

## NOTE

# Deliberate Indifference: Why Universities Must Do More to Protect Students from Sexual Assault

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### ABSTRACT

*The current construction of Title IX provides no incentive for universities to prevent the sexual harassment of students by their peers. Student victims of peer sexual assault must prove that their university acted in a way that was “deliberately indifferent” to the knowledge of their assault or harassment. This is a high bar for students to meet, as courts essentially require the university to have acted in a wholly unreasonable manner for the student to prevail. The high bar of the deliberate indifference standard creates a situation where universities may fail to meet their obligations to their students under Title IX with no consequence. This Note proposes legislation that alters the deliberate indifference standard to create a presumption against universities where they have failed to comply with specific, affirmative obligations under Title IX. These alterations provide greater incentives for universities to implement preventative programs to diminish the incidence of sexual assault on their campuses. They also ensure that deserving victims get their day in court by giving students an increased chance at making it past the summary judgment stage.*

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*For anybody whose once-normal, everyday life was suddenly shattered by an act of sexual violence, the trauma, the terror can shadow you long after one horrible attack. It lingers when you don’t know where to go or who to turn to. It’s there when you’re forced to sit in the same class or stay in the same dorm with the person who raped you; when people are more suspicious of what you were wearing or what you were drinking, as if it’s your fault, not the fault of the person who assaulted you. It’s a haunting presence when the very people entrusted with your welfare fail to protect you.*

—President Barack Obama<sup>1</sup>

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<sup>1</sup> Tanya Somanader, *President Obama Launches the “It’s On Us” Campaign to End Sexual Assault on Campus*, WHITE HOUSE: PRESIDENT BARACK OBAMA: BLOG (Sept. 19, 2014, 2:40

## INTRODUCTION

One in five women will be the victim of sexual violence during college.<sup>2</sup> In a study of sexual violence on nine college campuses during the 2014 to 2015 academic year, 10.3% of female students experienced a completed sexual assault.<sup>3</sup> While national data on men's experience of sexual assault on college campuses is not available, a regional study found that about 3.1% of men had experienced a completed sexual assault.<sup>4</sup> Congress has made many attempts to ensure that colleges and universities address the high rates of sexual harassment and sexual violence on their campuses.<sup>5</sup> Federal law attempts to ensure that institutions of higher education report sexual violence that occurs on their campuses and investigate these incidents.<sup>6</sup>

Unfortunately, universities fail to effectively protect their students from peer sexual harassment.<sup>7</sup> Many institutions have not implemented procedures to encourage reporting of sexual violence; over half of them do not allow students to report sexual assaults to the institution online.<sup>8</sup> Some universities "still do not allow confidential reporting" by students who have been victimized.<sup>9</sup> Moreover, as of 2014, a substantial number of schools had "not conducted a single investigation in the past five years."<sup>10</sup> Even at institutions where students' claims are properly investigated and reach adjudication, the adjudicatory procedures often fail to provide a neutral forum. Universities allow students to help resolve claims, fail to educate adjudicators

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PM), <https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus> [<https://perma.cc/ANE6-VKTL>].

<sup>2</sup> See U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT—MAJORITY STAFF, SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS 2 (2014) [hereinafter *SEXUAL VIOLENCE ON CAMPUS*], <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf> [<https://perma.cc/2NTJ-S4X6>].

<sup>3</sup> BUREAU OF JUSTICE STATISTICS, CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 69 (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [<https://perma.cc/4VNR-2RVQ>]. "Completed," for the purpose of this Note, is defined by its distinction from "attempted."

<sup>4</sup> See *id.* at 71.

<sup>5</sup> See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012); see also Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2012).

<sup>6</sup> See 20 U.S.C. §§ 1681–1688; see also 20 U.S.C. § 1092(f).

<sup>7</sup> Peer sexual harassment occurs when students are subjected to "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature" by other students. See *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997).

<sup>8</sup> See *SEXUAL VIOLENCE ON CAMPUS*, *supra* note 2, at 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

on common misconceptions about rape, and in some cases even permit the athletic department to oversee adjudications of student athletes.<sup>11</sup>

Many universities, despite detailed guidance from the Department of Education, continue to ignore their legal obligations to students. They not only ignore their responsibility to take reports and investigate instances of sexual harassment and sexual violence<sup>12</sup> but also fail to recognize the role a university can play in decreasing the risk of sexual assault on its campus. Despite efforts by former President Obama and Vice President Biden to focus on sexual-assault prevention in the past few years,<sup>13</sup> countless universities have failed to follow suit. Institutions are still reluctant to take the proper steps to protect their students because they know that they are unlikely to face consequences for their failure to comply with the law.<sup>14</sup>

Moreover, Title IX of the Education Amendments of 1972 (“Title IX”),<sup>15</sup> as it currently exists, does nothing to incentivize universities to prioritize efforts to prevent sexual harassment and sexual assault from happening on campus. Investigating reports does nothing to stop sexual harassment or sexual assault before it happens and, more pressingly, it does not prevent individuals from suffering from discrimination in their education. Universities already dodge requirements for reporting and investigation;<sup>16</sup> therefore, they are even less likely to independently implement preventative measures, which carry administrative costs and burdens. Preventative measures, however, are crucial to ensuring that students are less likely to experience peer sexual harassment or sexual violence on campus.

To ensure that universities prioritize the prevention of peer sexual harassment and sexual assault and comply with their legal obliga-

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *See id.* at 1.

<sup>13</sup> *See, e.g.,* Juliet Eilperin, *Biden and Obama Rewrite the Rulebook on College Sexual Assaults*, WASH. POST (July 3, 2016), [https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c\\_story.html?utm\\_term=.5f3a74c15fb7](https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c_story.html?utm_term=.5f3a74c15fb7) [<https://perma.cc/7M4Y-WXWQ>]; *About Vice President Biden's Efforts to End Violence Against Women*, WHITE HOUSE: PRESIDENT BARACK OBAMA: 1 IS 2 MANY, <https://obamawhitehouse.archives.gov/1is2many/about> [<https://perma.cc/CV36-CYEY>].

<sup>14</sup> *See infra* Section II.A.

<sup>15</sup> 20 U.S.C. §§ 1681–1688 (2012).

<sup>16</sup> *See, e.g.,* Jake New, *When the Victim Is Male*, INSIDE HIGHER ED (Dec. 12, 2014), <https://www.insidehighered.com/news/2014/12/12/smu-found-violation-title-ix-after-not-investigating-male-students-claim-sexual> [<https://perma.cc/LYC6-VGHU>] (recounting a situation in which a student was not informed of his Title IX rights, school police never sent a police report to the Title IX coordinator, and no university officials conducted a Title IX investigation).

tions under Title IX, Congress should pass legislation amending Title IX to (1) create an affirmative obligation for institutions of higher education to devise and implement educational programs aimed at preventing peer sexual harassment and sexual assault on campus and (2) enable a presumption of the institution's deliberate indifference when the institution fails to fulfill its obligations under Title IX. These two changes will provide an incentive for universities to adequately address concerns about peer sexual harassment and sexual assault on campus, both before and after any incidents of misconduct occur.

