

Eradicating the “Fear Environment” in Education That Threatens Free Speech and Emboldens Sexual Discrimination

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I. INTRODUCTION

During a middle school debate, Jeffrey, a seventh-grade student, shouts at a classmate, “Sally should focus on learning to cook and find a man to take care of her!” The class explodes into a rage, with half the class booing and half the class cheering, except for Sally, who sits quietly in the back of the class. After class, Sally tells her teacher that she feels threatened by Jeffrey’s statements because her father says the same thing to silence her mother. She also mentions that Jeffrey says similar things outside of class and inspires other students to do the same. Thus, she feels unsafe expressing her opinions, fearing she will be belittled like her mom. Jeffrey explains to the teacher that he meant no harm to Sally or anyone else but sincerely believed his statements based on “traditional values.” Was Sally sexually harassed by Jeffrey, or was Jeffrey simply expressing his beliefs, as protected by the First Amendment?

As this situation illustrates, educational institutions must find the balance between protecting against sexual harassment and upholding free speech rights.¹ Sexual harassment often subjects students to debilitating harmful speech that interferes with their educational experience and inflicts psychological trauma.² However, protecting free speech has long been

1. See Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. WOMEN & L. 67, 82 (2002) (providing a summary of sexual harassment and free speech issues in schools and the workplace).

2. Susan Fineran & Rebecca M. Bolen, *Risk Factors for Peer Sexual Harassment in Schools*, 21 J. INTERPERSONAL VIOLENCE 1169, 1170–71 (2006); see also James E. Gruber & Susan Fineran, *The Impact of Bullying and Sexual Harassment on Middle and High School Girls*, 13 VIOLENCE AGAINST WOMEN 627, 630 (2007).

recognized as a critical component of the educational experience by supporting the vigorous exchange of ideas that is necessary for student development.³ Both threats of sexual harassment and threats to freedom of speech create a culture of fear.⁴ Threats of sexual harassment create a culture of fear in which students are afraid to participate fully in their educational experience due to the danger of constant demeaning language.⁵ Conversely, threats against free speech create a culture of fear in which students are afraid to express their opinions.⁶

This “free speech versus sexual harassment” debate within the educational realm has become part of the larger cultural debate, often presented as a battle between conflicting rights.⁷ On one side, those who promote free speech often characterize attempts to eliminate sexual harassment as censorship or nefarious attempts to marginalize differing political opinions.⁸ They argue that limits on “sexual harassment” are part of an effort to indoctrinate students with specific political beliefs.⁹ On the other side are those who support stricter limits on speech, emphasizing the harm that hate speech, false information, and harassment causes to individuals and society.¹⁰ They suggest that free speech is often used as a thinly veiled attempt to

3. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *see also* Adam J. Speraw, Note, *No Bullying Allowed: A Call for a National Anti-Bullying Statute to Promote a Safer Learning Environment in American Public Schools*, 44 VAL. U. L. REV. 1151, 1198 (2010).

4. Catherine J. Ross, *Why Is It So Hard to Rein in Sexually Violent Speech?*, 95 B.U. L. REV. ANNEX 41, 41 (2015).

5. Valerie E. Lee et al., *The Culture of Sexual Harassment in Secondary Schools*, 33 AM. EDUC. RSCH J. 383, 384–85 (1996).

6. Lizzie Crocker, *How Title IX Killed Free Speech on Campus*, DAILY BEAST (Apr. 13, 2017, 4:32 PM), <https://www.thedailybeast.com/how-title-ix-killed-free-speech-on-campus> [<https://perma.cc/F3FM-2ST9>].

7. Geoffrey R. Stone, *Sexual Expression and Free Speech: How Our Values Have (D)evolved*, 43 HUM. RTS. MAG., no. 4, 2018, at 22, 22–24.

8. Greg Lukianoff, Ryne Weiss & Adam Goldstein, *Catching Up with ‘Coddling’ Part Thirteen: The Misuse of Title IX Still Threatens Free Speech on Campus*, FIRE (Mar. 19, 2021), <https://www.thefire.org/catching-up-with-coddling-part-thirteen-title-ix-still-threatens-free-speech-on-campus/> [<https://perma.cc/T3B3-EMJN>]; *see also* Joaquin Urias, *Using Hate Speech as an Excuse*, IDEES (Oct. 30, 2020), <https://revistaidees.cat/en/using-hate-speech-as-an-excuse/> [<https://perma.cc/83Q2-QCWU>].

9. *See* Russell Eisenman, *The Sexual Harassment Seminar: A Cultural Phenomenon of Indoctrination into Feminist Ideology*, 5 SEXUALITY & CULTURE, no. 4, 2001, at 77.

10. Lee Rainie, Janna Anderson & Jonathan Albright, *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RSCH. CTR. (Mar. 29, 2017), <https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/> [<https://perma.cc/8SCK-CWDB>].

support and promote sexism and uphold a toxic culture that has discouraged groups of people from getting an education and advancing in society.¹¹

This free speech versus sexual harassment debate has pervaded popular culture with the “Me Too” movement and documentaries exposing the toxic cultures in educational institutions.¹² Thus, finding a way to balance these competing concerns is often lost in the larger political debate that obscures the fact that both goals are vital to ensuring a vibrant and healthy educational system.¹³

The federal government has attempted to balance free speech and sexual harassment protection through Title IX of the Education Amendments (Title IX).¹⁴ Title IX and the related federal regulations require educational institutions to protect against sex discrimination.¹⁵ The federal government and the courts have interpreted Title IX’s protection against sex discrimination to include protections against sexual harassment.¹⁶ The Department of Education has attempted to help educational institutions eliminate sexual harassment while protecting free speech by incorporating different definitions of sexual harassment into Title IX’s sex discrimination protections.¹⁷

However, instead of providing a clear and definitive definition of sexual harassment, Title IX has vacillated between several different definitions of sexual harassment, mainly depending on the Presidential Administration in power.¹⁸ These definitions have generally utilized two different

11. Jessica Valenti, *Free Speech is a Bad Excuse for Online Creeps to Threaten Rape and Murder*, GUARDIAN (June 18, 2014, 7:30 AM), <https://www.theguardian.com/commentisfree/2014/jun/18/free-speech-online-creeps-cyberbullying-laws> [https://perma.cc/D96G-KS9C].

12. See Anya Jaremko-Greenwald, *Kirby Dick and Amy Ziering on Exposing the Horrifying Campus Rape Epidemic in ‘The Hunting Ground,’* INDIEWIRE (Feb. 26, 2015, 10:39 AM), <http://www.indiewire.com/article/kirby-dick-and-amy-ziering-on-exposing-the-horrifying-campus-rape-epidemic-in-the-hunting-ground-20150226> [https://perma.cc/JEF9-L2HB].

13. See David L. Hudson, Jr. & Lata Nott, *Sexual Harassment*, FREEDOM F. INST. (Mar. 2017), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-on-public-college-campuses-overview/sexual-harassment/> [https://perma.cc/H5QK-XG5Y].

14. Christopher J. Roederer, *Free Speech on the Law School Campus: Is It the Hammer or the Wrecking Ball That Speaks?*, 15 U. ST. THOMAS L.J. 26, 28–29 (2018).

15. Jordyn Sindt, Note, *Title IX’s Feeble Efforts Against Sexual Harassment: The Need for Heightened Requirements Within Title IX to Provide Comparable University and PreK–12 Policies*, 23 J. GENDER RACE & JUST. 495, 499 (2020) (providing a summary of Title IX’s requirements and protections against sex discrimination).

16. See *infra* Section II.A.

17. See Arthur L. Coleman, *When Hallways Become Hostile Environments: Understanding the Federal Law That Prohibits Sexual Harassment of Students by Students*, 1 GEO. J. GENDER & L. 109, 122–23 (1999).

18. See *infra* Part II.

conceptions of sexual harassment.¹⁹ One conception defines sexual harassment speech as sexual speech that limits the ability of students to participate in educational programs by creating a “hostile environment.”²⁰ This Hostile Environment Conception of sexual harassment is generally supported by those who seek a conception of sexual harassment that is broad enough to encompass many of the insidious forms of sexual harassment.²¹ However, critics suggest it is too broad and threatens free speech.²²

The other conception of sexual harassment rejects the Hostile Environment Conception and instead conceptualizes sexual harassment as sexual speech that is so “objectively offensive” that it denies a person equal access to their education.²³ This Objectively Offensive Conception is generally supported by those who advocate for a narrow definition of sexual harassment to protect free speech.²⁴ However, critics claim the Objectively Offensive conception is too narrow and does not adequately protect against the many forms of sexual harassment speech.²⁵

These “Dueling Title IX Conceptions” of sexual harassment and the constant change between them have done little to help educational institutions find the balance between sexual harassment and free speech.²⁶ Both Dueling Title IX Conceptions of sexual harassment fail to provide clear guidance as to what constitutes sexual harassing speech and what speech

19. See *infra* Part II.

20. See *infra* Section II.B.

21. Paula M. Popovich et al., *Perceptions of Sexual Harassment as a Function of Sex of Rater and Incident Form and Consequence*, 27 *SEX ROLES* 609, 609–11 (1992).

22. R. Shep Melnick, *Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/> [https://perma.cc/JAX4-9TLJ].

23. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632 (1999); see also 34 C.F.R. § 106.45 (2022).

24. See Mason Polaner, *A Note to President Biden: Do Not Eliminate Trump’s Title IX Changes*, APR (Jan. 5, 2022), <http://www.wesleyanarcadia.com/recents/2022/1/5/a-note-to-president-biden-do-not-eliminate-trumps-title-ix-changes> [https://perma.cc/TSZ2-ZEYV].

25. Jeannie Suk Gersen, *How Concerning Are the Trump Administration’s New Title IX Regulations?*, NEW YORKER (May 16, 2020), <https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations> [https://perma.cc/2QHL-VUDL].

26. See *infra* Section II.B.4 (providing examples of overly broad and overly narrow conceptions of sexual harassment implemented by educational institutions based on both Dueling Title IX Conceptions of sexual harassment).

should be protected by the First Amendment.²⁷ Instead, the Dueling Title IX Conceptions of sexual harassment, and the debate related to them, suggest educational institutions must choose between favoring one goal over the other by selecting the Hostile Environment Conception to guard against sexual harassment or the Objectively Offensive Conception to protect free speech.²⁸

However, a closer look at the Dueling Title IX Conceptions of sexual harassment demonstrates that they hold one common feature. Both conceptions identify sexual harassment based on the interference it causes to the educational experience.²⁹

Despite this shared focus on education interference, neither Title IX conception of sexual harassment provides a straightforward process to identify speech that creates this education interference. The ambiguity of the Hostile Environment Conception leads to an overly broad interpretation of education interference that often threatens free speech.³⁰ Conversely, the ambiguity of the Objectively Offensive Conception leads to an overly narrow understanding of education interference that fails to address the various insidious forms of sexual harassment.³¹

The ambiguity of this education interference concept robs educational institutions of the ability to fully address sexual harassment or protect free speech. When educational institutions try to adopt a policy based on the Hostile Environment Conception, their policies become so broad that they threaten speech necessary to support vigorous academic debate.³² Conversely, when educational institutions try to adopt an approach based on the Objectively Offensive Conception, their policies are often so narrow that they fail to address and protect against sexual harassment.³³ Thus, both Dueling Title IX conceptions of sexual harassment have been unable to provide clear guidance to educational institutions to find the balance between sexual harassment and free speech.

