costing a university more than $1 million.[24] While universities have had more time to prepare and correct issues with their sexual misconduct investigatory procedures and provide ample education to students about these procedures, similar lawsuits continue to be filed. The evidence of legal claims does not always lead to liability, but can these incidents help determine what is considered a violation? How often are systemic failings under Title IX leading to legal responsibility in civil courts? If the threat of Department of Education investigations is not encouraging compliance, can increased civil liability and the related financial costs spur action?

Section I of this Article will discuss the history of Title IX sexual assault legislation, including how courts decided on the deliberate indifference standard. Section II will expand and discuss how deliberate indifference has been defined in practice, along with summarizing the success of a plaintiff's deliberate indifference claims. Section III will conclude with a discussion on whether deliberate indifference remains an effective method for addressing a university's responsibility under Title IX and other avenues available to plaintiffs.

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18. Bauer-Wolf, *supra* note 13.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Emily Tate, *The High (Dollar) Cost of Sexual Assault*, INSIDE HIGHER ED (Apr. 6, 2017), https://www.insidehighered.com/news/2017/04/06/sexual-assault-claims-can-be-costly.

24. *Id.*

SECTION I

Under Title IX, the statutory language highlights administrative enforcement to ensure that federal funding is not used at institutions discriminating on the basis of sex with the Department of Education as the main driver of enforcement.[25] The purpose of the Department of Education's administration is to provide schools and universities the opportunity to correct non-compliant policies and practices.[26] This corrective action limits the need for financial penalties or loss of funding. Currently, no program has ever lost federal funding due to Title IX compliance concerns.[27]

As the Department of Education focuses on rehabilitation, the Supreme Court declared that a private right of action was intended by Congress to supplement compliance.[28] The initial aim of Title IX was to address discrimination in terms of access to educational programs, such as admissions to a program.[29] Allowing students to sue here followed the intentions of Congress while also providing additional incentive for schools and universities to provide effective protection against discrimination.[30] Sexual harassment was later added as a category of sex discrimination covered under the private right of action by the Supreme Court in *Alexander v. Yale University*.[31] The plaintiffs in *Alexander* argued that the absence of a sexual harassment grievance procedure violated their rights of equal access to education under Title IX.[32] As a result, their preferred remedy was injunctive relief to establish procedures to respond to student sexual harassment complaints.[33] While *Alexander* established the standard requiring institutional responsibility for student sexual harassment, these rights were extended to include monetary damages or injunctive relief in *Franklin v. Gwinnett County Public Schools* to provide increased incentive to educational institutions to address sexual harassment claims.[34] However, at the time, there was no operational standard to define how

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25. Erin E. Buzuvis, *Title IX and Official Policy Liability: Maximizing the Law's Potential to Hold Education Institutions Accountable for Their Responses to Sexual Misconduct*, 73 OKLA. L. REV. 35, 37-38 (2020).

26. *Id.* at 38.

27. *Id.*

28. Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979).

29. *Id.* at 694-98.

30. *Id.* at 704.

31. Alexander v. Yale Univ., 631 F.2d 178, 184-85 (2d Cir. 1980).

32. *Id.* at 180-82.

33. *Id.* at 181.

34. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 63, 65, 72, 76 (1992); Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2062-63 (2016).

schools should act or how they should address sexual harassment grievances.[35] They simply needed to have these policies in place.

Gebser v. Lago Vista Independent School District further defined these responsibilities, establishing the deliberate indifference standard.[36] To determine whether the school district has responsibility to address and prevent teacher-student sexual harassment, the Supreme Court established a standard of deliberate indifference.[37] The remedies provided under Title IX are predicated by notice to an appropriate person and an opportunity to address the situation.[38] Should an administrative official tasked with hearing Title IX complaints fail to address those concerns or provide action to remedy them, those actions would qualify as being deliberately indifferent.[39] The key in this standard is the school's knowledge of the forbidden conduct. After Gebser joined a book discussion led by a teacher, Frank Waldrop, who made sexually suggestive comments to students. Those comments after time became increasingly focused on her and led to a sexual relationship between the two.[40] Her relationship with Waldrop was not reported to school officials, but parents of other students in the discussion complained about his inappropriate comments.[41] The relationship with Gebser only became public after the two were seen engaging in sexual conduct by a police officer.[42] Since the knowledge of the relationship between Gebser and her teacher was not provided before they were discovered by a third party, the district was not found deliberately indifferent.[43]