Part I of this Note outlines the evolution of judicial recognition of peer sexual harassment as a valid claim through an implied private right of action under Title IX. It describes in detail the current elements required to bring an action against an institution for an incident of peer sexual harassment or violence on campus. This Part will also attempt to illustrate the gaps the Supreme Court has left in fashioning the current standards.

Part II analyzes three recent cases to show the inability of Title IX's current judicial construction to protect the statutory purpose: it fails to provide plaintiffs with adequate access to courts or to ensure that universities act in their own students' best interests. It also discusses the efforts of the Department of Education's Office for Civil Rights to fill the gaps in judicial enforcement with administrative enforcement efforts and concludes that these efforts are not an adequate substitute for a well-defined private right of action.

Part III outlines previously proposed solutions in scholarly works and examines why they fail to adequately address the problems with Title IX. Part IV presents the proposed legislation and discusses its specific aims, including the elements of Title IX's current judicial construction that should be maintained, the gaps in the construction that the legislation seeks to fill, and the necessary limits of the legislation. This Part presents the text of the proposed legislation and examines the proposal's weaknesses and potential criticisms.

## I. THE EVOLUTION OF TITLE IX

Title IX prohibits sex discrimination in federally funded education programs or activities.<sup>17</sup> It requires that “[n]o 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 assis-

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<sup>17</sup> See 20 U.S.C. §§ 1681–1688.

tance,” with some exceptions.<sup>18</sup> Title IX’s limited legislative history, including the legislative scheme and comments from multiple legislators, indicates that Title IX was patterned on previous civil rights legislation—Title VI of the Civil Rights Act of 1964.<sup>19</sup> Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>20</sup> Courts have broadly interpreted the purpose and procedures of Title IX in light of its legislative modeling on Title VI.<sup>21</sup>

### A. *Private Right of Action Under Title IX*

The Supreme Court first explicitly acknowledged the link between Title IX and Title VI in *Cannon v. University of Chicago*,<sup>22</sup> where the Court recognized an implied private right of action<sup>23</sup> against institutions for sex discrimination under Title IX without limit.<sup>24</sup>

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<sup>18</sup> *Id.* § 1681(a). Exceptions include educational institutions “controlled by a religious organization,” those that provide training for military service, those that have “traditionally and continually . . . had a policy of admitting only students of one sex,” and fraternity and sorority admissions policies. *See id.*

<sup>19</sup> *Cf.* Brief for Petitioner at 17–18, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843), 1998 WL 792418 (“The inescapable conclusion is that Congress intended that Title VI as well as its progeny—Title IX . . .—be given the broadest interpretation.” (quoting S. REP. NO. 100-64, at 7 (1987))); Brief for Petitioner at 7–8, *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (No. 77-926), 1978 WL 207069 (“Title IX was so patterned after Title VI that in its initial House consideration the bill was prepared ‘from a retyped, slightly altered Xerox copy’ of Title VI.”); Brief Amici Curiae of Fed’n of Orgs. for Prof’l Women et al. at 11–12, *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (No. 77-926), 1978 WL 207082.

<sup>20</sup> 42 U.S.C. § 2000d (2012). Note that Title IX’s language is almost identical, replacing “on the ground of race, color, or national origin” with “on the basis of sex” and adding “education” before “program or activity receiving Federal financial assistance.” *Compare id.*, with 20 U.S.C. § 1681(a).

<sup>21</sup> Title VI was interpreted broadly to permit a private right of action. *See Cannon*, 441 U.S. at 696 (listing cases construing Title VI as creating that right). This was imputed to Title IX. *See generally Davis*, 526 U.S. 629 (allowing a claim against a school for peer sexual harassment); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992) (recognizing sexual harassment as an actionable claim under Title IX); *Cannon*, 441 U.S. 677 (finding an implied right of action under Title IX).

<sup>22</sup> 441 U.S. 677 (1979).

<sup>23</sup> An implied right of action exists where the statutory language does not explicitly provide for a cause of action in court but a cause of action can be implied from congressional intent. *See id.* at 688. While there is a presumption against implied rights of action, courts can judicially recognize an implied right of action if there is sufficient evidence that Congress intended for a cause of action to exist under the statute. *See id.* at 690 n.13. The Supreme Court currently disfavors implied rights of action. *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

<sup>24</sup> *See Cannon*, 441 U.S. at 680, 689–90 (involving a plaintiff who sought to sue under Title IX on allegations that she had been denied admission to medical school because of her sex).

Under Supreme Court precedent, courts recognize an implied private right of action only where there is sufficient evidence of congressional intent for a cause of action.<sup>25</sup> When Title IX was passed, courts had construed Title VI to create a private remedy.<sup>26</sup> The Court held that the legislative decision to pattern Title IX on Title VI<sup>27</sup> and the similarity in the statutes' purposes—to protect individuals from discrimination—indicated that Congress intended a private right of action under Title IX.<sup>28</sup>

The Court's failure to define specific contours for the right of action, however, led to later judicial attempts to define the boundaries of the private right of action under Title IX.<sup>29</sup> In *Grove City College v. Bell*,<sup>30</sup> the Supreme Court limited the scope of the implied private right of action under Title IX. The Court held that where students, but not the university, receive direct federal funding, institutional liability under Title IX was limited solely to the program affected by those funds.<sup>31</sup>

Congress thwarted these judicial attempts to limit the private right of action by passing new amendments to Title IX just three years later.<sup>32</sup> In direct response to *Grove City College*, Congress amended Title IX to ensure that when any part of an educational institution receives direct federal funding, the entirety of the institution is subject to liability for sex discrimination.<sup>33</sup> Congress, through its amendments, expanded the private right of action under Title IX to cover the whole of any institution (private or public) whose students receive federal financial assistance (either grants or student loans), indicating its intent for broad application of Title IX.<sup>34</sup>

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<sup>25</sup> See *Sandoval*, 532 U.S. at 286.

<sup>26</sup> *Cannon*, 441 U.S. at 696.

<sup>27</sup> See *id.* at 694–96.

<sup>28</sup> See *id.* at 704 (explaining that Title IX sought “to avoid the use of federal resources to support discriminatory practices” and “to provide individual citizens effective protection against those practices”).

<sup>29</sup> The facts of *Cannon* concerned only *official* action taken by the medical school. See *id.* at 680. The Court did not define the realm of actionable claims or available remedies for the right of action under Title IX. See generally *id.*

<sup>30</sup> 465 U.S. 555 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28–29 (1988), *as recognized in* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999).

<sup>31</sup> See *id.* at 571.

<sup>32</sup> See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28–29 (1988) (codified as amended at 20 U.S.C. § 1687 (2012)).