These vague conceptions of sexual harassment fuel the toxic sexual harassment versus free speech debate whereby both sides can co-opt the definition to fit their narratives. Those who advocate for free speech argue that educational institutions often use vague definitions of sexual harassment to eliminate free speech.³⁴ Conversely, those who support strong sexual harassment protection argue that some educational institutions use ambiguous

27. *See infra* Sections II.B.4, 5.

28. *See infra* Section II.B.1.

29. *See infra* Section II.B.

30. *See infra* Section II.B.

31. *See infra* Section II.B.

32. *See infra* Section II.B.4.

33. *See infra* Section II.B.4.

34. *See supra* notes 9–10 and accompanying text.

conceptions of sexual harassment to ignore or even protect the toxic culture that sexual harassment creates.³⁵

These vague Dueling Title IX Conceptions of sexual harassment and ambiguous conceptions of education interference create a culture of fear within educational institutions. One of the keys to protecting against sexual harassment is creating an environment where students clearly understand the line between free speech and sexual harassment.³⁶ This clear line will assure students that they will be protected from harmful speech and be allowed to express themselves.³⁷

To eliminate the ambiguity that plagues both Dueling Title IX Conceptions of sexual harassment, Title IX should incorporate a sexual harassment definition that clearly identifies and defines the education interference that both attempt to address.³⁸ The law can utilize social science’s insight into the cause and effect of sexual harassment to address these issues. In general, social science supports the concept that sexual harassment causes harm in the educational setting by interfering with the educational experience.³⁹ Specifically, sexual harassment creates fear in students and, as a result, makes students afraid to fully participate in educational experiences.⁴⁰

However, social science also recognizes that speech that does not elicit fear provides several demonstrable benefits by encouraging active participation in the exchange of ideas.⁴¹

The law can use fear to define and identify sexual harassment and distinguish it from provocative speech that educational institutions must

35. See Mira Sydow, *The Silenced Students in the “Free Speech” Debate*, NATION (June 3, 2022), <https://www.thenation.com/article/society/free-speech-harassment-censorship/> [<https://perma.cc/5JL3-2D5J>].

36. See generally JOHN PALFRETY, *SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION* 117–30 (2017).

37. This fear makes students afraid to fully express themselves for fear of being accused of sexual harassment and also scared to raise claims of sexual harassment because the definitions fail to explain what constitutes sexual harassment. See Frank Furedi, *The Campus Culture of Fear and Its Costs*, CITY J. (Aug. 3, 2018), <https://www.city-journal.org/html/campus-culture-fear-and-its-costs-16095.html> [<https://perma.cc/TN46-2UGY>]; Jonathan R. Cole, *The Chilling Effect of Fear at America’s Colleges*, ATLANTIC (June 9, 2016), <https://www.theatlantic.com/education/archive/2016/06/the-chilling-effect-of-fear/486338/> [<https://perma.cc/U44G-4UL9>].

38. See *infra* Section II.B.5.

39. See *infra* Part III.

40. See *infra* Section III.A.

41. See *infra* Section III.C.

protect to encourage the exchange of ideas necessary for a healthy academic atmosphere.⁴²

This Article proposes a new conception of sexual harassment that melds the insight of social science with the parameters of sexual harassment established through the Dueling Title IX Conceptions of sexual harassment. This Fear Environment Conception of sexual harassment defines sexual harassing speech as:

Speech that creates an environment of fear that interferes with the educational experience of students by causing a reasonable student to believe that (1) they will face similar threats in the future that (2) they cannot avoid, based on the (3) perceived harmful intent of the speaker.

This Fear Environment Conception focuses on the education interference that Dueling Title IX Conceptions of sexual harassment identify as the root harm of sexual harassment while utilizing social science to target the fear that creates this education interference. It also uses the critical features of both Dueling Title IX Conceptions of sexual harassment. As with the Hostile Environment Conception, the Fear Environment Conception also assesses speech based on the environment it creates to target speech that produces a harmful educational environment. As with the Objectively Offensive Conception, the Fear Environment Conception creates an objective standard by assessing speech from a reasonable person's perspective. However, the Fear Environment Conception eliminates the ambiguity that plagues both Dueling Title IX Conceptions by utilizing social science to identify the specific features of speech that cause the fear that leads to education interference and, therefore, the harm associated with sexual harassment.

To establish the Fear Environment Conception of sexual harassment, Part II of this Article provides a detailed analysis of the various definitions of sexual harassment offered by Title IX.

Part III of this Article discusses the social science research regarding sexual harassment, which demonstrates that fear is the key feature that distinguishes harmful sexual harassment from provocative speech that educational institutions must protect. Finally, Part IV establishes the Fear Environment Conception of sexual harassment that utilizes social science to define sexual harassment based on the fear that creates education interference.

Through this Fear Environment Conception, educational institutions will be able to eliminate the culture of fear created when the line between free speech and sexual harassment is blurred.⁴³ Specifically, it will avoid

42. *See infra* Part IV.

43. *See infra* Part IV.

the overbroad definition of sexual harassment that creates a culture of fear in which students are afraid to express their beliefs. At the same time, it will protect against the culture of fear that arises when educational institutions fail to eliminate the nefarious forms of sexual harassment. Instead, this Fear Environment Conception will enable educational institutions to create a culture of interaction where students are free to express their beliefs and opinions without fear of sexual harassment or speech limits.

II. TITLE IX AND SEXUAL HARASSMENT

Title IX of the Educational Amendments requires all educational institutions receiving federal funds to eliminate discrimination based on sex.⁴⁴ To implement Title IX’s protection against sex discrimination, the Department of Education established a set of regulations—the “Implementing Regulations”—that create the specific requirements that educational institutions must meet to protect against sex discrimination as required by Title IX.⁴⁵ The Department of Education’s Office for Civil Rights (OCR) enforces these Implementing Regulations.⁴⁶ OCR also has the authority to interpret the Implementing Regulations, which it does through various public documents often identified as “Dear Colleague Letters.”⁴⁷ Thus, Title IX’s protection against sexual harassment consists of Title IX, the Implementing Regulations, OCR’s interpretations, and court cases interpreting Title IX and the Implementing Regulations.⁴⁸

44. 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

45. See *Cohen v. Brown Univ.*, 991 F.2d 888, 893–94 (1st Cir. 1993) (summarizing the Title IX Implementing regulations).

46. *Mansourian v. Bd. of Regents of Univ. of Cal.*, 816 F. Supp. 2d 869, 918 (E.D. Cal. 2011) (“The DOE, acting through the Office for Civil Rights (‘OCR’), is the agency charged with administering Title IX.” (citing *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 826 n.3 (11th Cir. 1993))).

47. See Jennifer James, Comment, *We Are Not Done: A Federally Codified Evidentiary Standard Is Necessary for College Sexual Assault Adjudication*, 65 DEPAUL L. REV. 1321, 1328–29 (2016) (providing a summary and analysis of OCR’s authority and history of issuing guidance documents to enforce Title IX).

48. See *id.* at 1326, 1328.

A. *Prior Title IX Definitions of Sexual Harassment*

Although Title IX does not directly mention sexual harassment, the Implementing Regulations and OCR have identified sexual harassment as a form of sex discrimination that educational institutions must address to ensure compliance with Title IX. However, neither OCR nor the Implementing Regulations have clearly or uniformly defined sexual harassment.⁴⁹ Instead, Title IX's history has produced several definitions of sexual harassment. Thus, the Title IX definition of sexual harassment and its relation to free speech has undergone several recent changes based on OCR interpretations, changes in the Implementing Regulations, and court decisions.

1. *The "OCR 1997 Definition" of Sexual Harassment*

The original Implementing Regulations did not directly address sexual harassment.⁵⁰ However, several court cases dealt with claims arguing that Title IX's protection against sex discrimination applied to sexual harassment.⁵¹ These court cases did not develop a uniform definition of sexual harassment as applied to Title IX.⁵²

In 1997, OCR declared that it would enforce Title IX's protection against sex discrimination, including sexual harassment.⁵³ Specifically, OCR defined sexual harassment as conduct "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity or to create a hostile or abusive educational environment."⁵⁴ OCR based this conception of sexual harassment on the federal definition applicable to workplace harassment that established the Hostile Environment Conception of sexual harassment.⁵⁵

49. See also Abbey Widick, Note, *It Is Time to Move Forward . . . On the Basis of Sex: The Impact of Bostock v. Clayton County on the Interpretation of "Sex" Under Title IX*, 68 WASH. U. J.L. & POL'Y 303, 318, 351 (2022).

50. See Jon Gould, *Title IX in the Classroom: Academic Freedom and the Power to Harass*, 6 DUKE J. GENDER L. & POL'Y 61, 64 (1999).

51. See *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1290 (N.D. Cal. 1993) ("The issue of sexual harassment in an educational setting as a form of sex discrimination has been less frequently before the courts, however, and the viability of a sex discrimination claim based on hostile environment sexual harassment under Title IX is a novel question.").

52. See *id.*; see also Kaija Clark, Note, *School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers*, 66 GEO. WASH. L. REV. 353, 357–58, 377 (1998).

53. Final Policy Guidance, 62 Fed. Reg. 12,034, 12,044–45 (Mar. 13, 1997).

54. *Id.* at 12,045; see also *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,467 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

55. See Final Policy Guidance, 62 Fed. Reg. at 12,046 n.2 ("In analyzing sexual harassment claims, the Department also applies, as appropriate to the educational context,

2. The Supreme Court’s “Davis Definition” of Sexual Harassment

After the OCR 1997 Definition, the Supreme Court assessed sexual harassment in the context of Title IX. In *Davis v. Monroe County Board of Education*, the Supreme Court conducted a detailed analysis of sexual harassment to try to balance the competing concerns of addressing sexual harassment while protecting free speech within education.⁵⁶

To find this balance, the Supreme Court first recognized that many conceptions of sexual harassment were too broad for the educational context and, therefore, threatened free speech.⁵⁷ Thus, the Supreme Court rejected the concept of a hostile environment to define sexual harassment in the education environment.⁵⁸ Specifically, the Supreme Court recognized that the concept of a hostile environment described sexual harassment in the workplace, but found it was too broad in the education context because of the need to protect the free exchange of ideas.⁵⁹ Several other courts also expressed the concern that the Hostile Environment Conception of sexual harassment was too broad in the education context.⁶⁰

Instead of the Hostile Environment Conception, the Supreme Court sought a conception that established an objective standard for sexual harassment to protect “offensive speech” that may be objectionable but was common in the education context.⁶¹ Thus, the Supreme Court developed a definition of sexual harassment narrower than the hostile environment standard in the OCR 1997 Definition.⁶² Specifically, the Supreme Court established the “*Davis* Definition,” which defined sexual harassment as

many of the legal principles applicable to sexual harassment in the workplace developed under Title VII.”).

56. *See* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

57. *See id.* at 633 (“[W]e conclude that [a private damages action] may lie only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”).

58. *See id.* at 636–38.

59. *See id.* at 651–52 (“Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may interact in a manner that would be unacceptable among adults.”).

60. *See, e.g.,* *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991) (suggesting that the First Amendment protects student speech that may create a hostile environment even though Title VII bans hostile environment speech in the workplace).

61. *See* *Davis*, 526 U.S. at 651–52; *see also* *Sexual Harassment on College Campuses*, FIRE (Apr. 9, 2019), <https://www.thefire.org/issues/sexual-harassment/> [<https://perma.cc/B2ZZ-MCM9>].