This private right of action was extended to include peer-to-peer sexual harassment in *Davis v. Monroe County Board of Education*.[44] Liability for peer-to-peer sexual harassment hinges on the conduct of school officials, like the qualifications provided for teacher-student sexual harassment. The respondents argued that this suit was trying to hold the school responsible for a third party's actions.[45] The majority, using the *Gebser* standard of deliberate indifference, disagreed and declared that deliberate indifference focuses on the responsibility of the school due to their control over the alleged harassment.[46] The petitioner was subjected to prolonged sexual harassment from a classmate that began in

35. *See* Mackinnon, *supra* note 34.

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

37. *Id.* at 277.

38. *Id.* at 289-90.

39. *Id.* at 290-91.

40. *Id.* at 277-78.

41. *Id.*

42. *Id.*

43. *Id.* at 291.

44. Davis v. Monroe Cty. Bd. of Ed., 526 U.S. 629 (1999).

45. *Id.* at 640-41.

46. *Id.*

December of 1992 and included attempts to touch her breasts and genital area while making lewd comments.[47] Each incident was reported by the petitioner to her mother and her teacher. The school's principal was also informed of the behavior, but no disciplinary action occurred.[48] Deliberate indifference in this context must subject the student to continued harassment or make them vulnerable to additional harassment.[49] Therefore, a school official needs to have the authority to remedy a situation before deliberate indifference is a viable option for a plaintiff.[50]

The petitioner's claim in *Davis* was remanded to the Eleventh Circuit because the complaint suggested the petitioner could show both actual knowledge and deliberate indifference in the school's response to her harassment.[51] School administrators and officials were given prior notice of the potential liability for peer-to-peer student harassment in March of 1993, which is within the window of the harassment in this case.[52] The National School Boards Association published a guide to be used by school attorneys and administrators to explain the law regarding sexual harassment of employees and students and when those officials could be liable under Title IX for their failure to respond.[53] The school made no effort to prevent future harassment or remove the petitioner from the situation.

Deliberate indifference was never intended to be a catch-all policy requiring schools to be directly responsible for sexual misconduct on campus. The court in *Davis* cautioned against the probability of school liability for all sexual misconduct.[54] Instead, schools continue to exercise discretion unless those actions were clearly unreasonable under the circumstances.[55] This flexible standard, while cautious, has made deliberate indifference difficult to define as a specific standard of care to be followed by all institutions. Liability often hinges upon actual notice of misconduct and failing to respond accordingly or in a "clearly unreasonable" manner.[56] The Supreme Court in *Davis* continued by highlighting that deliberate indifference is not a mere reasonableness standard but allows the school to remain flexible to account for the level of disciplinary authority available and the potential liability created through

47. *Id.* at 634-35.
48. *Id.*
49. *Id.* at 644-45.
50. *Id.*
51. *Id.* at 653-54.
52. *Id.* at 647.
53. *Id.*
54. *Id.* at 648-49.
55. *Id.*
56. *Id.* at 649.

exercising certain disciplinary actions.[57] This may be difficult for a plaintiff to prove, especially if the school has taken some action or a repeat perpetrator does not offend in a similar manner for additional incidents. Further, many victims fail to report sexual misconduct based on a belief that school officials won't take their concerns seriously. That reputation exacerbates the problem while allowing schools to avoid liability because of a lack of knowledge regarding a specific event.