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

### B. *The Recognition of Peer Sexual Harassment Claims Under Title IX*

In light of Congress's renewed commitment to a broad application of Title IX, the Court next recognized sexual harassment as an actionable claim that offered monetary damages.<sup>35</sup> In *Franklin v. Gwinnett County Public Schools*,<sup>36</sup> the Court drew directly from Title VII jurisprudence on the prohibition of sex discrimination in employment,<sup>37</sup> finding that sexual harassment of a student by a teacher qualified as sex discrimination for which the institution would be liable.<sup>38</sup> The Supreme Court also recognized monetary damages as an available remedy for an implied private right of action under Title IX where equitable remedies would not be sufficient.<sup>39</sup> Specifically, the Court reasoned that some plaintiffs in sex discrimination cases would lack access to a remedy if Title IX only provided equitable remedies because students would be entitled to neither back pay nor prospective relief.<sup>40</sup>

The Court broadened the consequences of Title IX violations by opening a new avenue for monetary relief where institutions would previously not have been liable, but it unfortunately failed to create standards to determine the circumstances that would trigger imputation of the sexual harassment to the institution.<sup>41</sup> This conflicting result created uncertainty for educational institutions. Now facing much higher potential liability, institutions had no guidance to determine the employee actions for which they could be liable. With such uncertainty, educational institutions looked to the Supreme Court to define the scope of imputed liability, as it had done with Title VII.<sup>42</sup>

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<sup>35</sup> See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992).

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 75 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (recognizing sexual harassment as actionable sex discrimination under Title VII)).

<sup>38</sup> See *id.* (finding that teacher harassment of a student because of sex was comparable to prohibited supervisor harassment of a subordinate because of sex under Title VII).

<sup>39</sup> See *id.* at 75–76.

<sup>40</sup> See *id.* at 76 (explaining that plaintiff would not be entitled to back pay as a student, nor would prospective relief be sufficient because she no longer attended school within the county).

<sup>41</sup> See generally *id.* (holding Title IX enforceable through an implied right of action and allowing federal courts to award any appropriate damage remedies).

<sup>42</sup> Title VII prohibits employment discrimination based on race, color, sex, religion, or national origin. 42 U.S.C. § 2000e-2 (2012). Courts have often interpreted Title IX in light of the judicial standards for Title VII that were in place when Title IX was passed. See, e.g., *Franklin*, 503 U.S. at 75 (quoting *Meritor*, 477 U.S. at 64). The differences between education and employment, however, have kept the interpretation of Title IX from being completely in line with Title VII jurisprudence.



In *Gebser v. Lago Vista Independent School District*,<sup>43</sup> the Supreme Court established the needed framework for determining an educational institution's liability for sexual harassment of students by the institution's employees. This framework limited institutions' potential liability for sexual harassment under Title IX and consequently reduced incentives to actively protect students. The Court articulated a three-pronged test for when monetary relief is available in an implied private right of action under Title IX: an educational institution's official must (1) have the authority to institute corrective measures, (2) have actual notice of the misconduct, and (3) display deliberate indifference to the misconduct.<sup>44</sup>

The Court explicitly chose the deliberate indifference standard in *Gebser* to limit institutions' liability in potential sexual harassment cases. Analogizing to the administrative enforcement of Title IX, the Court reasoned that liability should only exist when "an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance."<sup>45</sup> Moreover, the Court purposely chose the deliberate indifference standard because it is a high bar, believing that a lower standard would risk too much institutional liability for independent actions of an employee.<sup>46</sup> The Court's concern was that adopting the standard advocated by the student would allow "unlimited recovery of damages under Title IX" while Title VII damages were strictly limited.<sup>47</sup>

Although the majority's test provided a concrete standard for institutional liability for sexual harassment outside of the classroom, it also heightened the standard of inaction that plaintiffs needed to

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<sup>43</sup> 524 U.S. 274 (1999).

<sup>44</sup> *See id.* at 290–91 (acknowledging that on the facts, findings of actual notice and deliberate indifference were unlikely because the teacher's sexual harassment of the student had taken place outside of the classroom). The deliberate indifference standard is the last hurdle for plaintiffs to jump and the most subjective in its analysis. *See* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 *YALE L.J.* 2038, 2068–69, 2068 n.142 (2016). Therefore, the deliberate indifference standard most often stands in the way of a deserving plaintiff's recovery, while the authority and actual notice prongs do not. *See id.* at 2041 n.5 ("[D]eliberate indifference is the main issue used to eliminate cases on preliminary motions under Title IX, as well as the principle one used by litigators to decide whether cases for survivors will be brought at all.").

<sup>45</sup> *Gebser*, 524 U.S. at 290.

<sup>46</sup> *See id.* at 290–91.

<sup>47</sup> *See id.* at 286. The student advocated for respondeat superior liability, where "recovery in damages against a school district would generally follow whenever a teacher's authority over a student facilitates the harassment." *Id.* at 282. In the alternative, the student advocated for liability under a constructive notice theory, "where the district knew or 'should have known' about harassment but failed to uncover and eliminate it." *Id.*

prove.<sup>48</sup> Justice Stevens flatly rejected the majority’s conclusion in his dissent and predicted what would soon become apparent: the deliberate indifference standard renders the Title IX cause of action useless because it precludes a remedy for students.<sup>49</sup> He reasoned that the high standard would prevent all but a “few Title IX plaintiffs who have been victims of intentional discrimination . . . [from] recover[ing] damages.”<sup>50</sup> The deliberate indifference standard is inconsistent with the purpose of Title IX because it disproportionately protects institutions over students by creating an insurmountable hurdle for the average plaintiff.<sup>51</sup>

The secondary holding in *Gebser* compounds the problems created by the deliberate indifference standard. The Court explicitly held that an institution’s failure to comply with federal regulations under Title IX “does not establish the requisite . . . deliberate indifference,” nor is the failure to comply with regulations itself discrimination in violation of Title IX.<sup>52</sup> The Court reasoned that regulations could be enforced administratively, and therefore implied rights of action did not authorize damages for failure to comply with administrative requirements.<sup>53</sup> This holding provides an explicit “escape hatch” or “safe harbor” for institutions that do not comply with the federal regulations in the realm of private actions. This safe harbor minimizes universities’ incentive to comply with the regulations for prevention of and response to sexual harassment unless the Office for Civil Rights of the Department of Education initiates an enforcement action.<sup>54</sup>

The Supreme Court continued its simultaneous expansion and contraction of institutional liability under Title IX in *Davis v. Monroe County Board of Education*.<sup>55</sup> For the first time, the Court recognized

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<sup>48</sup> The majority also resolved a circuit split on the issue of notice, requiring all plaintiffs to prove actual notice, rather than constructive notice. See David S. Cohen, *Limiting Gebser: Institutional Liability for Non-harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 325–30 (2004) (laying out the Sixth and Eighth Circuits’ use of Title VII “knew or should have known” standard for liability in Title IX harassment actions).

<sup>49</sup> See *Gebser*, 524 U.S. at 304 (Stevens, J., dissenting).

<sup>50</sup> *Id.* (quoting *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74 (1992)).

<sup>51</sup> See *infra* Section II.A.

<sup>52</sup> *Gebser*, 524 U.S. at 291–92.

<sup>53</sup> See *id.* at 292.

<sup>54</sup> See, e.g., Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 235–43 (2011); MacKinnon, *supra* note 44, at 2067–85; Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1060–62 (2015). See also *infra* note 129 and accompanying text (explaining why solely addressing administrative violations through administrative enforcement is not adequate).