62. *Davis*, 526 U.S. at 647–48.

conduct “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.”⁶³

With the *Davis* decision, Title IX produced two definitions of sexual harassment. The OCR 1997 Definition defined sexual harassment as creating a hostile environment that causes education interference.⁶⁴ By rejecting this Hostile Environment Conception, the Supreme Court provided a definition that targeted speech that was so objectively offensive that it caused education interference.⁶⁵ OCR would soon address these differences.

3. The “OCR Clarification Guidance”

After the *Davis* Definition offered by the Supreme Court, OCR released several documents reinforcing the OCR 1997 Definition.⁶⁶ In 2001, OCR published a guidance document called the “2001 Guidance” that specifically addressed how OCR would define sexual harassment to enforce Title IX.⁶⁷ Although the 2001 Guidance recognized that the *Davis* Definition included different language from the OCR 1997 Definition, it found that the definitions were “consistent” because both sought to address speech that caused education interference.⁶⁸ The 2001 Guidance also noted that both definitions allow for, and indeed require, consideration of the facts and circumstances surrounding the speech at issue.⁶⁹ However, in the 2001

63. *Id.* at 650.

64. *See supra* Section II.A.1.

65. *See Davis*, 526 U.S. at 633; *see also Sexual Harassment on College Campuses*, *supra* note 61.

66. *See, e.g.*, U.S. DEP’T OF EDUC., OCR-00057, DEAR COLLEAGUE LETTER HARASSMENT AND BULLYING (OCTOBER 26, 2010) BACKGROUND, SUMMARY AND FAST FACTS (2021).

67. Availability Notice, 66 Fed. Reg. 5512 (Jan. 19, 2001); *see also* Julie A. Klusas, Note, *Providing Students with the Protection They Deserve: Amending the Office of Civil Rights’ Guidance or Title IX to Protect Students from Peer Sexual Harassment in Schools*, 8 TEX. F. ON C.L. & C.R. 91, 110 (2003).

68. U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at v–vi (2001) (“Although the terms used by the Court in *Davis* are in some ways different from the words used to define hostile environment harassment in the 1997 guidance . . . the definitions are consistent. Both the Court’s and the Department’s definitions are contextual descriptions intended to capture the same concept—that under Title IX, the conduct must be sufficiently serious that it adversely affects a student’s ability to participate in or benefit from the school’s program.”).

69. *Id.* at vi (“In determining whether harassment is actionable, both *Davis* and the Department tell schools to look at the ‘constellation of surrounding circumstances, expectations, and relationships,’ and the *Davis* Court cited approvingly the underlying core factors described in the 1997 guidance for evaluating the context of the harassment.” (quoting *Davis*, 526 U.S. at 651)).

Guidance, OCR found the hostile environment analysis was necessary to spur educational institutions to address environments in which sexual harassment developed.⁷⁰ Specifically, the Hostile Environment Conception required educational institutions to determine if the speech was part of a larger environment that encouraged sexual harassment.⁷¹ Thus, in the 2001 Guidance, OCR declared it would continue to use the OCR 1997 Definition when assessing sexual harassment claims as part of its overall effort to target sexual harassment, rejecting the idea that it should adopt the *Davis* Definition.⁷²

In 2011, OCR released more guidance documents called the “2011 Guidance” that established Title IX’s protection against sexual harassment and confirming the OCR 1997 Definition.⁷³ Once again, OCR deemed the *Davis* Definition insufficient to address sexual harassment.⁷⁴ The 2011 Guidance led to a renewed focus on sexual harassment within the educational system.⁷⁵ Thus, the 2011 Guidance and its refocus on the OCR 1997 Definition was primarily seen as part of a larger effort to expand the scope of Title IX to address the many insidious forms of sexual harassment.⁷⁶

Both the 2001 Guidance and the 2011 Guidance—collectively, the “OCR Clarification Guidance”—established that OCR would continue to utilize the OCR 1997 Definition to assess sexual harassment and specifically

70. *Id.* at 16 (“Steps should also be taken to eliminate any hostile environment that has been created. For example, if a female student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment.”).

71. *Id.* at 5, 7, 22–23.

72. *Id.* at v–vi; *see also* Melnick, *supra* note 22 (“In January 2001, it rejected the Supreme Court’s framework. The court’s interpretation, it maintained, applied only to lawsuits for money damages, not to the conditions attached to federal funding. It imposed more demanding requirements on educational institutions, but for over a decade it made little effort to enforce its mandate.”).

73. Letter from Russlynn Ali, Assistant Sec’y for C.R., U.S. Dep’t of Educ., to colleague (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/P5JC-TQ3P>].

74. *Id.*

75. *See* R. Shep Melnick, *The Strange Evolution of Title IX*, NAT’L AFFS. (2018), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix> [<https://perma.cc/72QB-HWDX>].

76. Melnick, *supra* note 22 (“In 2011, the Obama administration launched a concerted attack on the problem of sexual assault on college campuses. OCR issued a lengthy ‘dear colleague letter’ (DCL) spelling out the many measures schools must institute to ‘end any harassment, eliminate a hostile environment if it has been created, and prevent harassment from occurring again.’”).

focus on whether speech created a hostile environment. However, various groups challenged the OCR 1997 Definition on free speech grounds, suggesting that the Supreme Court and the First Amendment required OCR to adopt the *Davis* Definition.⁷⁷ These groups alleged that the OCR 1997 Definition was unconstitutional in violating free speech rights.⁷⁸ In 2020, this conflict would again take center stage as part of the collective overhaul of the Title IX regulations.

4. *The “2020 Trump Definition” of Sexual Harassment*

In 2020, the Department of Education, under the Trump Administration, revised the Title IX Implementing Regulations for the first time since their inception in 1972 to establish the “2020 Amendments.”⁷⁹ As part of this overhaul, the 2020 Amendments adopted a definition of sexual harassment that explicitly rejected the Hostile Environment Conception of sexual harassment.⁸⁰ Instead, the 2020 Amendments incorporated the *Davis* Definition into the Implementing Regulations.⁸¹ Specifically, the 2020 Amendments, referred to as the “2020 Trump Definition,” defined sexual harassment as “[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”⁸²

In justifying the 2020 Trump Definition, the Department of Education cited the Supreme Court’s reasoning rejecting the Hostile Environment Conception offered in the OCR 1997 Definition.⁸³ Specifically, the Department

77. Robert Shibley, *Why the Supreme Court’s Davis Standard is Necessary to Restore Free Speech to America’s College Campuses: Part I*, FIRE (Oct. 19, 2019), <https://www.thefire.org/why-the-supreme-courts-davis-standard-is-necessary-to-restore-free-speech-to-americas-college-campuses-part-i/> [<https://perma.cc/HF2S-JJCV>].

78. *Id.*

79. See Melnick, *supra* note 22 (“This was the first full rulemaking on a major Title IX issue since 1975, and the only one ever dedicated to sexual harassment.”).

80. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,171 (to be codified at 34 C.F.R. pt. 106) (“While the two concepts may overlap, for reasons discussed above, the denial of equal access to education element is more precisely tailored to serve the purpose of Title IX (which bars discrimination in education programs or activities) than the hostile environment concept, which originated to describe the kind of hostile or abusive *workplace* environment sexual harassment may create under Title VII.”).

81. *Id.* at 30,149 (“The Department chooses to adopt in these final regulations the *Davis* standard defining actionable sexual harassment, as one of three parts of a sexual harassment definition.”).

82. 34 C.F.R. § 106.30(a)(2) (2020).

83. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,144 (“We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis*

of Education concurred with the Supreme Court’s finding that the Hostile Environment Conception was overly broad for educational institutions because of the unique interactions that often occur in schools.⁸⁴ Thus, the Department of Education found that the Objectively Offensive Conception outlined in the *Davis* Definition better matched the goals of Title IX within the educational realm.⁸⁵

The Department of Education also cited free speech as one of the main reasons to justify the implementation of the *Davis* Definition through the 2020 Amendments.⁸⁶ Indeed, the 2020 Amendments added a provision to the Implementing Regulations specifically requiring educational institutions to avoid enforcing Title IX in any way that would not harm other constitutional rights, including First Amendment rights.⁸⁷

The Department of Education also found that the Objectively Offensive Conception better allowed for subjective and objective considerations when assessing speech.⁸⁸ Further, the Department of Education noted that the Objectively Offensive Conception allowed for, and indeed required, educational institutions to consider the totality of the circumstances and

standard (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard.”).

84. *See id.* at 30,152 (“The Department believes that the *Davis* definition in § 106.30 provides a definition for non-*quid pro quo*, non-Clery Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter.”).

85. *Id.* at 30,154.

86. *Id.* at 30,170 (“[T]he Department believes that adoption and adaption of the *Davis* standard better serves both the purposes of Title IX’s non-discrimination mandate and constitutional protections of free speech and academic freedom, and thus the final regulations retain the *Davis* formulation of effective denial of equal access rather than the language used in Department guidance documents.”).

87. 34 C.F.R. § 106.44(a) (2020) (“The Department may not deem a recipient to have satisfied the recipient’s duty to not be deliberately indifferent under this part based on the recipient’s restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.”).

88. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,167 (“The Department believes that a benefit of the *Davis* standard as formulated in the second prong of § 106.30 is that whether harassment is actionable turns on both subjectivity (*i.e.*, whether the conduct is unwelcome, according to the complainant) and objectivity (*i.e.*, ‘objectively offensive’) with the *Davis* elements determined under a reasonable person standard, thereby retaining a similar ‘both subjective and objective’ analytic approach that commenters point out is used in the 2001 Guidance.” (citation omitted)).

use a reasonable person standard.⁸⁹ For all of these reasons, the Department of Education, through the 2020 Amendments, found that the Objectively Offensive Conception of sexual harassment, as established through the *Davis* Definition, was more appropriate than the Hostile Environment Conception of sexual harassment.⁹⁰

The Department of Education’s decision to reinstate the *Davis* Definition of sexual harassment was hailed by many free speech rights advocates as necessary to protect free speech while still addressing sexual harassment.⁹¹ However, critics suggested it created too high of a standard to protect against all forms of sexual harassment.⁹² Thus, under the Biden Administration, the Department of Education again proposed changes to the sexual harassment definition.⁹³

5. *The “2022 Biden Definition” of Sexual Harassment*

On June 24, 2022, the federal government, under the Biden Administration, released proposed revisions to Title IX, that changed the definition of sexual harassment.⁹⁴ This “2022 Biden Definition” changed the definition of sexual harassment to reintroduce the Hostile Environment Conception.⁹⁵ As with the OCR 1997 Definition, the 2022 Biden Definition utilized the workplace definition of sexual harassment established through Title VII to define it for Title IX purposes.⁹⁶ Specifically, the 2022 Biden Definition defines sexual harassment as follows: “Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits

89. *See id.* at 30,158.

90. *Id.* at 30,170 (“[T]he Department believes that adoption and adaption of the *Davis* standard better serves both the purposes of Title IX’s non-discrimination mandate and constitutional protections of free speech and academic freedom, and thus the final regulations retain the *Davis* formulation of effective denial of equal access rather than the language used in Department guidance documents.”).

91. Jason M. Shepard & Kathleen B. Culver, *Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times*, 55 SAN DIEGO L. REV. 87, 140 (2018).

92. Nicole Bedera, *Trump’s New Rule Governing College Sex Assault is Nearly Impossible for Survivors to Use. That’s the Point*, TIME (May 14, 2020, 1:32 PM), <https://time.com/5836774/trump-new-title-ix-rules/> [<https://perma.cc/ZJM3-XSLP>].

93. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,390–91 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

94. *Id.*

95. *Id.* at 41,413–14.

96. *Id.* at 41,390–91 (noting that the purpose of the 2022 Biden Definition is to “[c]larify the Department’s view of the scope of Title IX’s prohibition on sex discrimination, including related to a hostile environment under the recipient’s education program or activity”).

a person’s ability to participate in or benefit from the recipient’s education program or activity (*i.e.*, creates a hostile environment).⁹⁷ Thus, the 2022 Biden Definition incorporated the hostile environment concept from the OCR 1997 Definition and the language which described education interference as speech that “denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.”⁹⁸

In its explanation to justify the changes of the 2022 Biden Definition, the Department of Education declared that the *Davis* Definition and, therefore, the 2020 Trump Definition were too narrow and did not adequately protect against sexual harassment or ensure compliance with Title IX’s protection against sexual discrimination.⁹⁹ The Department of Education also declared that the 2022 Biden Definition would help educational institutions find the balance between sexual harassment and free speech.¹⁰⁰ However, the 2022 Biden Definition has been criticized, like the OCR 1997 Definition, for being overly broad and threatening free speech.¹⁰¹

B. *The “Dueling Title IX Conceptions” of Sexual Harassment*

The history of Title IX has produced four definitions of sexual harassment, which fall into two general conceptions of sexual harassment. The first conception, initiated with the OCR 1997 Definition, confirmed by the OCR Clarification Guidance, and codified by the 2022 Biden Definition, conceptualizes sexual harassment as creating a hostile environment.¹⁰² Specifically, in all of these definitions, sexual harassment is identified as

97. *Id.* at 41,569.

98. *Id.* at 41,414 (emphasis omitted).

99. *Id.* at 41,407 (“After extensive review, the Department’s current view is that the 2020 amendments do not adequately promote full implementation of Title IX’s prohibition on sex discrimination, including sex-based harassment, by a recipient in its education program or activity.”).

100. *Id.* at 41,414–15 (“[T]he Department’s tentative view is that the proposed scope of conduct that would constitute a hostile environment under the definition of ‘sex-based harassment’ in proposed § 106.2 would sufficiently protect the constitutional rights and interests of students and employees.”).

101. Sarah Parshall Perry, *Biden’s New Title IX Rule Guts Protections for Women and Girls, Here’s How to Fight It.*, HERITAGE FOUND. (July 18, 2022), <https://www.heritage.org/gender/commentary/bidens-new-title-ix-rule-guts-protections-women-and-girls-heres-how-fight-it> [https://perma.cc/E3VB-9EZ9].

102. *See infra* Sections II.A.1, 3, 5.

speech that “creates a hostile environment” by limiting “a person’s ability to participate in or benefit from an education program or activity.”¹⁰³

Collectively, these definitions rely on the Hostile Environment Conception of sexual harassment originally developed through Title VII, which addresses sexual harassment in the workplace.¹⁰⁴ This Hostile Environment Conception of sexual harassment has been adopted by States as well.¹⁰⁵ The Hostile Environment Conception of sexual harassment is generally presented as a way to address the broad range of sexual harassment students face.¹⁰⁶

The second conception of sexual harassment offered through Title IX was established by the *Davis* Definition and codified by the 2020 Amendments.¹⁰⁷ This conception replaced the Hostile Environment Conception and used the “objectively offensive” standard.¹⁰⁸ In developing this Objectively Offensive Conception of sexual harassment, both the *Davis* Definition and the 2020 Trump Definition explicitly rejected the

103. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,413. Specifically, the OCR 1997 Definition identified sexual harassment as “sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.” U.S. DEP’T OF EDUC., *supra* note 68. OCR, through the 2001 Guidance and the 2011 Guidance, upheld OCR 1997 Definition. *Id.* at vi; see also Letter from Russlynn Ali to colleague, *supra* note 73. Similarly, the 2022 Biden Definition defines sex-based harassment as conduct that “denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity (*i.e.*, creates a hostile environment).” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,413.

104. 29 C.F.R. § 1604.11 (1999) (“Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”).

105. See CAL. EDUC. CODE § 212.5(c) (West 2023) (“Sexual harassment” means . . . conduct [that] has the purpose or effect of having a negative impact upon the individual’s work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.”).

106. See Chris Diffie, *Going Offshore: Horseplay, Normalization, and Sexual Harassment*, 24 COLUM. J. GENDER & L. 302, 375 (2013); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 97 (1995).

107. See *supra* Sections II.A.2, 4.

108. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,152 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (“[T]he Department believes that the *Davis* definition in § 106.30 provides a definition for non-*quid pro quo*, non-Clery Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter.”); see also *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632 (1999).

Hostile Environment Conception for Title IX as overly broad.¹⁰⁹ The Supreme Court recognized that the Hostile Environment Conception might apply to workplace harassment under Title VII but found it was too broad in the education context because of the need to protect the free exchange of ideas.¹¹⁰ The Supreme Court also followed other cases that found that the Hostile Environment Conception of sexual harassment was too broad for the educational context.¹¹¹ Similarly, the 2020 Amendments explicitly rejected the Hostile Environment Conception as a threat to free speech in the educational context.¹¹² The 2020 Trump Definition thus upheld the Objectively Offensive Conception of sexual harassment found in the *Davis* Definition to protect free speech rights in the educational setting.¹¹³

Thus, both the *Davis* Definition and the 2020 Trump Definition replaced the Hostile Environment Conception with the Objectively Offensive Conception of sexual harassment as part of an effort to narrow the scope of sexual harassment to protect free speech.¹¹⁴ The Objectively Offensive

109. See *supra* Sections II.A.2, 4.

110. *Davis*, 526 U.S. at 651–52.

111. See *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) (holding that the First Amendment protects student speech creating a hostile environment even though Title VII prohibits hostile environment speech in the workplace); see also *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (holding that the hostile environment harassment code was unconstitutionally vague and overbroad and was not a valid prohibition of fighting words).

112. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,151 (“The rationale for preventing a hostile workplace environment free from any severe or pervasive sexual harassment that alters conditions of employment does not raise the foregoing concerns (*i.e.*, allowing for the social and developmental growth of young students learning how to interact with peers in the elementary and secondary school context; fostering robust exchange of speech, ideas, and beliefs in a college setting). Thus, the Department does not believe that aligning the definitions of sexual harassment under Title VII and Title IX furthers the purpose of Title IX or benefits students and employees participating in education programs or activities.”).

113. *Id.* at 30,036 n.88 (“[T]he *Davis* definition of sexual harassment as ‘severe, pervasive, and objectively offensive’ comports with First Amendment protections, and the way in which a broader definition, such as severe, persistent, or pervasive (as used in the 1997 Guidance and 2002 Guidance), has led to infringement of rights of free speech and academic freedom of students and faculty.”).

114. *Id.* at 30,140 (“[T]he Supreme Court intentionally has adopted a narrower definition of harassment under Title IX than under Title VII, requiring that conduct be both severe and pervasive enough to deny equal educational access, as opposed to merely fostering a hostile environment through severe or pervasive conduct.”).

Conception focused on distinguishing between harmful speech and mere teasing that often occurs in an educational setting.¹¹⁵

Therefore, the various definitions of sexual harassment provided through Title IX have offered two Dueling Title IX Conceptions of sexual harassment. The Hostile Environment Conception, established by the OCR 1997 Definition and the 2022 Biden Regulations, is generally presented as a broad definition designed to address the various insidious forms of sexual harassment.¹¹⁶ Thus, the Hostile Environment Conception is usually supported by those who advocate for a robust definition of sexual harassment.¹¹⁷ However, the Hostile Environment Conception is generally derided by those who focus on protecting free speech.¹¹⁸

The Objectively Offensive Conception, established through the *Davis* Definition and codified by the 2020 Trump Definition, is generally presented as a narrow conception of sexual harassment designed to protect free speech.¹¹⁹ However, this Objectively Offensive Conception is similarly criticized by those that argue that it fails to address sexual harassment adequately.¹²⁰

1. *The Title IX Sexual Harassment Versus Free Speech Debate*

Thus, the free speech versus sexual harassment debate within the educational system is often presented as a binary choice between two conceptions,

115. *Davis*, 526 U.S. at 652 (“Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”).

116. See Popovich et al., *supra* note 21, at 609–10.

117. Sandra J. Perry & Tanya M. Marcum, *Liability for School Sexual Harassment Under Title IX: How the Courts Are Failing Our Children*, 30 U. LA VERNE L. REV. 3, 6 (2008).

118. Meghan Brink, *Biden’s Title IX Overhaul*, INSIDE HIGHER ED (June 24, 2022), <https://www.insidehighered.com/news/2022/06/24/biden-expands-protections-sexual-harassment-lgbtq-students> [https://perma.cc/56BJ-R565].

119. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [https://perma.cc/YR2S-YE3T] (“The biggest single step in the right direction does not involve faculty or university administrators, but rather the federal government, which should release universities from their fear of unreasonable investigation and sanctions by the Department of Education. Congress should define peer-on-peer harassment according to the Supreme Court’s definition in the 1999 case *Davis v. Monroe County Board of Education*.”).

120. Heather D. Redmond, Comment, *Davis v. Monroe County Board of Education: Scant Protection for the Student Body*, 18 MINN. J.L. & INEQ. 393, 412 (2000) (“Although the ultimate conclusion of the Court in *Davis* was correct, the standard is too narrow. The standard is neither an effective way to remedy the pervasive problem of sexual harassment in our schools, nor is it an accurate reflection of the purpose of Title IX.” (footnote omitted)).

each supporting one side of the debate. Those supporting a robust and broad definition of sexual harassment support the Hostile Environment Conception, while those supporting a limited definition to protect free speech uphold the Objectively Offensive Conception.¹²¹ This debate has become part of the larger cultural debate, with some attacking the Hostile Environment Conception of sexual harassment to indoctrinate students through a politically correct culture.¹²² In contrast, others suggest that the Objectively Offensive Conception is part of an effort to protect and promote toxic and outdated sexist beliefs.¹²³

However, a closer look at the Dueling Title IX Conceptions demonstrates they both have similarities that can be used to meet both goals of protecting free speech while addressing the many insidious forms of sexual harassment.

2. *The Common Focus on Education Interference to Define Sexual Harassment*

The Dueling Title IX Conceptions seem to emphasize different goals, with the Hostile Environment Conception focusing on addressing sexual harassment and the Objectively Offensive Conception focusing on free speech.¹²⁴ Despite their differences, both the Hostile Environment and Objectively Offensive Conceptions of sexual harassment attempt to define sexual harassment based on the education interference it creates.¹²⁵ Indeed, the courts have also upheld the general idea that the conception of sexual harassment in the educational realm should focus on whether the speech at issue creates interference with the educational experience.¹²⁶

Thus, even though free speech versus sexual harassment often appears as a toxic debate between two incompatible goals, there is a common agreement

121. See Suzanne Eckes, R. Shep Melnick & Kimberly J. Robinson, *Reactions to the Biden Administration’s Proposed Title IX Changes from Education Law Scholars*, BROOKINGS (June 30, 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/06/30/reactions-to-the-biden-administrations-proposed-title-ix-changes-from-education-law-scholars/> [https://perma.cc/5F3Y-FFGV].