SECTION II

One of the most challenging aspects of sexual harassment grievance and assessing resulting liability are the variety of forms this harassment can take on a college campus.[58] Opinions may vary on what behavior qualifies as sexual harassment versus a friendly, but misplaced, gesture.[59] Further, victims of harassment may feel pressured to respond in socially appropriate ways to maintain politeness or based on a belief that what occurred wasn't serious if it did not involve forced penetration.[60] This could blur the lines of unacceptable or unreasonable responding behavior for universities. The majority in *Davis* highlighted that in an appropriate case, courts would be able to identify a response as clearly unreasonable as a matter of law.[61] However, in practice, this standard used to define deliberate indifference has not led to consistent patterns in the circuits or easy circumstances for courts to define on a motion to dismiss for summary judgment.[62]

Establishing deliberate indifference under Title IX requires 1) actual notice to an appropriate individual who has the power to act to remedy the harassment and 2) a failure to act by that appropriate individual.[63] Because actual notice must be given to the individual with the power to utilize the grievance process, this could insulate schools from liability if the report did not go through the procedures provided. For example, if a coach or another university employee finds out about harassment involving one of their players and decides to address the issue themselves instead of reaching out to the Title IX coordinator, this

57. *Id.*

58. Lisa Fedina, Jennifer L. Holmes & Bethany Backes, *How Prevalent is Campus Sexual Assault in the United States*, 277 NAT. INS. OF JUST. 1, 4 (2016), https://www.ojp.gov/pdffiles1/nij/249827.pdf.

59. *Id.*

60. Carol B. Mills & Joseph N. Scudder, *He Said, She Said: The Effectiveness & Outcomes of Responses to Sexual Harassment*, INT. J. BUS. COMMC'N, (2020).; *see also* MacKinnon, *supra* note 34 at 2053-61.

61. Davis v. Monroe Cty. Bd. of Ed., 526 U.S. 629, 648-49 (1999).

62. MacKinnon, *supra* note 34, at 2067-85.

63. *Davis*, 526 U.S. at 644-45.

could be interpreted as the school lacking actual notice about the issue.[64]

Under the regulations provided by the Obama administration, certain individuals on campuses, like coaches and faculty members in daily direct contact with students were considered mandatory reporters.[65] This distinction provided that once those employees were informed about sexual misconduct, they would have to report the misconduct to the Title IX office where an investigation could begin.[66] The victims were given the option to not pursue an investigation and could be fully informed of the options available to them.[67] However, under the new standards released in 2020, there is no specification about who qualifies as a mandatory reporter.[68] Schools could leave policies in place that make all employees responsible, or it could be left to the student to directly report issues to the Title IX office.[69] While college students may be mature enough to make this decision, this policy does not consider student hesitation or politeness that stops them from seeking protections they need. The lack of clear definition, as to which employees are required to report incidents of sexual misconduct, will allow some cases to fall through the cracks and allow schools to avoid claims of deliberate indifference because actual notice was not provided.

Additionally, the failure to act essentially needs to appear as an official decision to decline action to qualify as deliberately indifferent. The baseline of clearly unreasonable behavior suggests that if schools do something to address the harassment, there will be judicial deference to those actions.[70] It remains unclear what that something needs to be, whether it be a substantial effort to address the harassment including limiting contact between the alleged victim or perpetrator, or merely filing a report and trying to avoid the same incident occurring again. The sometimes subjective nature of what qualifies as sexual harassment seems incongruous with the responsibility given to schools to provide equal access and a safe environment for all. This gives schools

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64. Ross v. Univ. of Tulsa, 859 F.3d 1280 (10th Cir. 2006) (holding that campus security officers were not appropriate persons for notice under Title IX). Under the 2020 Title IX Guidelines, coaches, athletic directors, faculty, and staff are no longer considered mandatory reporters. They are not required to report allegations of sexual misconduct, leaving reporting to the victim. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 10.

65. *See generally* U.S. DEP'T OF EDUC., OFF. FOR C.R., QUESTION AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, *supra* note 8.