<sup>55</sup> 526 U.S. 629 (1999).

institutional liability for peer sexual harassment under Title IX, expanding the realm of actionable claims for plaintiffs.<sup>56</sup> The *Davis* standard for peer sexual harassment requires that (1) the institution have authority to take remedial action against the harasser,<sup>57</sup> (2) the institution have actual knowledge of the harassment,<sup>58</sup> (3) the institution be deliberately indifferent to the sexual harassment,<sup>59</sup> and (4) the harassment be “so severe, pervasive, and objectively offensive” that it deprives the victim of “access to . . . educational opportunities or benefits.”<sup>60</sup> The Court’s detailed explanation of the deliberate indifference standard, however, reinforced the validity of Justice Stevens’s prediction of a useless right of action.<sup>61</sup> Deliberate indifference requires the institution’s “response to the harassment or lack thereof [to be] clearly unreasonable in light of the known circumstances.”<sup>62</sup> A reasonable response is not limited to institutions’ “purging their schools of actionable peer harassment,” nor does it require administrators to “engage in particular disciplinary action.”<sup>63</sup> The Court’s heightened standard responded to the dissenting justices’ concerns that permitting a cause of action against institutions for peer sexual harassment would require schools to remedy *all* peer harassment.<sup>64</sup> Yet students suing their institution for an inadequate response to peer sexual harassment were unlikely to be successful in securing a remedy under the heightened standard.<sup>65</sup> Thus, the Court, while allowing more plaintiffs to bring actionable claims, also decreased the chances that these plaintiffs would be successful in bringing claims against their universities.

The *Davis* standard also guides courts’ analysis of Title IX peer sexual harassment claims in higher education. This is unsurprising, as the majority in *Davis* assumed the extension of its holding to institutions of higher education.<sup>66</sup> The circuit courts embraced the *Davis* de-

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56 *See id.* at 632–33 (permitting a parent to bring a claim under Title IX on behalf of her fifth-grade child, seeking damages for the child’s sexual harassment by a classmate).

57 *See id.* at 644.

58 *See id.* at 650.

59 *See id.*

60 *Id.* The plaintiff successfully alleged all four elements required by the Court, and therefore the claim moved forward. *See id.* at 653–54.

61 *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 304 (1999) (Stevens, J., dissenting).

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

63 *Id.*

64 *See id.* at 648–49.

65 *See infra* Section II.A.

66 *See Davis*, 526 U.S. at 649 (stating that standard is “sufficiently flexible” to adjust for

cision, as evidenced by the first two subsequent circuit court decisions post-*Davis*, which applied the holding in its entirety to institutions of higher education.<sup>67</sup> But the concerns Justice Stevens raised in his dissent to *Gebser*<sup>68</sup> did not disappear. Instead, Justice Stevens's apprehensions became a common feature of the federal courts' treatment of peer sexual harassment claims under Title IX.

## II. POST-*DAVIS* CONCERNS

Post-*Davis*, Justice Stevens's predictions came true in the judicial administration of Title IX. Shortly after *Davis*, the Office for Civil Rights within the Department of Education began its attempts to compensate for the holes in the Court's jurisprudence with policies for administrative enforcement. Notwithstanding ongoing efforts to find an administrative solution, the deliberate indifference standard continues to create a paradox in judicial enforcement: individuals may sue after they have been harmed but may not sue to ensure that their university or college is fulfilling its obligation to protect students.<sup>69</sup> The Department of Education has continued its attempts at an administrative solution throughout the past decade as litigation has continued to prove difficult for plaintiffs.<sup>70</sup>

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differences in institutions' factual circumstances and used universities as an example). The majority did not recognize or examine the potential consequences of this extension. *See id.* Justice Kennedy, in his dissent, argued that the Title IX obligation for universities to discipline their students for speech constituting peer sexual harassment potentially conflicted with the First Amendment. *See id.* at 667 (Kennedy, J., dissenting). He also asserted that the expansion of Title IX liability was inappropriate because universities "do not exercise custodial and tutelary power over their adult students" after the reduction of universities' *in loco parentis* responsibility to their students. *Id.*

<sup>67</sup> *See* Gregory M. Petouvis, Note, *Student-on-Student Sexual Harassment in Higher Education: The Effect of Davis v. Monroe County Board of Education*, 8 VA. J. SOC. POL'Y & L. 397, 433–36 (2001) (examining *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997), *rev'd*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000), and *Adusumilli v. Ill. Inst. of Tech.*, No. 98-3561, 1999 WL 528169 (7th Cir. July 21, 1999)).

<sup>68</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 304 (1999) (Stevens, J., dissenting) (quoting *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74 (1992)).

<sup>69</sup> *See id.* at 291–92 (majority opinion).

<sup>70</sup> *See infra* Section II.A.

### A. Outcomes in Peer Sexual Harassment Cases

Although many cases illustrate the problems with Title IX,<sup>71</sup> two cases, *Simpson v. University of Colorado Boulder*<sup>72</sup> and *Williams v. Board of Regents of the University System of Georgia*,<sup>73</sup> exemplify the failure of *Gebser* and *Davis* to incentivize universities to implement preventative measures against peer sexual harassment. In both cases, the universities had information that there were ongoing problems of peer sexual harassment and assault that needed to be addressed yet failed to take any action to protect vulnerable students.<sup>74</sup> When Tiffany Williams, Lisa Simpson, and Anne Gilmore took their universities to court, the courts dismissed their Title IX claims.<sup>75</sup>

Lisa Simpson and Anne Gilmore, students at the University of Colorado Boulder, were gang-raped by football players and recruits in the final days of the football recruiting program.<sup>76</sup> As a result, Anne withdrew from the University of Colorado Boulder for a year, and Lisa withdrew entirely.<sup>77</sup> Anne demonstrated in her complaint that, at the time of her assault, the University of Colorado Boulder knew there was an increased risk of sexual assault by the football team if football recruiting remained inadequately supervised.<sup>78</sup> The local district attorney had met with top University of Colorado officials to inform them that they needed to both develop policies for supervising football recruits and implement sexual assault–prevention training for football players.<sup>79</sup> Lisa and Anne also alleged that coaching staff were

<sup>71</sup> See, e.g., *Shank v. Carleton Coll.*, 232 F. Supp. 3d 1100 (D. Minn. 2017); *Moore v. Regents of the Univ. of Cal.*, No. 15-cv-05779-RS, 2016 WL 7048991 (N.D. Cal. Dec. 5, 2016); *Butters v. James Madison Univ.*, 208 F. Supp. 3d 745 (W.D. Va. 2016); *Doe v. Univ. of Ky.*, No. 5:15-cv-00296-JMH, 2016 WL 4578328 (E.D. Ky. Aug. 31, 2016); *Frederick v. Simpson Coll.*, 149 F. Supp. 2d 826 (S.D. Iowa 2001).

<sup>72</sup> 500 F.3d 1170 (10th Cir. 2007) (involving who plaintiffs alleged that football recruits and players sexually assaulted them during a recruiting program).

<sup>73</sup> 477 F.3d 1282 (11th Cir. 2007) (involving a plaintiff who alleged that members of the University of Georgia basketball and football teams gang-raped her).