122. See Lukianoff & Haidt, *supra* note 119.

123. See Eckes, Melnick & Robinson, *supra* note 121; see also *supra* notes 10–11 and accompanying text.

124. See *supra* notes 116–18 and accompanying text.

125. See *supra* Section II.B.2.

126. See *Doe v. Brown Univ.*, 896 F.3d 127, 132 (1st Cir. 2018).

that sexual harassment should focus on education interference to address sexual harassment and protect free speech.¹²⁷

3. *Fatally Ambiguous Conceptions of Education Interference*

However, this education interference has yet to be clearly defined within the legal realm, either through the Dueling Title IX Conceptions of sexual harassment or by the courts. The Hostile Environment Conception suggests that a hostile environment causes education interference.¹²⁸ However, this Hostile Environment Conception does not define the term “hostile” or distinguish between harmful speech and provocative speech that may make some people uncomfortable or even be deemed offensive but does not rise to the level of creating a hostile environment.¹²⁹ Unlike the workplace environment, this provocative speech is a common, and indeed necessary, part of the educational experience.¹³⁰

The Objectively Offensive Conception of sexual harassment suggests that speech creates education interference if it is so objectively offensive that it prohibits individuals from benefiting from the educational experience.¹³¹ However, the Objectively Offensive Conception does not define offensive. It fails to provide any specifics regarding how to determine if speech is objectively offensive enough to create education interference.¹³² As with the Hostile Environment Conception, the Objectively Offensive Conception does not distinguish between harmful speech and the negative, offensive speech common in educational institutions and necessary for intellectual development.¹³³

Thus, despite their differing focuses, the Dueling Title IX Conceptions of sexual harassment focus on education interference as the critical factor in assessing sexual harassment.¹³⁴ However, both Dueling Title IX

127. See *supra* Section II.B.2.

128. See *supra* Sections II.A.1, 3, 5.

129. Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 500 (2002).

130. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651–52 (1999) (“It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender.”); see also *infra* Section III.C.2.

131. See *supra* Sections II.A.2, 4.

132. Susan P. Stuart, *Jack and Jill Go to Court: Litigating a Peer Sexual Harassment Case Under Title IX*, 29 AM. J. TRIAL ADVOC. 243, 254 (2005).

133. See *id.*

134. U.S. DEP’T OF EDUC., *supra* note 68 (“Although the terms used by the Court in *Davis* are in some ways different from the words used to define hostile environment harassment in the 1997 guidance, . . . the definitions are consistent. Both the Court’s and

Conceptions provide vague conceptions of this education interference. As a result of these ambiguous conceptions offered through Title IX, the various policies implemented by educational institutions to target sexual harassment have been rejected as being both overly broad and overly narrow.

4. *The Resulting Overly Broad and Inadequately Narrow Sexual Harassment Policies*

The failure of both Dueling Title IX Conceptions of sexual harassment to provide clear guidance as to what speech constitutes sexual harassment has caused educational institutions to develop policies that either fail to protect free speech or fail to protect against sexual harassment.¹³⁵ These policies also try, and often fail, to comply with the Title IX definition of sexual harassment in effect at the time.¹³⁶

Educational institutions that adopted policies based on the Hostile Environment Conception often developed overly broad policies that threatened free speech.¹³⁷ For example, in *Speech First, Inc. v. Cartwright*, the United States Court of Appeals, Eleventh Circuit, assessed the University of Central Florida’s (U.C.F.) sexual harassment policy on First Amendment grounds.¹³⁸ The U.C.F. policy focused on hostile environment harassment and deemed speech sexual harassment if it “unreasonably . . . alters” another student’s “participation in a university program or activity.”¹³⁹ In its analysis of U.C.F.’s speech code, the court noted that the First Amendment protects against overbroad limits on speech because such limitations chill protected

the Department’s definitions are contextual descriptions intended to capture the same concept—that under Title IX, the conduct must be sufficiently serious that it adversely affects a student’s ability to participate in or benefit from the school’s program.”)

135. See Jehan A. Abdel-Gawad, Note, *Kiddie Sex Harassment: How Title IX Could Level the Playing Field Without Leveling the Playground*, 39 ARIZ. L. REV. 727, 735 (1997); see also Marc Edelman, *Assessing the Department of Education’s Proposed 2018 Revisions to Its Regulations Under Title IX of the Education Amendments Act*, 9 WAKE FOREST J.L. & POL’Y 155, 159 (2019).

136. See Olivia Grob-Lipkis, Note, *Title IX on the Line: Ethical Implications of Title IX Sexual Assault Enforcement and Lawyers’ Roles*, 33 GEO. J. LEGAL ETHICS 555, 567 (2020).

137. See Abdel-Gawad, *supra* note 135.

138. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022).

139. *Id.* at 1114–15 (citation omitted).

expression.¹⁴⁰ The court found U.C.F.'s speech code to be unconstitutionally overbroad, noting that its vague conception could limit speech that makes some people uncomfortable.¹⁴¹

Educational institutions that have adopted policies incorporating the Objectively Offensive Conception of sexual harassment have failed to provide the general protection required by Title IX.¹⁴² For example, the University of Montana's (UM) sexual harassment policy declared that "conduct does not constitute sexual harassment unless it is objectively offensive."¹⁴³ As part of an investigation into a complaint against UM that it failed to comply with Title IX, OCR found UM's definition of sexual harassment too narrow.¹⁴⁴ Specifically, OCR concluded that UM's definition "leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both."¹⁴⁵ Thus, OCR required UM to broaden its definition to fully protect against sexual harassment and provide clarity to identify the specific conduct that may constitute sexual harassment.¹⁴⁶ However, free speech advocates criticized OCR's orders in the UM decision as only adding to the ambiguity of the sexual harassment definition and contributing to free speech assaults.¹⁴⁷

Thus, because Title IX has yet to offer a clear conception of sexual harassment, educational institutions have adopted various sexual harassment policies, many of which are either overly broad and, therefore, threaten free speech or overly narrow and fail to address sexual harassment adequately. This ambiguity has led to the toxic culture within educational institutions whereby the issue becomes a political argument. As a result, educational institutions seek policies that protect them from lawsuits rather than finding a way to protect against sexual harassment and uphold free speech.¹⁴⁸

140. *Id.* at 1125 ("The Overbreadth doctrine is designed 'to prevent the chilling of protected expression.'" (quoting *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989))).

141. *See id.* at 1129.

142. *See* Abdel-Gawad, *supra* note 135.

143. Letter from Anurima Bhargava, Chief of Educ. Opportunities Section, & Gary Jackson, Reg'l Dir., Office for Civil Rights, to Royce Engstrom, President of the Univ. of Montana, & Lucy France, Univ. Counsel, Univ. of Montana, at 9 (May 9, 2013), <http://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf> [<https://perma.cc/HQC8-JGMJ>].

144. *Id.* at 1, 9 n.11.

145. *Id.* at 8.

146. *Id.* at 7-8; *see also* C.R. Div., U.S. Dep't of Just., DOJ DJ no. 169-44-9, Resolution Agreement (2013), at 9 <https://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf> [<https://perma.cc/EY3N-EK95>].

147. *Sexual Harassment on College Campuses*, *supra* note 61.

148. *See* Daniel G. McBride, *Guidance for Student Peer Sexual Harassment? Not!*, 50 STAN. L. REV. 523, 548-49 (1998).

5. Balancing Free Speech and Sexual Harassment by Eliminating the Ambiguity of Education Interference

Therefore, the history and implementation of the Dueling Title IX Conceptions of sexual harassment demonstrate that neither has produced a clear definition of sexual harassment. Instead, the Hostile Environment Conception created sexual harassment policies that are overly broad and threaten free speech.¹⁴⁹ Conversely, the Objectively Offensive Conception has produced overly narrow definitions that do not adequately protect against sexual harassment.¹⁵⁰ However, both Dueling Title IX Conceptions of sexual harassment indicate that education interference is the prominent harm caused by sexual harassment within educational institutions.¹⁵¹

The Dueling Title IX Conceptions of sexual harassment suggest that the law needs a conception of sexual harassment that targets speech based on education interference but eliminates the ambiguity that haunts the Dueling Title IX Conceptions of sexual harassment. Indeed, scholars have recognized that the ambiguity of the education interference concept is the main threat to free speech.¹⁵² Similarly, scholars have identified ambiguity as the leading cause of educational institutions failing to address the many insidious forms of sexual harassment.¹⁵³

Through this clear conception of education interference, educational institutions can target and eliminate insidious forms of sexual harassment while protecting free speech by separating provocative speech. The law can turn to social science to develop a clear conception of education interference.

III. SOCIAL SCIENCE AND SEXUAL HARASSMENT

Social science provides vast insight into the many forms of, and the specific harm caused by, sexual harassment.¹⁵⁴ As noted above, both Dueling

149. See *supra* notes 137–41 and accompanying text.

150. See *supra* notes 142–47 and accompanying text.

151. See *supra* Section II.B.2.

152. See Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 567 (1995); see also Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 483 (1991).

153. See Sindt, *supra* note 15, at 520.

154. See Margaret S. Stockdale, T.K. Logan & Rebecca Weston, *Sexual Harassment and Posttraumatic Stress Disorder: Damages Beyond Prior Abuse*, 33 LAW & HUM. BEHAV. 405, 406–08 (2009); see also Rebecca A. Thacker & Stephan F. Gohmann, *Emotional and*

Title IX Conceptions of sexual harassment suggest targeting sexual harassment through the education interference it creates.¹⁵⁵ Similarly, social science research also indicates that sexual harassment causes harm in the educational environment through education interference.¹⁵⁶ Conversely, this research lends credence to the legal theory that provocative speech, or speech that does not create the harm associated with sexual harassment, should be protected because it provides many educational benefits necessary for student development.¹⁵⁷ Thus, a social science analysis fits within Title IX's overall goals of eliminating sexual harassment based on its education interference while protecting non-harmful provocative speech.¹⁵⁸ This analysis suggests fear is the key difference between harmful sexual harassment and beneficial provocative speech.¹⁵⁹

A. *The Fear of Sexual Harassment*

Speech can cause psychological trauma and harm when the speech threatens a person's identity or safety.¹⁶⁰ This threatening speech may focus on a person's gender or sexual orientation.¹⁶¹ Thus, sexually harassing speech can cause psychological trauma and harm.¹⁶² Specifically, people subject to sexually harassing speech experience fear, which causes psychological trauma and harm.¹⁶³ Fear causes harm through its negative effect and various emotions and beliefs, such as depression, anxiety, and low self-

Psychological Consequences of Sexual Harassment: A Descriptive Study, 130 J. PSYCH. 429, 429–33 (1996).

155. See *supra* Section II.B.2.

156. Anne L. Bryant, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*, 63 J. SCH. HEALTH, no. 8, 1992, at 355, 362.

157. See Manuel Almagro, Ivar R. Hannikainen & Neftali Villanueva, *Whose Words Hurt? Contextual Determinants of Offensive Speech*, 48 PERSONALITY & SOC. PSYCH. BULL. 937, 940 (2021).

158. The idea of utilizing social science in the legal realm is not new. See Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555, 1593 (2016) (“[P]sychological and emotional injuries are recognized in several legal contexts.”); see also Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 832 (2004) (“[C]ourts have become more comfortable with the nature of mental injuries as the psychiatric and psychological fields have progressed.”).

159. See *infra* notes 160–64 and accompanying text.

160. See Laura Leets, *Experiencing Hate Speech: Perceptions and Responses to Anti-Semitism and Antigay Speech*, 58 J. SOC. ISSUES, 341, 343 (2002).