66. *Id.*

67. *Id.*

68. R. Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 1, 2020), https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/.

69. *Id.*

70. *See* MacKinnon, *supra* note 34, at 2067-85.

continuing flexibility in their decision-making in a way that may not prioritize or incentivize an effective response to sexual misconduct.

In an examination of federal cases in district and appellate courts that significantly discuss deliberate indifference from *Gebser* through the end of May 2014, MacKinnon found that the plaintiff student's case was dismissed on summary judgment in 140 cases.[71] While her research does not highlight how many plaintiffs were successful once their cases were considered on the merits, those initial cases were summary judgments granted in favor of the defendant university.[72] This is a consistent result across all federal circuits.[73]

Two recent cases from the Sixth Circuit signify the inconsistent definitions provided under the deliberate indifference standard and how those patterns tend to benefit a defendant university.[74] Both cases involve peer-to-peer sexual harassment while the aggressor was under university control.[75] While the harassment in each case varies, the main concern is when can a school be held liable for responding to reports of sexual harassment because the results provided in these two cases appear to be contradictory with more decisive action taken by the university, who initially lost their motion to dismiss.[76] Both universities ultimately prevailed and further highlighted the idea that deliberate indifference requires only some reasonable response with little consideration for the effectiveness of that response.[77]

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71. *Id.*

72. *Id.*

73. *Id.* As a part of the research for this article, the author examined at least two cases in each circuit from 2003 on that discuss deliberate indifference under Title IX in detail. If a plaintiff was successful, there was another case in the same circuit siding with the *defendant* university. Only the Fourth Circuit included two cases that were remanded for further proceedings after a finding that the plaintiff produced a genuine issue of material fact related to the defendant's deliberate indifference. *See* Doe v. Brown Univ., 896 F.3d 127 (1st Cir. 2018); Fitzgerald v. Barnstable Sch. Cmte., 504 F.3d 165 (1st Cir. 2007); Hayut v. State Univ. of N.Y., 352 F.3d 733 (2d Cir. 2003); Papelino v. Albany College of Pharmacy of Union Univ., 633 F.3d 81 (2d Cir. 2011); Bostic v. Smyrna Sch. Dist., 418 F.3d 355 (3d Cir. 2005); Doe v. Trs. of Univ. of Pa., 270 F.Supp.3d 799 (2017); Feminist Majority Found. v. Hurley, 911 F.3d 674 (4th Cir. 2018); Doe ex rel. v. Dallas Indep. Sch. Dist., 220 F.3d 380 (5th Cir. 2000); Sanches v. Carrollton-Farmers Branch Indep., 647 F.3d 156 (5th Cir. 2011); Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018); Foster v. Bd. of Regents of Univ. of Mich., 952 F.3d 765 (6th Cir. 2020); Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F. 3d 613 (6th Cir. 2019); Delgado v. Stegall, 367 F.3d 668 (7th Cir. 2004); Doe v. St. Francis Sch. Dist., 694 F.3d 869 (7th Cir. 2012); KT v. Culver-Stockton Coll., 865 F.3d 1054 (8th Cir. 2017); Roe v. St. Louis Univ., 746 F.3d 874 (8th Cir. 2014); Karasek v. Regents of Univ. of Cal., 956 F.3d 1093 (9th Cir. 2020); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736 (9th Cir. 2000); Escue v. N. Ok. Coll., 450 F.3d 1146 (10th Cir. 2006); Ross v. Univ. of Tulsa, 859 F.3d 1280 (10th Cir. 2017); Doe v. Sch. Bd. of Broward Cnty., Fla., 604 F.3d 1248 (11th Cir. 2010); Hill v. Cundiff, 797 F.3d 948 (11th Cir. 2015).

74. Kollaritsch v. Mich. St. Univ. Bd. of Trs., 944 F.3d 613 (6th Cir. 2019); Foster v. Bd. of Regents of Univ. of Mich., 982 F.3d 960 (6th Cir. 2020) (en banc).