<sup>74</sup> See *Simpson*, 500 F.3d at 1173; *Williams*, 477 F.3d at 1291.

<sup>75</sup> See *Simpson v. Univ. of Colo.*, 372 F. Supp. 2d 1229, 1245 (D. Colo. 2005), *rev'd*, 500 F.3d 1170 (10th Cir. 2007); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, No. Civ.A.103CV2531CAP, 2004 WL 5545037, at \*13 (N.D. Ga. June 30, 2004), *aff'd in part*, 441 F.3d 1287 (11th Cir. 2006), *reh'g denied*, 179 F. App'x. 686 (11th Cir. 2006), *vacated*, 477 F.3d 1282 (11th Cir. 2007). Although courts of appeals eventually reversed both dismissals, these cases still display how the judicial administration of Title IX works against plaintiffs in trial courts.

<sup>76</sup> See Appellants' Opening Brief [Redacted] at 9–10, *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007) (No. 06-1184).

<sup>77</sup> See *id.* at 11.

<sup>78</sup> See *Simpson*, 500 F.3d at 1173.

<sup>79</sup> See *id.* There had been a history of sexual assaults at the university as a result of the recruiting programs. Plaintiff Anne Gilmore's First Amended Complaint and Jury Demand at

previously informed of sexual assault and harassment by players but reacted in a manner more likely to encourage the conduct than to eliminate it.<sup>80</sup> According to the allegations, coaches resisted the suggestions of the district attorney and continued to tell players to show the recruits a “good time.”<sup>81</sup>

Tiffany Williams, a student at the University of Georgia, was gang-raped by two basketball players and one football player.<sup>82</sup> Tiffany alleged in her complaint that the University of Georgia knew there was a substantial likelihood of student athletes sexually assaulting other students.<sup>83</sup> Specifically, the allegations stated that officials had “received suggestions from student-athletes that coaches needed to inform the student-athletes about [the University of Georgia’s] sexual harassment policy.”<sup>84</sup> The University of Georgia had also recruited one of her attackers for the basketball team despite its knowledge that the player had previously sexually harassed women at his prior schools.<sup>85</sup>

The universities’ treatment of Lisa, Anne, and Tiffany show the failure of Title IX to incentivize universities to take preventative action against potential peer sexual harassment or assault even where the institutions are clearly aware that there is a problem on their campuses. These universities were willing to forego preemptive actions that could prevent peer sexual harassment and sexual assault when faced with administrative burdens.<sup>86</sup> This is because Title IX does not create consequences for universities’ lack of preemptive action.<sup>87</sup>

An affirmative obligation of the institution to provide educational programming or training about the sexual harassment and assault policy may have diminished the likelihood of the plaintiffs’ assaults. If the University of Colorado Boulder and University of Georgia had implemented sexual assault–prevention training for their

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4–5, *Simpson v. Univ. of Colo. Boulder*, 372 F. Supp. 2d 1229 (D. Colo. 2005) (No. 03-RB-2495 (CBS)).

<sup>80</sup> See *Simpson*, 500 F.3d at 1173–74.

<sup>81</sup> See Plaintiff Anne Gilmore’s First Amended Complaint and Jury Demand, *supra* note 79, at 9–10.

<sup>82</sup> See *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1288 (11th Cir. 2007) (detailing how the two players who initially began the assault then called to invite two other teammates to participate).

<sup>83</sup> See *id.* at 1290.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*; see also *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1174–75 (10th Cir. 2007).

<sup>87</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291–92 (1999).

student athletes, the toxic environments that permitted a culture of rape acceptance may have been eradicated.<sup>88</sup> While bystander intervention training may not have had an impact in these specific cases—the football team perpetrated the Colorado assaults and Williams was assaulted in a private dorm room—there are other instances where this training may have had an impact.<sup>89</sup> For example, Elizabeth Shank, a student at Carleton College who was raped by two different students at two off-campus parties (one of which the college sponsored),<sup>90</sup> may have been helped had the college trained students on how to recognize dangerous situations and safely intervene.

Universities may also have greater incentive to address assaults after they are reported. In *Williams*, the University of Georgia failed to hold a timely hearing for the players charged with disorderly conduct.<sup>91</sup> The university may have held a timely hearing in this case if it had known that its failure to act would give rise to a presumption of deliberate indifference in a potential lawsuit. Expanding the deliberate indifference standard to create a presumption where a university is not fulfilling its affirmative obligations under Title IX (as enacted by the solution proposed herein) may decrease the chances of these incidents occurring or give plaintiffs greater access to a remedy.

*Doe v. University of the Pacific*<sup>92</sup> illustrates how a university can implement educational preventative programming to help combat sexual assault. Unlike the University of Colorado Boulder and University of Georgia, the University of the Pacific had numerous preventative policies and initiatives in place to combat peer sexual harassment and sexual assault on campus.<sup>93</sup> The University of the Pacific introduced

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<sup>88</sup> See generally John D. Foubert & Bradford C. Perry, *Creating Lasting Attitude and Behavior Change in Fraternity Members and Male Student Athletes: The Qualitative Impact of an Empathy-Based Rape Prevention Program*, 13 VIOLENCE AGAINST WOMEN 70 (2007) (analyzing results of a questionnaire provided to fraternity members and male student athletes regarding the impact of a rape prevention program).

<sup>89</sup> See *Williams*, 477 F.3d at 1288; Appellants' Opening Brief, *supra* note 76, at 9–10. Bystander Intervention is a program intended to educate community members on what dangerous situations look like and how to intervene to prevent sexual assault from occurring. See MATT J. GRAY ET AL., SEXUAL ASSAULT PREVENTION ON COLLEGE CAMPUSES 123–24 (2017). Bystander Intervention training has been successful at schools like the University of New Hampshire in reducing rates of sexual assault. See Michael Winerip, *Stepping Up to Stop Sexual Assault*, N.Y. TIMES (Feb. 7, 2014), <https://www.nytimes.com/2014/02/09/education/edlife/stepping-up-to-stop-sexual-assault.html> [<https://perma.cc/27X3-UPF4>].

<sup>90</sup> *Shank v. Carleton Coll.*, 232 F. Supp. 3d 1100, 1105–06 (D. Minn. 2017).

<sup>91</sup> See *Williams*, 477 F.3d at 1296.

<sup>92</sup> No. CIV. S–09–764 FCD/KJN, 2010 WL 5135360 (E.D. Cal. Dec. 8, 2010), *aff'd*, 467 F. App'x 685 (9th Cir. 2012) (involving a similar factual situation to both *Simpson* and *Williams*).

<sup>93</sup> See *id.* at \*2.