161. Christina Wood, *Fear Factor: Harassment Hurts*, EDUTOPIA (Nov. 11, 2004), <https://www.edutopia.org/fear-factor> [<https://perma.cc/MR8B-7QE3>].

162. See generally Vania Cessato & Anastasia Loukaitou-Sideris, *Fear of Sexual Harassment and Its Impact on Safety Perceptions in Transit Environments: A Global Perspective*, 28 VIOLENCE AGAINST WOMEN 26 (2021).

163. See generally *id.*; see also Louise F. Fitzgerald, *Still the Last Great Open Secret: Sexual Harassment as Systemic Trauma*, 18 J. TRAUMA & DISSOCIATION 483, 484–86 (2017).

esteem.¹⁶⁴ Thus, social science establishes fear as the root cause of the trauma associated with sexually harassing speech.¹⁶⁵

The trauma resulting from fear manifests itself in behaviors and actions designed to avoid the source of fear and similar sources in the future.¹⁶⁶ Although these actions and behaviors vary depending on the situation, social science collectively identifies them as “avoidant coping” strategies.¹⁶⁷ Thus, speech can cause harm by creating fear, which can be identified through avoidant coping strategies.¹⁶⁸ In other words, instead of trying to determine if speech creates fear or the associated negative internal emotions and beliefs, social science suggests that we can look at the actions and behaviors caused by the speech to determine if the speech causes fear and related harm.

In the educational environment, these avoidant coping strategies interfere with the educational experience by causing the person to avoid participating in educational activities.¹⁶⁹ In the example opening this Article, Sally may experience fear due to Jeffrey’s comments, which will cause her to avoid participating in specific discussions or any educational activities that may cause her to face similar language in the future.

Thus, social science suggests a linear path between sexual harassment speech and education interference. Sexually harassing speech creates fear, leading to avoidant coping strategies that ultimately cause education interference.¹⁷⁰ For example, people who suffer from sexual harassment often report being afraid to participate fully in their educational experience because they fear being subject to similar harassment or actions in the future.¹⁷¹

164. Josh M. Cisler et al., *Emotion Regulation and the Anxiety Disorders: An Integrative Review*, 32 J. PSYCHOPATHOLOGICAL BEHAV. ASSESSMENT 68, 70–73 (2010).

165. *See id.*

166. Thierry Steimer, *The Biology of Fear- and Anxiety-Related Behaviors*, 4 DIALOGUES CLINICAL NEUROSCIENCE 231, 240–41 (2002).

167. Ruth Chu-Lien Chao, *Managing Stress and Maintaining Well-Being: Social Support, Problem-Focused Coping and Avoidant Coping*, 89 J. COUNSELING & DEVELOPING 338, 341 (2011).

168. *Id.*

169. *Id.* at 339–41.

170. *See* JAMIE WHYTE, POLLUTING WORDS: IS THERE A COASEAN CASE TO REGULATE OFFENSIVE SPEECH? 6–7 (2021).

171. *See* Juliet Njeri Muasya, *Effects of Sexual Harassment on Women Students’ Access to Opportunities and Facilities: A Case Study of The University of Nairobi, Kenya*, 3 GLOB. J. INTERDISC. SOC. SCI. no. 4, 2014, at 83, 83–87.

However, the question remains, how do we define sexual harassment through this fear in a way that will allow educational institutions to target and eliminate harmful sexual harassment while separating and protecting provocative speech? Various conceptions of sexual harassment have included fear as a defining feature of sexual harassment.¹⁷² However, these conceptions suffer from the same ambiguity problem that plagues the Dueling Title IX Conceptions of sexual harassment because they do not establish how to determine if speech causes fear or is likely to cause it.¹⁷³

B. *The Three “Fear Components” of Harmful Speech*

Specific characteristics of speech lead to the fear that causes education interference. When faced with negative speech, social science suggests people determine if the speech should be feared by making specific assessments of the speech.¹⁷⁴ These assessments will, in turn, determine if the speech creates the fear that leads to avoidant coping strategies and results in education interference.¹⁷⁵

Specifically, speech creates fear when the recipient makes three underlying assessments of the speech, which this Article collectively labels “fear components.”¹⁷⁶ In sum, speech is likely to create fear when the recipients of the speech: (1) determine that the speaker intends to inflict harm; (2) believe the speech is an indication that similar threats will occur in the future; and (3) perceive they cannot remedy the underlying threat of the speech.¹⁷⁷

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172. See, e.g., N.J. STAT. ANN. § 18A:37-14 (West 2013). The statute provides: Harassment . . . means any gesture, any written, verbal or physical act . . . that:
- a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
 - b. has the effect of insulting or demeaning any student or group of students;
 - c. creates a hostile educational environment for the student by interfering with a student’s education or by severely or pervasively causing physical or emotional harm to the student.

Id. § 18A:37-14(2).

173. See *supra* Section II.B.3.

174. See Eleonora Gullone, *The Assessment of Normal Fear in Children and Adolescents*, 2 CLINICAL CHILD & FAMILY PSYCH. REV. 91, 93–94 (1999).

175. See generally David L Hudson Jr., *Threatening WORDS*, 104 A.B.A. J. 56, 58 (2018).

176. See generally *id.*

177. See generally *id.* at 61; Cornelius T. Gross & Newton Sabino Canteras, *The Many Paths to Fear*, 13 NATURE REV. 651, 655 (2012).

Thus, instead of merely defining sexually harassing speech as causing “fear,” the law can utilize these fear components to determine if speech is likely to induce fear and therefore create education interference by invoking avoidant coping strategies.

1. *The Perceived Intent of the Speaker*

When faced with stressful speech, recipients of the speech first make a quick assessment of the likely underlying intent of the speaker.¹⁷⁸ If the recipient determines the speech is caused by the speaker’s underlying hostility or the desire to invoke harm, it can cause fear and lead to avoidant coping strategies.¹⁷⁹ However, if the recipient determines the speaker did not intend to elicit or threaten harm, fear is less likely to result.¹⁸⁰ Instead of the intent to harm, the recipient may assume the speaker is ignorant or issuing an “idle threat” without the intention to back the speech up with action.¹⁸¹ Instead of focusing on the actual intent of the speaker, the harm from sexually harassing speech comes from the target’s perceived intent of the speaker.¹⁸²

Title IX can incorporate this “intent” factor to balance consideration of the speaker’s actual intent with the recipient’s subjective interpretation of the speech. Many scholars have suggested that the speaker’s intent should be critical in defining sexual harassment.¹⁸³ These various definitions of sexual harassment suggest that sexual harassment only occurs when the speaker intends to sexually harass or otherwise threatens a person based on their sex or gender.¹⁸⁴ By focusing on the speaker’s intent, these conceptions

178. Murray A. Hewgill & Gerard R. Miller, *Source Credibility and Response to Fear-Arousing Communications*, 32 COMM’N MONOGRAPHS 95, 96–101 (2009).

179. *See id.*; *see also* Robyn K. Mallett, Thomas E. Ford & Julie A. Woodzicka, *What Did He Mean by That? Humor Decreases Attributions of Sexism and Confrontation of Sexist Jokes*, 75 SEX ROLES 272, 280 (2016) (discussing how women’s perceptions of sexism can influence their responsive hostility).

180. *See* Leets, *supra* note 160, at 354–55 (discussing how targets sometimes attribute negative speech to ignorance and therefore, do not suffer the harmful effect of speech attributed to hostility).

181. *See id.*; *see also* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 294 (2001) (“The challenge is to distinguish a true threat from an idle threat, political hyperbole, a jest, misconstrued speech, allowable coercion, or legitimate political advocacy.”).

182. *See* Rothman, *supra* note 181.

183. *See* Robert Austin Ruescher, *Saving Title VII: Using Intent to Distinguish Harassment from Expression*, 23 REV. LITIG. 349, 355 (2004).

184. *See id.*

of sexual harassment protect against overly broad definitions of sexual harassment that penalize speakers who did not intend harm.¹⁸⁵

However, critics of this approach argue that the speaker's intent should not outweigh the actual effect of speech on the recipient.¹⁸⁶ Critics say that the impact of the speech should be the focus of sexual harassment regardless of the intent. Further, critics point to the difficulty in getting inside the head of the speaker to determine intent.¹⁸⁷

By focusing on the recipient's assessment of the speaker's intent, the law can consider the recipient's intent while focusing on the effect of the speech on the target. Instead of requiring an analysis of the actual intent of the speaker, the law can focus on the recipient's interpretation of the intent based on the specifics of the situation. The true intent of the speaker can be part of this analysis. Thus, this process provides a hybrid approach of considering both the speaker's intent and the effect on the recipient.

2. *Assessed Likelihood of Future Harm*

In addition to the intent, the speech's harm will depend on the target's assessment of whether the speech represents a future threat.¹⁸⁸ Although people often fear different things, most people fear the unknown.¹⁸⁹ Thus, if speech creates the belief that the recipient is likely to face threats or harm in the future, it creates an unknown threat that is likely to produce fear.¹⁹⁰

Fear is not necessarily caused by the actual speech but by the belief that the speech is indicative of future harm.¹⁹¹ If a person believes speech indicates that they will face harm in the future, including additional harmful speech

185. See *id.*; see also Margaret S. Stockdale, Declan O. Gilmer & Tuyen K. Dinh, *Dual Effects of Self-Focused and Other-Focused Power on Sexual Harassment Intentions*, 39 EQUAL DIVERSITY & INCLUSION 17, 19–23 (2019).

186. Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1397 (1993) (recognizing that it is subject to debate whether harassers intend to harm their victims); see also Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 60–61 (2018).

187. See Tuyen K. Dinh, Laurel Mikalouski, & Margaret S. Stockdale, *When “Good People” Sexually Harass: The Role of Power and Moral Licensing on Sexual Harassment Perceptions and Intentions*, 46 PSYCH. WOMEN Q. 278, 278–79 (2022).

188. See Lynne Tirrell, *Toxic Speech: Toward an Epidemiology of Discursive Harm*, 45 PHIL. TOPICS, no. 2, 2017, at 139, 142.

189. See R. Nicholas Carleton, *Fear of the Unknown: One Fear to Rule Them All?*, 41 J. ANXIETY DISORDER 5, 8–10 (2016).

190. See *id.*; see also Brian D. Ostafin, Inka Papenfuss & John Vervaeke, *Fear of the Unknown as a Mechanism of the Inverse Relation Between Life Meaning and Psychological Distress*, 35 ANXIETY STRESS & COPING 379, 382 (2021).

191. See Antonion Blanco Salgueiro, *Promises, Threats, and Foundations of Speech Act Theory*, 20 PRAGMATICS 213, 213–15 (2010).

or other actions, it will evoke fear.¹⁹² However, if the recipient determines that speech does not represent a future threat but is an isolated incident, it is unlikely to produce fear.¹⁹³ Regardless of the content of the speech, the target will likely conclude that they can ignore, dismiss, or redress the speech at issue without fear of future threat or harm.¹⁹⁴

This fear of future harm is a common conception within the law used to assess whether a particular event caused psychological damage.¹⁹⁵ Instead of focusing on the emotional effect of the event, the courts evaluate whether the event causes fear of future threats.¹⁹⁶ Evidence of fear of future harm can be demonstrated through actions or behaviors designed to avoid future harm.¹⁹⁷ Thus, this fear of future harm analysis avoids having to get inside the head of the victim to determine the harm but instead can focus on whether the event at issue created fear of future harm, exhibited through behaviors by the target designed to avoid similar harm.¹⁹⁸

Thus, the conception of sexual harassment can utilize this fear of future harm analysis provided in other areas of law to assess whether speech creates legitimate fear of future threats.¹⁹⁹ Based on the circumstances of the speech at issue, this conception of sexual harassment will allow consideration of whether the person subjected to the speech is likely to fear similar

192. *Id.*

193. See Brian H. Spitzberg & Jean Mark Gawron, *Toward Online Linguistic Surveillance of Threatening Messages*, 11 J. DIGIT. FORENSICS SEC. & L., no. 3, 2016, at 43, 44.