75. *Kollaritsch*, 944 F.3d at 618; *Foster*, 982 F.3d at 962.

76. *See* Foster v. Bd. of Regents of Univ. of Mich., 952 F.3d 765 (6th Cir. 2020).

77. *Id*.

First, the Sixth Circuit ruled that a school's response to sexual harassment must fail to protect the student from actual further harassment for their actions to be deliberately indifferent in *Kollaritsch v. Michigan State University*.[78] This lawsuit was the result of four peer-to-peer sexual assaults at Michigan State University. Each incident was reported to campus police and was investigated by the proper administrative authorities on campus.[79] However, one of the plaintiffs was "stalked, harassed and/or intimidated" by her harasser at least nine times after her initial report.[80] An investigation was conducted into the retaliation claims, where it was found that no retaliation occurred, even though the two lived in the same dormitory and used the same cafeteria and public areas. The university administrator in charge of this case informed her that there's a difference between retaliation and just seeing her harasser, suggesting that she needed mental health services.[81] Here, the Sixth Circuit concluded that deliberate indifference would be present only if that indifference led to another actionable claim of sexual misconduct.[82] There were no details provided that established these encounters to be sexual, severe, or even objectively unreasonable.[83]

Similarly, in *Foster v. Board of Regents of the University of Michigan*, the Sixth Circuit initially reversed a grant of summary judgment and remanded the case after establishing that the plaintiff, Foster, established a genuine issue of material fact about the university's deliberate indifference in response to similar repeated incidents of harassment.[84] A later rehearing en banc affirmed the district court's ruling that the university was not deliberately indifferent in their response to the harassment.[85] Foster and her harasser took part in an off-site executive MBA program based in Los Angeles, California.[86] These students met once a month in weekend residency sessions taking place at the Beverly Wilshire hotel in Beverly Hills.[87] While Foster and her fellow student were initially friendly, but after expressing romantic interest, the respondent made unwanted physical contact with Foster on many occasions, starting in December 2013.[88] Foster reported the harassment to the university on March 13, 2014,

78. *Kollaritsch*, 944 F.3d at 622.

79. *Id.* at 624-25.

80. *Id.* at 624.

81. *Id.*

82. *Id*. at 624-25.

83. *Id.* at 624.

84. Foster v. Bd. of Regents of Univ. of Mich., 952 F.3d 765 (6th Cir. 2020).

85. Foster v. Bd. of Regents of Univ. of Mich., 982 F.3d 960 (6th Cir. 2020) (en banc).

86. *Id.* at 962.

87. *Id.* at 971.

88. *Id.* at 962-63.

providing evidence of the continued harassment.[89] The university began an investigation where they interviewed both parties and then ordered the harasser to not contact Foster.[90] He violated this order by contacting Foster via text.[91] This text was reported to the university who reprimanded him for violating this order.[92]

For the remaining session of the program, the university housed the harasser in another hotel.[93] He was not permitted to eat meals with the rest of the cohort and sat in class out of Foster's sightline.[94] After a follow-up expressing concern for her safety and a desire to not be in the same room with her harasser, the university offered additional accommodations including finishing the program at the Ann Arbor campus.[95] This option was provided to both Foster and the respondent, and both declined.[96] After the respondent violated the no-contact order again, the university banned him from the last day of the program and later prohibited him from attending the commencement ceremony in Ann Arbor after a series of emails to classmates and university administrators.[97] The harasser ignored this ban as well, showing up to the hotel prior to graduation, and he was forced to board a plane back to California once discovered.[98] With the final investigative report issued on May 1, the university imposed a permanent no-contact order, banned him from campus for three years, banned him from any University sponsored event attended by Foster, and placed a notation that he committed sexual misconduct on his transcript.[99]