“facilitated discussions” about the university’s anti–sexual assault policy and gave an educational presentation (part of which addressed peer sexual assault) at a mandatory new-student orientation.<sup>94</sup> Speakers were brought in regularly throughout the academic year “to address and educate the University’s students on . . . sexual assault.”<sup>95</sup> In addition, the University of the Pacific ensured that presentations on sexual assault and prevention were “made to discrete student groups such as members of the fraternities and sororities and student athletes.”<sup>96</sup> These steps, likely based on California state laws concerning sex discrimination rather than federal law,<sup>97</sup> are some of the same affirmative obligations that federal law can make binding on universities.<sup>98</sup>

### *B. Attempts of the Office for Civil Rights to Fill Gaps with Regulatory Enforcement*

The Office for Civil Rights within the Department of Education has attempted to fill the gaps left by the *Davis* standard through administrative enforcement. Administrative enforcement mechanisms, however, also fail to incentivize colleges and universities to prevent peer sexual harassment on campus. The Office for Civil Rights has attempted to solve the problems created in *Davis* by using a construc-

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<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> The sexual assault incident in this case took place in 2008. *See id.* At the time of the plaintiff’s assault, the 2008 Department of Education guidance document had only been recently released. Neither the 2001 guidance nor the 2008 guidance provided any concrete requirements for preventative measures that universities could implement and also suggests that these preventative measures are optional. *See infra* Section II.B. In contrast, California state law has a similar provision to Title IX that provides that “[n]o person shall be subjected to discrimination on the basis of . . . gender identity . . . in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.” CAL. EDUC. CODE § 220 (West Supp. 2017). Another California statute, in place since 1991, states multiple preventative actions that colleges and universities should take including implementing “a variety of effective educational programs . . . to disseminate factual information about sexual assault, promote open discussion, encourage reporting, and provide information about prevention.” CAL. EDUC. CODE § 67390(d) (West 2012). It also specifically states that brochures and policies are not sufficient; universities must ensure that students receive these materials. *See id.* § 67390(g). Student organizations “should undergo rape-awareness training each year” and “[c]omprehensive information about . . . sexual assault[ ] should be provided at all new student orientation programs.” *Id.* § 67390(h), (i). The University of the Pacific’s preventative policies align closely with those laid out in this law; therefore, it is more likely that the state law influenced these policies than the federal regulations and guidance under Title IX.

<sup>98</sup> *See infra* Section IV.B.



tive notice standard<sup>99</sup> for enforcement actions<sup>100</sup> and enacting administrative guidance<sup>101</sup> for institutions on how to respond to peer sexual harassment of students.<sup>102</sup>

When the Office for Civil Rights introduced a constructive notice standard, it undermined its own efforts by creating a flexible multifactor test for institutions to determine whether an incident qualified as peer sexual harassment. First, the 2001 guidance stated that the Office for Civil Rights would always treat claims of peer sexual harassment as hostile environment claims.<sup>103</sup> Second, the guidance provided nine factors to determine whether the peer sexual harassment constituted a hostile environment.<sup>104</sup> The guidance emphasized using “com-

<sup>99</sup> The Office for Civil Rights issued guidance in 2001 that incorporated and responded to the changes wrought by *Davis* on peer sexual harassment. See U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], <https://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [<https://perma.cc/E22L-KKU7>]. The guidance clarified that in the Office’s enforcement actions, institutions would be held liable where a “responsible employee ‘knew, or in the exercise of reasonable care should have known’ about the harassment”—a constructive notice standard. *Id.* at 13.

<sup>100</sup> The Office for Civil Rights can bring suits against schools that it finds not in compliance with Title IX. See *Sex Discrimination: Overview of the Law*, U.S. DEP’T OF EDUC., <https://www.ed.gov/policy/rights/guid/ocr/sexoverview.html> [<https://perma.cc/4BP2-WRA3>]. These suits are generally called enforcement actions. See *id.* Most often, however, the enforcement actions result in “resolution agreements.” See *Search Results, Resolution Letters and Agreements Since October 2013*, U.S. DEP’T OF EDUC., <https://www.ed.gov/ocr-search-resolutions-letters-and-agreements> [<https://perma.cc/3X4L-8ST9>] (yielding 219 resolution agreements under Title IX through a search conducted by entering no keywords, selecting “resolution agreement” checkbox and “Title IX” checkbox). Resolution agreements are essentially judicially approved contracts that are used to postpone or prevent litigation if the defendant agrees to certain conditions set by the Office for Civil Rights. See, e.g., Resolution Agreement, University of Montana–Missoula, OCR Case No. 10126001 (2013) [hereinafter Resolution Agreement], <https://www.ed.gov/about/offices/list/ocr/docs/investigations/more/10126001-b.pdf> [<https://perma.cc/8J92-SY2N>].

<sup>101</sup> This guidance comprises a document issued by an administrative agency to clarify regulated parties’ responsibilities for compliance. See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 420 (7th ed. 2016). Guidance documents generally fall into two categories: legislative rules (which have gone through notice-and-comment rulemaking procedures) and interpretative rules or policy statements (a more informal statement offering the agency’s opinion on matter of law and policy). See *id.* Violation of legislative rules is sufficient for liability, whereas violation of interpretative rules or policy statements is not. See *id.* at 420–21.

<sup>102</sup> See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 99.

<sup>103</sup> See *id.* at 5. A hostile environment claim is one where the harassment is so “severe, pervasive, and objectively offensive” that it deprives the victim of access to educational opportunities or benefits. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); cf. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

<sup>104</sup> See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 99, at 5–7. These eight factors include (1) “[t]he degree to which the conduct affected [the student’s] education,” (2) “[t]he

mon sense and reasonable judgment” in assessing these factors.<sup>105</sup> Though these factors give institutions necessary flexibility, they also provide institutions with an “out” to find that the harassment did not rise to the creation of an hostile environment. Accordingly, the administrative scheme does not provide as robust protections as the constructive notice standard might imply.

Moreover, the guidance provided by the Office for Civil Rights focused almost exclusively on creating administrative direction for institutions’ responses *after* an incident of peer sexual harassment or assault occurred. The 2001 guidance stated that the *Gebser* and *Davis* decisions did not change institutions’ obligations to both “prevent and eliminate sexual harassment” but the remainder of the document focused almost entirely on postreporting duties to students.<sup>106</sup> It also emphasized that the failure of a university or college to *respond* to the knowledge of peer sexual harassment is what triggers liability.<sup>107</sup> Therefore, the guidance incentivizes higher education institutions to focus their energy on responses to reports of peer sexual harassment and violence, not on the little-mentioned prevention obligation.

In the guidance it has given since 2001, the Office for Civil Rights has continued to place heavy weight on postreporting action. The 2008 guidance, despite including preventative practices for universities and colleges to adopt,<sup>108</sup> reiterated that the only time institutions *must* take action is when they know or should know that harassment occurred.<sup>109</sup> Finally, in 2011, the Office for Civil Rights released a “Dear Colleague” letter solely on the subject of peer sexual violence.<sup>110</sup> However, only a single page of the nineteen-page letter mentions anything

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type, frequency, and duration of the conduct,” (3) “[t]he identity of and relationship between the alleged harasser and the [student],” (4) “[t]he number of individuals involved” in the harassment, (5) “[t]he age and sex of the alleged harasser and the [student],” (6) “[t]he size of the school” and the “location of the incidents” at the school, (7) “[o]ther incidents at the school,” and (8) “[i]ncidents of gender-based, but nonsexual harassment.” *See id.*

<sup>105</sup> *See id.* at 7.

<sup>106</sup> *Id.* at ii.

<sup>107</sup> *See id.* at iii.