194. See Marlon Hurt & Tim Grant, *Pledging to Harm: A Linguistic Appraisal Analysis of Judgment Comparing Realized and Non-Realized Violent Fantasies*, 30 DISCOURSE & SOC’Y 154, 155–56 (2019).

195. See Bayefsky, *supra* note 158, at 1579; see also Katalin Sulyok, *Managing Uncertain Causation in Toxic Exposure Cases: Lessons for the European Court of Human Rights from U.S. Toxic Tort Litigation*, 18 VT. J. ENV’T. L. 519, 556 (2017) (noting that “psychological distress, such as fear of future harm” is used in tort cases); Alexander Santee, *More Than Just Bad Blood: Reasonably Assessing Fear of AIDS Claims*, 46 VILL. L. REV. 207, 214 (2001) (discussing how psychological science is used to assess emotional distress).

196. *Id.* at 1587.

197. *Id.* at 1584.

198. See *id.* at 1587; see also Heather Littleton et al., *Trauma Coping Strategies and Psychological Distress: A Meta-Analysis*, 20 J. TRAUMATIC STRESS, 977, 977–79 (2007) (discussing research on avoidant coping strategies which include avoiding behaviors such as social withdrawal and avoidance of potential stressors); Caroline M. Clements & Daljit K. Sawhney, *Coping with Domestic Violence: Control Attributions, Dysphoria, and Hopelessness* 13 J. TRAUMATIC STRESS 219, 233–34 (reviewing studies showing that expectations about future outcomes have harmful psychological effects).

199. See *id.* at 1613.

threats in the future.²⁰⁰ Thus, victims of sexual harassment will not have to prove that the speech caused harm but instead show that it creates a reasonable fear of future harm.²⁰¹

3. Available Options to Address Threats

Finally, speech creates fear if the targets of the speech conclude that they have no options available to redress the speech and its underlying threat.²⁰² Conversely, if the targets determine that they have the resources and ability to resolve any underlying threat posed by the speech, a fear response is less likely to occur.²⁰³ Even if the target believes that the speaker intended to harm and concludes that the speech is indicative of potential future threats, the targets will likely avoid the fear response if they believe that they have options to confront and eliminate the threat.²⁰⁴

This “perceived options to redress” factor allows consideration of the educational institution’s process for addressing sexual harassment. If the educational institution has a clear and effective policy for redressing sexual harassment, students will be more likely to conclude that they have valid options to redress threatening speech.²⁰⁵ In other words, if the educational institution has a fair and well-publicized procedure for addressing sexual harassment, the speech will be less likely to create fear because students know they have the resources available to address threatening speech.²⁰⁶

Both Dueling Title IX Conceptions of sexual harassment recognize the need to consider the facts and circumstances of the speech at issue to

200. *Id.* at 1587.

201. *See id.* at 1613.

202. *See* T. Völlink et al., *Emotion-Focused Coping Worsens Depressive Feelings and Health Complaints in Cyberbullied Children*, 2013 J. CRIMINOLOGY (SPECIAL ISSUE) 1, 3 (2013).

203. *See* Maria T. M. Dijkstra & Astrid C. Homan, *Engaging in Rather than Disengaging from Stress: Effective Coping and Perceived Control*, 7 FRONTIERS PSYCH. 1, 2–3 (2016).

204. *See id.*

205. *See* Kathryn S. Whitted & David R. Dupper, *Best Practices for Preventing or Reducing Bullying in Schools*, 27 CHILD. & SCHS. 167, 169–71 (2005).

206. *See* 34 C.F.R. § 106.45 (2020). Interestingly, the process needed to mitigate fear does not necessarily require a strict policy on sexual harassment. Such a strict policy can backfire because it could create a situation in which people have to choose whether they want a “full-blown” investigation or to take no action. Often, victims of sexual harassment seek a resolution that addresses the situation but do not want to participate in a detailed investigation process. Thus, educational institutions should provide an avenue to allow recipients of provocative speech to seek support and redress without requiring the recipient to undergo a complete Title IX investigation. The 2020 Amendments provided such a pathway through the “informal resolution process” offered by Title IX Implementing Regulations.

determine whether speech constitutes sexual harassment.²⁰⁷ However, the Dueling Title IX Conceptions do not provide much guidance regarding the specific facts to consider.²⁰⁸ By focusing on fear, educational institutions can focus their assessment on the options available to the target to redress the potential threat of the speech.

4. Fear Caused by All Three Fear Components

In sum, sexual harassment speech can cause education interference through the three fear components. Specifically, fear creates education interference through: (1) the perceived malicious intent of the speaker; (2) the likelihood of facing similar threats in the future; and (3) the perceived resources available to redress the fear.²⁰⁹ Speech that features these three fear components is likely to create fear in the target of the speech, leading to avoidant coping strategies that ultimately cause education interference.²¹⁰ This social science research can develop a conception of sexual harassment that targets education interference, as both Dueling Title IX Conceptions of sexual harassment attempt to do, while eliminating the ambiguity that plagues both conceptions by focusing on the specific fear components.²¹¹

C. Non-Fear Inducing “Provocative Speech”

Speech without these three fear components is unlikely to produce the fear that causes education interference.²¹² Instead, this non-fear-inducing

207. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631 (1999) (“Whether gender-oriented conduct is harassment depends on a constellation of surrounding circumstances, expectations, and relationships . . .” (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998))); see also *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,041 (Mar. 13, 1997). When establishing the Hostile Environment Conception, the Department of Education stated, “If there is a dispute about whether harassment occurred or whether it was welcome—in a case in which it is appropriate to consider whether the conduct could be welcome—determinations should be made based on the totality of the circumstances.” *Id.*

208. See *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. at 12,041.

209. See *supra* Sections III.B.1, 2, 3.

210. See Nan Stein, *Sexual Harassment in School: The Public Performance of Gendered Violence*, 65 HARV. EDUC. REV. 145, 145–57 (1995).

211. See *supra* notes 154–58 and accompanying text.

212. Thomas Ollendick et al., *Fear in Children and Adolescents: Relations with Negative Life Events, Attributional Style, and Avoidant Coping*, 42 J. CHILD PSYCH. & PSYCHIATRY

speech provides development and educational benefits, even if some people interpret the speech to be negative, offensive, or even stressful.²¹³

Thus, educational institutions can separate negative speech into two categories based on fear.²¹⁴ Speech that creates fear through the three fear components is deemed harmful sexual harassment because it creates education interference.²¹⁵ Conversely, speech that does not create this fear, even though it may have a negative connotation, can be separated and protected as beneficial provocative speech.²¹⁶ This provocative speech does not exhibit the features that cause the harm associated with sexual harassment but instead provides several benefits.²¹⁷

1. Provocative Speech Does Not Create Education Interference

As explained above, fear often leads to avoidant coping strategies, which generally create education interference by causing people to avoid participating in their educational experience. However, speech that does not induce fear is unlikely to lead to these avoidant coping strategies and, therefore, does not create education interference.²¹⁸ Instead, the negative emotions associated with non-fear-inducing provocative speech may trigger alternative coping strategies that benefit the educational experience.²¹⁹ Specifically, these beneficial coping strategies are known as engagement coping strategies.²²⁰

& ALLIED DISCIPLINES 1029, 1031–32 (2001); *see also* Leets, *supra* note 160, at 344 (“This study intends to explore that possibility and cautiously notes that while one person may be traumatized as a result of hate utterances . . . the same words may have no influence on another person and may even strengthen his or her tolerance and restraint.”).

213. David Rock, *Has Coddling an Entire Generation of Children Set Them Up for Failure?*, PSYCH. TODAY (Mar. 5, 2012), <https://www.psychologytoday.com/au/blog/your-brain-work/201203/has-coddling-entire-generation-children-set-them-fo> [<https://perma.cc/2LUS-SBQF>] (suggesting that protecting people from negative events harms development).

214. *See* Leets, *supra* note 160, at 354 (“Hurling hate slurs in an effort to harm a person’s identity does not appear to be similar to slinging arrows at the concentric circles of a target, as some would imagine. That is, there does not seem to be a center point for the maximal damage, with the degree of hurt varying with distance to that point. Instead, there seems to be a narrow mark that delineates damage, with all the slurs outside it having no effect.”).

215. *See supra* notes 172–92 and accompanying text.

216. This Article uses the term “provocative speech” to identify negative speech that does not induce fear, even though it may seem offensive or cause stress in some people.

217. *See supra* notes 212–16 and accompanying text; *infra* notes 218–21 and accompanying text.

218. Ollendick et al., *supra* note 212.

219. *See* Susan Folkman & Richard S. Lazarus, *Coping as a Mediator of Emotion*, 54 J. PERSONALITY & SOC. PSYCH. 466, 469 (1988).

220. David Bourguignon et al., *On the Protective Role of Identification with a Stigmatized Identity: Promoting Engagement and Discouraging Disengagement Coping Strategies*, 50 EUR. J. SOC. PSYCH. 1125, 1125–26 (2020).

2. The Benefits of Provocative Speech

As with avoidant coping strategies, these engagement coping strategies include a variety of different behaviors depending on the situation.²²¹ However, engagement coping strategies generally involve behaviors designed to face, confront, and resolve the source of the negative emotion.²²² These engagement coping strategies are usually healthy and specifically beneficial in the educational setting.²²³ Academic and social development requires young people to be exposed to and address speech that challenges their views and opinions, even if such speech may seem offensive or cause stress.²²⁴ Thus, engagement coping strategies and the speech that produce them benefit education by spurring the interaction necessary for intellectual development.²²⁵

One of the common emotions associated with non-fear-inducing provocative speech is anger.²²⁶ Although anger is often presented as a negative emotion, anger and its expression are often healthy and lead to beneficial results, including engagement coping strategies.²²⁷ Put simply, provocative speech can produce anger which can spur constructive engagement, while fear produces shame which is harmful to development.²²⁸ Indeed, there is precedent in the legal realm for distinguishing between anger and fear.²²⁹

Thus, the negative emotions associated with non-fear-inducing provocative speech do not create education interference.²³⁰ Instead, the negativity

221. See *id.*; see also Dijkstra & Homan, *supra* note 203, at 2–3.

222. See generally Charles S. Carver & Jennifer Connor-Smith, *Personality and Coping*, 61 ANN. REV. PSYCH. 679 (2010).

223. See Folkman & Lazarus, *supra* note 219.

224. See Lukiankoff & Haidt, *supra* note 119 (“According to the most-basic tenets of psychology, the very idea of helping people with anxiety disorders avoid the things they fear is misguided. A person who is trapped in an elevator during a power outage may panic and think she is going to die. That frightening experience can change neural connections in her amygdala, leading to an elevator phobia. If you want this woman to retain her fear for life, you should help her avoid elevators.”).

225. See *id.*

226. See Eran Halperin et al., *Anger, Hatred, and the Quest for Peace: Anger Can Be Constructive in the Absence of Hatred*, 55 J. CONFLICT RESOL. 274, 276 (2011).