The Sixth Circuit in *Foster* noted that it is not a university's job to remove all harassment but to respond in good faith when allegations occur.[100] Here, the university acted as soon as they were aware of the harassment in March using interim protective measures while investigating Foster's claims. The delay in responding may have led to the increased harassment but the university could not act until provided actual knowledge of an issue. The fact that the university imposed increasingly more restrictive measures after the harasser violated orders to stay away shows that they did what was best and possible under the circumstances to protect Foster. Further, the Sixth Circuit compared this case to

89. *Id.* at 966.
90. *Id.* at 963.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 964.
96. *Id.*
97. *Id.*
98. *Id.* at 965.
99. *Id.*
100. Foster v. Bd. of Regents of the Univ. of Mich., 982 F.3d 960 (6th Cir. 2020) (en banc).

others where the school was less proactive and still prevailed in court like in *Kollaritsch*. In both instances, if the school took some proactive steps to protect the victim from further harassment, then their actions will not be viewed as deliberately indifferent.[101]

The mere presence of harassers in the same area as a plaintiff is not enough to establish the need for a response from the school, meaning the University of Michigan's response in *Foster* went above and beyond the legal requirement set by the Sixth Circuit. An argument could be made that Michigan State's policies surrounding investigating sexual assault were generally ineffective because Kollaritsch reported her assault to Michigan State in January 2012, which includes the same period covered in the university's record-setting fine under the Clery Act related to Dr. Larry Nassar.[102] What's different between these two cases and why the university was not found to be deliberately indifferent here is the fact that the university did investigate Kollaritsch's claims and disciplined the accuser. Their fine under the Clery Act is based on the failure to disclose crime statistics.[103] This again highlights the premise that if a university does something, and that something appears to be a good faith response to the allegations, then deliberate indifference will not be found.

SECTION III

Existing case law shows us that a finding of deliberate indifference is rare and only associated with consistent evidence that a school did not respond to a sexual misconduct claim at all.[104] Judicial deference gives the school a lot of leeway to determine what is an appropriate response in these circumstances, especially because the varying nature of fact scenarios that could be reported means that the school should have some flexibility in their response. As long as preventive measures are taken in good faith as soon as the university is made aware of a complaint, they will be protected from a claim of deliberate indifference.

Under this standard, a university's success on the merits is not limited to plaintiff victims challenging the response to their report, but also includes plaintiffs who were accused of misconduct and were subject to disciplinary proceedings.[105] In cases involving plaintiffs accused of misconduct, it is not

101. *Kollaritsch*, 944 F.3d at 618; *Foster*, 952 F.3d at 778.

102. Bauer-Wolf, *supra* note 13.

103. *Id.*

104. *See* MacKinnon*, supra* note 34 at 2067-85.

105. *See e.g.*, Doe v. Miami Univ.¸882 F.3d 579 (6th Cir. 2018) (holding that deliberate indifference requires sexual misconduct where the plaintiff is the victim not the alleged aggressor); Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016) (holding that schools cannot act with bias based on sex when investigating and responding to claims of sexual assault).

surprising that disciplinary proceedings used against those individuals did not constitute deliberate indifference because a key component of this theory is that the indifference is directly related to sexual assault experienced, not caused, by the plaintiff. Additionally, it is another example of courts refusing to impose judgment on discretionary matters.

Judicial determination of deliberate indifference has ultimately not created an effective deterrent for schools to improve their Title IX processes. These standards often appear to require a bare minimum, focused on reacting to incidents as they occur not the prevention of future incidents. While this seems disheartening publicly speaking, it follows the same problems associated with addressing sexual misconduct in other areas of society.[106] Even when judicial rulings extend the requirements for university responsibility under Title IX, it does so with built-in caveats.