<sup>108</sup> *See* U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 16 (2008) [hereinafter SEXUAL HARASSMENT: IT’S NOT ACADEMIC], <https://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf> [<https://perma.cc/5RAL-SAAW>] (preventative actions only included issuing a policy against sex discrimination, adopting and publishing grievance procedures, and appointing a Title IX coordinator).

<sup>109</sup> *See id.* at 10.

<sup>110</sup> *See* Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. Office for Civil Rights, to Colleague (Apr. 4, 2011), <https://www.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/4ZR3-6SKC>].

about practices to address peer sexual violence before it happens.<sup>111</sup> Even when the 2011 letter was rescinded recently by Secretary of Education Betsy DeVos,<sup>112</sup> the notice of revocation and accompanying “Q&A” document solely focused on procedures for postnotice investigations.<sup>113</sup> The reiteration of previous publications’ focus on postincident response once again impresses upon institutions that even if they have some obligation to students before incidents of peer sexual violence occur, their resources are best spent ensuring that postincident responses will not lead to Title IX liability.

Ultimately, use of enforcement actions by the Office for Civil Rights provides even less incentive for universities to be proactive.<sup>114</sup> The practice of the Office is to give institutions the opportunity to enter “resolution agreements” to avoid enforcement actions and the expenses of a lawsuit.<sup>115</sup> Therefore, while resolution agreements can be burdensome for universities, the burden is generally no more than would be required by the administrative guidance. Therefore, it is solely a matter of *when* the university’s compliance will be required. If no one submits a complaint to the Office for Civil Rights, then the university may entirely avoid compliance with Title IX.<sup>116</sup> This structure, therefore, keeps the administrative enforcement mechanism from effectively filling the gaps in Title IX.

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111 *See id.* at 14–15. Similarly, the proportion of material included in the 2008 guidance reinforced institutions’ assumption that their focus should be on ensuring postincident investigations and responses, rather than creating preventative measures. *See generally* SEXUAL HARASSMENT: IT’S NOT ACADEMIC, *supra* note 108.

112 Press Release, U.S. Dep’t of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/departement-education-issues-new-interim-guidance-campus-sexual-misconduct> [https://perma.cc/87HW-NAMZ].

113 *See* Letter from Candice Jackson, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. Office for Civil Rights, to Colleague (Sept. 22, 2017), <https://www.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [https://perma.cc/HH7M-BNLE]; *see also* U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), <https://www.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [https://perma.cc/JK83-8ELJ]. This guidance has now been challenged in court by several victims’ rights and women’s rights groups as “violat[ing] federal law and discriminat[ing] against accusers.” Erica L. Green, *Education Secretary Betsy DeVos Is Sued over Sexual Assault Guidance*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/politics/betsy-devos-sexual-assault-guidelines-lawsuit.html> [https://perma.cc/5ZFQ-N5PL].

114 *See supra* note 100.

115 *See id.*; *see, e.g.*, Resolution Agreement, *supra* note 100.

116 If universities can escape compliance, then they never have to pay the associated costs.

### III. ALTERNATIVE SOLUTIONS

Title IX needs refashioning—this much is not disputed by academics and practitioners.<sup>117</sup> Yet previously suggested solutions for the failure of Title IX to incentivize universities to establish robust peer sexual harassment prevention programs, or to encourage reporting of incidents, have not succeeded. These solutions either fail to sufficiently solve the issue or create additional problems for the enforcement of Title IX in the context of higher education.

#### A. *Adjustments to the Notice Requirement of Gebser*

First, Nancy Chi Cantalupo (who currently serves on a Department of Education committee to implement amendments made to the Jeanne Clery Act)<sup>118</sup> and other authors propose a solution based on notice: adopting a constructive knowledge approach for Title IX private suits.<sup>119</sup> A constructive knowledge approach allows liability where the university knew or *should have known* about the peer sexual harassment.<sup>120</sup> Arguably, the more expansive liability of constructive notice creates incentives for schools to act in a “responsible and concerned manner” towards their students.<sup>121</sup> However, scholars discussed and criticized the constructive notice standard before it was squarely rejected by *Davis*.<sup>122</sup>

Constructive notice unfairly exposes universities to excessive liability. While it may be appropriate in the context of K–12 schools, which have more control over students, constructive notice cannot serve as an appropriate standard for colleges and universities.<sup>123</sup> Given

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<sup>117</sup> See, e.g., Cohen, *supra* note 48, at 316–17; Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 53–54 (2013); Silbaugh, *supra* note 54, at 1050; Carrie L. Hoon, Note, *The Reasonable Girl: A New Reasonableness Standard to Determine Sexual Harassment in Schools*, 76 WASH. L. REV. 213, 213–15 (2001). Many academics argue that Title IX needs refashioning because its application to institutions of higher education is too expansive a reading of the statute and endangers the academic freedom of both professors and students on university campuses. See generally AM. ASS'N OF UNIV. PROFESSORS, *THE HISTORY, USES AND ABUSES OF TITLE IX* (2016), <https://www.aaup.org/file/TitleIXreport.pdf> [<https://perma.cc/P2H3-Y8HY>].

<sup>118</sup> See Nancy Chi Cantalupo, GEO. L.: OUR FAC., <https://www.law.georgetown.edu/faculty/cantalupo-nancy-chi.cfm#> [<https://perma.cc/SS5M-8WFJ>].

<sup>119</sup> See, e.g., Cantalupo, *supra* note 54, at 252.

<sup>120</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 282 (1999).

<sup>121</sup> See Cantalupo, *supra* note 54, at 253.

<sup>122</sup> See generally William P. Hoye & William A. Hahn, *Beyond the Camel's Nose: Institutional Liability for Peer Sexual Harassment on Campus*, 50 S.C. L. REV. 55 (1998) (advocating for the adoption of the actual notice standard over the constructive notice standard for universities).

<sup>123</sup> See *id.* at 84–91.

the abrogation of the doctrine of *in loco parentis*<sup>124</sup> for colleges and universities, the depressed level of supervision and control these institutions exercise over students, and the lesser duty they owe to students, a constructive notice standard expands potential liability too far.<sup>125</sup> Under this standard, even universities making efforts to improve enforcement of sexual harassment policies may be exposed to liability if a student can argue that the university *should* have known about the incident.

### B. *Fixing Title IX Through Stronger Administrative Enforcement*

A second approach to solving the Title IX problem is to strengthen the enforcement mechanism created by the Department of Education.<sup>126</sup> One proposed change is to shift the Department's focus from solely ensuring that adequate postassault disciplinary procedures exist to requiring "[p]roactive evidence-based prevention programming."<sup>127</sup> Incorporating proactive public health-based programs as part of a regulatory enforcement structure, however, does not lend itself to creating effective incentives for schools. These programs would not touch the actual notice or deliberate indifference requirements for a private right of action. Instead, they come only with the threat of an Office for Civil Rights enforcement action, which the university can likely escape by signing a resolution agreement to adopt these programs.<sup>128</sup> Furthermore, an administration that does not prioritize enforcement actions will provide little incentive for universities to comply with any requirements for preventative programming.<sup>129</sup>

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124 "*In loco parentis*" means "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." *In loco parentis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

125 *See id.* at 84–85, 87–89.