227. See Ellen D. Fiedler, *Denial of Anger/Denial of Self: Dealing with the Dilemmas*, 20 ROEPER REV. 158, 160 (1998).

228. Brady Coleman, *Shame, Rage and Freedom of Speech: Should the United States Adopt European “Mobbing” Laws?*, 35 GA. J. INT’L & COMP. L. 53, 77–79 (2006).

229. *Id.* at 78 (discussing *Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W.2d 202 (Tex. App. 1996)).

230. See *supra* notes 119–21 and accompanying text.

associated with provocative speech can benefit the educational experience by encouraging engagement coping strategies.²³¹

Therefore, educational institutions should protect provocative speech to encourage the development of these engagement coping strategies.²³² By protecting provocative speech, educational institutions can allow students to face speech that may make them uncomfortable or produce negative emotions as part of their intellectual development.²³³

3. *The Threat of Overly Broad Conceptions of Sexual Harassment to Provocative Speech*

Thus, overly broad definitions of sexual harassment that do not focus on fear to target harmful speech cause harm because they eliminate beneficial provocative speech.²³⁴ Moreover, these excessively broad sexual harassment conceptions create harm by *catastrophizing* provocative speech.²³⁵ Overly broad definitions of sexual harassment threaten to label non-fear-inducing provocative speech as sexual harassment.²³⁶ This overbroad labeling may cause students to develop a fear of speech that otherwise does not organically create fear.²³⁷ In other words, if educational institutions suggest people should fear provocative speech, students may learn to associate the speech with fear even though the speech would not cause fear without this label.

Furthermore, overly broad “speech codes” that eliminate provocative speech can harm intellectual development by: (1) stifling the ability of students to express themselves fully; (2) preventing students from obtaining the development benefit of facing and overcoming stressful provocative speech; and (3) creating a culture of fear by labeling otherwise harmless speech dangerous sexual harassment.

231. See Sebastian Wachs et al., *Associations Between Coping Strategies and Cyberhate Involvement: Evidence from Adolescents Across Three World Regions*, 19 INT’L J. OF ENV’T RSCH. & PUB. HEALTH, no. 11, 2022, at 1, 14.

232. See Saran M. McGough, *Offensive Speech in Educational Materials: Changing Words Without Censorship*, 109 TCHRS. COLL. REC. 973, 974 (2007).

233. See *id.*; see also A.V. Skripkina et al., *The Coping Behavior Strategy of Self-Realization of Students with Disabilities*, 10 J. PHARM. SCI. & RES. 2603, 2604 (2018).

234. See Jessica Flanigan & Alec Greven, *Speech and Campus Inclusivity*, 35 PUB. AFFS. Q. 178, 196–97 (2021).

235. See Lukiankoff & Haidt, *supra* note 119.

236. See *id.*; see also Flanigan & Greven, *supra* note 234, at 182.

237. Flanigan & Greven, *supra* note 234, at 186.

IV. THE “FEAR ENVIRONMENT” CONCEPTION OF SEXUAL HARASSMENT

The law and social science suggest that sexual harassment can and should be identified through the education interference it creates.²³⁸ In the legal realm, educational institutions must eliminate speech interfering with students’ education to comply with Title IX’s protection against sex discrimination.²³⁹ In the social science realm, sexual harassment interferes with the educational experience by creating fear which leads to avoidant coping strategies that cause students to avoid fully participating in their educational experience.²⁴⁰

Both the law and social science further suggest that the concept of sexual harassment should be narrowly construed to protect provocative speech within educational institutions.²⁴¹ Within the legal realm, the First Amendment is the basis for protecting provocative speech.²⁴² The courts have consistently found that free speech rights do not end when students enter school.²⁴³ Thus, sexual harassment should be narrowly construed to protect free speech.²⁴⁴ Within social science, educational development requires the protection of provocative speech.²⁴⁵ Social science demonstrates that non-fear-inducing provocative speech benefits the educational experience and is vital to intellectual development.²⁴⁶

However, the law and social science have struggled to identify harmful sexual harassment and separate provocative speech. As explained above, Title IX provides several definitions of sexual harassment, which have been challenged as too broad, too narrow, and collectively too ambiguous.²⁴⁷ Similarly, social science has provided much insight into sexual harassment but has not provided a clear or definitive definition.²⁴⁸ Instead, social science

238. See *supra* Sections II.B.2, III.A.

239. See *supra* Part II.

240. See *supra* Sections III.A, B.

241. See *supra* Sections II.A, III.C.

242. See *supra* Section II.B.4; see also Coleman, *supra* note 228, at 91.

243. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

244. See *id.*; see also *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1148 (9th Cir. 2016).

245. See *supra* Section III.C; see also ROGER J.R. LEVESQUE, *ADOLESCENTS, MEDIA, AND THE LAW: WHAT DEVELOPMENTAL SCIENCE REVEALS AND FREE SPEECH REQUIRES*, 201–40 (2007) (discussing free speech rights of adolescents).

246. *Id.*

247. See *supra* Section II.B.4.

248. James Campbell Quick & M. Ann McFadyen, *Sexual Harassment: Have We Made Any Progress?*, 22 J. OCCUPATIONAL HEALTH PSYCH. 286, 286–98 (2017) (discussing the many different definitions of sexual harassment).

offers extensive research that has yet to be organized in a way that creates a practical conception of sexual harassment that educational institutions can use to identify sexual harassment and separate it from provocative speech.²⁴⁹

Based on the insight provided by social science, and the parameters established by Title IX, this Article proposes a Fear Conception of sexual harassment, which defines sexual harassment as follows:

Speech that creates an environment of fear that interferes with the educational experience of students by causing a reasonable student to believe that: (1) they will face similar threats in the future that (2) they cannot avoid, based on the (3) perceived harmful intent of the speaker.

A. The Fear Environment Conception and Social Science

This Fear Conception of sexual harassment utilizes social science by identifying sexual harassment through the specific fear components of speech that create the fear that causes educational harm. As explained above, fear is the key factor that distinguishes between harmful sexual harassment and beneficial provocative speech. Thus, the Fear Conception enables educational institutions to focus on whether the speech at issue creates fear to determine if it constitutes sexual harassment. Speech that creates fear will lead to avoidant coping strategies that ultimately cause education interference and, therefore, can be eliminated as toxic sexual harassment.

Alternatively, speech that does not create fear will not likely result in education interference but instead leads to engagement in coping strategies. These engagement coping strategies benefit the educational experience by encouraging the necessary interaction to create a vibrant academic environment. Therefore, by focusing on the fear components established through social science, the Fear Environment Conception of sexual harassment will enable educational institutions to separate and protect provocative speech based on social science.

B. The Fear Environment Conception Within Title IX

This Fear Environment Conception must also fit within the legal framework established by Title IX by upholding the goals and insight provided by Title IX's efforts to address sexual harassment. Specifically, the Fear Environment Conception focuses on the education interference that both Dueling Title IX Conceptions of sexual harassment attempt to target.

249. *Id.*

However, it eliminates the ambiguity that plagues both Dueling Title IX Conceptions by focusing on fear to identify this education interference.

The Fear Environment Conception also takes the key pieces of both Dueling Title IX Conceptions of sexual harassment. The Hostile Environment Conception attempts to capture speech that creates education interference on a widespread or environmental level. Social science confirms that speech causing fear can create a harmful environment. However, instead of using the vague term “hostile,” the harmful environment can and should be identified by the fear it creates. Thus, instead of relying on the vague concept of “hostility” to define this harmful environment, the Fear Environment Conception focuses on the fear environment identified through the three fear components.

The Objectively Offensive Conception of sexual harassment attempts to establish an objective standard for sexual harassment language. Social science suggests such an objective standard is possible because fear is a universal emotion usually caused when speech exhibits the fear components. Thus, instead of identifying speech that a reasonable person would find “offensive,” the Fear Environment Conception allows educational institutions to assess whether the speech at issue would cause a reasonable person to experience fear.

The Fear Environment Conception of sexual harassment provides a balance between the Dueling Title IX Conceptions of sexual harassment by utilizing the broadness of the Hostile Environment Conception to target insidious forms of sexual harassment while using the narrowness of the Objectively Offensive Conception to protect free speech. The Fear Environment Conception of sexual harassment also enables educational institutions to uphold the twin goals of protecting against sexual harassment and protecting free speech through the insight of social science and the legal framework of Title IX. Specifically, the Fear Environment Conception targets sexual harassment based on the education interference that both Title IX and social science identify as the root harm of sexual harassment. The Fear Environment Conception also separates and protects provocative speech, which both Title IX and social science identify as the key to protecting the rights and development of students.

V. CONCLUSION

Since the inception of Title IX’s protection against sex discrimination, the Department of Education and educational institutions nationwide have struggled with defining sexual harassment in a way that targets the insidious

forms of sexual harassment while protecting free speech. The various definitions of sexual harassment offered through Title IX have failed to find this delicate balance.

Instead, Title IX has provided two conceptions of sexual harassment, each favoring one goal at the expense of the other. Critics often present the Hostile Environment Conception as protecting against the many insidious forms of sexual harassment at the expense of free speech. Conversely, critics often present the Objectively Offensive Conception as too narrow to address the many forms of sexual harassment.

These Dueling Title IX Conceptions have turned Title IX into a political football in which the definition of sexual harassment changes based on the politics of the Presidential Administration in possession.²⁵⁰ The Trump Administration incorporated the Objectively Offensive Conception of sexual harassment into federal law as part of its overall effort to protect free speech. The Biden Administration championed the Hostile Environment Conception as part of its efforts to undo the changes of the Trump Administration. The Biden Administration also criticized the Objectively Offensive Conception as inadequate to protect against sexual harassment. Thus, instead of providing educational institutions with a stable and precise definition of sexual harassment, Title IX has vacillated between definitions and will likely continue to do so as different political parties come into power.²⁵¹ Title IX's failure to provide a clear and consistent definition of sexual harassment has created a culture of fear within educational institutions, whereby students are both afraid to express their opinions for fear of being accused of sexual harassment and fearful of facing sexual harassment without support.²⁵²

Instead of choosing between these Dueling Title IX Conceptions of sexual harassment or deciding whether to favor either protecting free speech or protecting against sexual harassment, the Fear Environment Conception of sexual harassment proposed by this Article is based on social science insight. Social science establishes that fear is the main difference between sexually harassing speech and non-harmful provocative speech. By identifying sexual harassment through fear, the Fear Environment Conception targets harmful speech while separating provocative speech that is necessary to protect the rights and ensure the development of all students.

This Fear Environment conception of sexual harassment will enable educational institutions to protect free speech and protect against sexual

250. Robert S. Eitel, *Biden Revives the Title IX Menace*, NAT. REV. (July 19, 2022, 10:59 AM), <https://www.nationalreview.com/2022/07/biden-revives-the-title-ix-menace/> [https://perma.cc/KL5W-FXCF].

251. Eitel, *supra* note 250.

252. *See supra* notes 36–37 and accompanying text.

harassment, thereby eliminating the culture of fear that thrives whenever either one of these goals is upheld at the expense of the other. Thus, the Fear Environment Conception of sexual harassment will allow educational institutions to create a new culture where all students can thrive in an environment free of speech limits and sexual harassment. Instead of a culture of fear, the Fear Environment Conception of sexual harassment will create a culture of participation and interaction, whereby all students are free to participate fully and flourish.