In *Karasek v. Regents of the University of California*, the Ninth Circuit established a test for pre-assault deliberate indifference after three plaintiffs who were assaulted as undergraduates at the University of California-Berkeley filed suit against the University.[107] They argued that the university failed to adequately respond to their individual claims of sexual assault and maintained a policy of deliberate indifference when addressing these claims.[108] That indifference created a higher risk and likelihood that the plaintiffs would be assaulted while attending the university.[109] Initially, the Ninth Circuit noted that pre-assault liability exists when the school maintains a policy of deliberate indifference to reports of sexual misconduct that creates a heightened risk of sexual harassment in an area under the university's control and a plaintiff is harassed as a result.[110] This standard was amended in a subsequent opinion issued in April 2021 to add that the harassment should be "so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the school."[111] This change was made to ensure that not every claim of harassment would be eligible for pre-assault indifference under Title IX, but instead the focus would be on the actions of universities creating a clearly unreasonable risk of harm to students.[112] Notably, the Ninth Circuit did not find deliberate indifference here in connection to the university's response to the sexual assault report by the

106. Alison Gash & Ryan Harding, *#MeToo? Legal Discourse and Everyday Responses to Sexual Violence*, MDPI (May 21, 2018), https://www.mdpi.com/2075-471X/7/2/21/htm.

107. Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093 (9th Cir. 2020).

108. *Id.* at 1112-13.

109. *Id.* at 1103.

110. *Id.* at 1111-12 (citing *Davis*, 526 U.S. at 650).

111. *Id.* at 1112 (citing *Davis*, 526 U.S. at 650).

112. *Id.* at 1098.

individual plaintiffs because investigations did occur and the response was not clearly unreasonable.[113]

This pre-assault liability based on university policy is connected to a lesser-known Title IX theory of liability: official policy liability.[114] This theory was first successfully used in *Simpson v. University of Colorado Boulder* when the court recognized that responsibility under Title IX is not just for an indifferent response but for misconduct that occurs due to ineffective policies.[115] In *Simpson*, the Tenth Circuit Court of Appeals ruled that there was sufficient evidence to support the findings that the university maintained an official policy that increased the likelihood of sexual misconduct.[116] The university had an official policy of showing high school recruits "a good time" on their campus visits and did not adequately supervise player-hosts in a manner that allowed that "good time" to include the alleged sexual assault of other students.[117] The plaintiffs in this case were assaulted by football players and high school students on one of these recruiting trips.[118] Proper notice to address these issues was available to the university because this was not the first recruiting trip leading to misconduct with prior assaults reported in 1990 and 1997 along with a meeting in 1998 with university officials to discuss the need to supervise these visits and implement sexual assault prevention training with the football team to avoid future incidents.[119] The Tenth Circuit found that the university had done nothing to address these concerns.[120] This follows the same standards provided under deliberate indifference where a violation is present only if the university fails to respond. *Simpson* was remanded to a lower court for consideration on the merit and the parties settled the suit on December 5, 2007 for $2.5 million.[121]

The changing nature of guidelines surrounding Title IX makes it difficult for universities to have a consistent procedure for addressing reports of sexual misconduct on campus. However, this inconsistency rarely leads to legal liability.[122] Financial liability through public relations and legal settlements continues to be a concern.[123] The amount of judicial deference provided gives schools cover for their actions if they have provided some response that can

113. *Id.* at 1106-07.

114. *See* Buzuvis, *supra* note 25.

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

116. *Id.* at 1173.

117. *Id.*

118. *Id.*

119. *Id.* at 1180-85.

120. *Id.*

121. Ebonee Avery-Washington, *Court Case: Lisa Simpson, et al. v. Univ. of Colo.*, AAUW (Feb. 2005), https://ww3.aauw.org/resource/lisa-simpson-et-al-v-university-of-colorado/.

122. *See* MacKinnon, *supra* note 34, at 2067-85.

123. *See* Tate, *supra* note 23.

reasonably be considered effective, similar to the Department of Education's focus on education over punishment as a deterrent to failed Title IX policies. As a result, deliberate indifference will likely not be present, even in environments where universities are failing to consistently address sexual misconduct as seen at LSU and Michigan State recently. The public perception of a massive problem is not enough to declare that a legal problem exists. Hindsight may highlight specific problems; however, judicial deference focuses on not monitoring those who are failing to meet their responsibility, but on those who refuse to act at all.