126 *See generally, e.g.,* Cantalupo, *supra* note 54; Silbaugh, *supra* note 54.

127 *See* Silbaugh, *supra* note 54, at 1064, 1066.

128 *See supra* notes 114–16 and accompanying text.

129 The Obama administration prioritized diminishing peer sexual violence on college campuses and made the according adjustment. *See* Cantalupo, *supra* note 54, at 254 ("The Obama administration is already making improvements to the proactive guidance and the availability of its enforcement actions to the public."). Thus far under the Trump administration, it has become clear that neither President Trump nor Secretary DeVos believe that Title IX enforcement should be a priority. Secretary DeVos refused to commit to maintaining guidance surrounding campus rape and peer sexual assault at her confirmation hearing. *See Education Secretary Confirmation Hearing*, C-SPAN (Jan. 17, 2017), <https://www.c-span.org/video/?421224-1/education-secretary-nominee-betsy-devos-testifies-confirmation-hearing> [<https://perma.cc/WCV2-6X7J>]. Even more recently, Secretary DeVos announced that the Department of Education would revisit the Obama-era sexual assault guidance to ensure protections for the accused, a step that many saw as the beginning of the rollback of enforcement by the Department of Education. *See* Press Release, *supra* note 112; *see also* Anya Kamenetz, *Betsy DeVos Signals a Pullback on*

### C. *State Law as a Remedy*

A third suggested solution is for victims of harassment to use state law to circumvent the limitations on institutional liability under Title IX.<sup>130</sup> The theory is that because state courts are not bound to interpret state law barring discrimination in the same way that Title IX is interpreted, state law may provide a better vehicle for victims of peer sexual harassment to obtain a remedy from an institution.<sup>131</sup> State law does not solve the problem, however, for victims in states where antidiscrimination laws are no more protective than Title IX. Consequently, potential plaintiffs still need the Title IX standards for institutional liability to be restructured.

### D. *Suggested Changes to Deliberate Indifference*

A final approach is changing the deliberate indifference standard to heighten the duty of institutions to respond to any notice of peer sexual harassment. One such proposal is to replace the deliberate indifference standard with the international human rights liability standard: due diligence.<sup>132</sup> The due diligence standard was developed in response to “the assumption that victims have a human right to access an effective remedy.”<sup>133</sup> It

requires that deprivations of equality rights, of which the state knew or should have known, be prevented, victims of equality violations be protected, investigations be effective and based on accurate empirical data, punishment be exacted where justified, remedies, compensation, and reparations be provided to victims and where appropriate to the groups of which they are members, and prevention include transformative change to ensure that such abuses do not happen again.<sup>134</sup>

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*Campus Sex Misconduct Enforcement*, NPR: NPR ED (Sept. 7, 2017, 1:52 PM), <http://www.npr.org/sections/ed/2017/09/07/549197971/betsy-devos-signals-a-pullback-on-campus-sex-misconduct-enforcement> [<https://perma.cc/EU6T-BHKX>]; Sophie Tatum, *DeVos Announces Review of Obama-Era Sexual Assault Guidance*, CNN (Sept. 7, 2017, 10:02 PM), <http://www.cnn.com/2017/09/07/politics/betsy-devos-education-department-title-ix/index.html> [<https://perma.cc/XR8F-C6C3>].

<sup>130</sup> See Fatima Goss Graves & Adaku Onyeka-Crawford, *Restoring Students' Protections Against Sexual Harassment in Schools*, 41 HUM. RTS. 20, 22 (2014).

<sup>131</sup> See *id.* (“There often are critical differences between Title IX and state antidiscrimination laws that allow states to provide fuller protections for students against harassment in schools.”); see also CAL. EDUC. CODE § 220 (West Supp. 2017); CAL. EDUC. CODE § 67390 (West 2012).

<sup>132</sup> See MacKinnon, *supra* note 44, at 2096–104.

<sup>133</sup> *Id.* at 2096.

<sup>134</sup> *Id.* at 2096–97.

While this proposal is certainly attractive, it suffers from a problem similar to that which the constructive notice standard faces: a lack of predictability. Due diligence is an intensely context-dependent analysis, meaning that its application may look radically different depending on the facts of a particular case.<sup>135</sup> For example, under a due diligence standard a college may assign different duties to its undergraduate students than it assigns to its law students. Although flexibility under Title IX must be retained, the due diligence standard will create unacceptable uncertainty for institutions and a lack of clarity as to precisely what a private right of action requires to avoid a determination of liability. Redefining deliberate indifference to include a failure to meet specified actions is the sounder approach to ensure that institutions have clarity and certainty moving forward.

#### IV. PROPOSED SOLUTION: A NEW STANDARD AND ADDITIONAL STATUTORY OBLIGATIONS

There is a clear problem with judicial enforcement of Title IX. The deliberate indifference standard severely restricts the chances that a plaintiff will succeed on claims of peer sexual harassment.<sup>136</sup> Plaintiffs' limited chances for success—and therefore universities' diminished chances of paying money damages—minimize universities' incentive to actively combat peer sexual harassment and assault on their campuses.<sup>137</sup> And, as shown above, no one has suggested a satisfactory solution.<sup>138</sup>

Any solution must serve and safeguard the stated purpose of Title IX: ensuring that no student faces discrimination because of their sex.<sup>139</sup> The proposed solution—altering the deliberate indifference standard and creating new statutory obligations for universities—provides new incentives for universities and colleges to make proactive efforts to decrease peer sexual harassment and protect their students from this prolific discrimination.

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<sup>135</sup> See *id.* at 2098 n.287 (“The substantive content of each facet of the due diligence standard would vary according to the particular requirements of each context. For instance, the equality needs of children in elementary school calls for different preventative and remedial strategies than those of graduate and professional students.”).

<sup>136</sup> See *supra* Section II.A.

<sup>137</sup> See *supra* Part II. Administrative enforcement of Title IX is also inadequate because it focuses primarily on postincident response. See *supra* Section II.B.

<sup>138</sup> See *supra* Part III.

<sup>139</sup> See 20 U.S.C. § 1681(a) (2012).

### A. *Aim of the Solution*

The legislation proposed herein is crafted to incentivize universities to engage in proactive efforts to decrease peer sexual harassment on campuses and to appropriately address peer sexual harassment when it does occur. It does this by redistributing the balance between the universities' institutional need for limited liability and the interests of students who are most likely to suffer from peer sexual harassment. By changing this balance, the legislation will increase plaintiffs' chances of success in Title IX litigation for claims of peer sexual harassment or assault. The new, explicit statutory requirements and the increased possibility of liability will create greater incentives for universities to comply with Title IX regulations in their approach to peer sexual harassment and sexual assault on campuses. While this solution cannot entirely solve the problem of peer sexual harassment and sexual assault at higher education institutions, it provides a substantial step forward in diminishing the incidence of sexual assault and increasing university responsiveness to the issue.

The current deliberate indifference standard weighs concerns about excessive institutional liability over concerns about the student who has suffered through peer sexual harassment.<sup>140</sup> Notwithstanding the virtue of ensuring that universities attempting good-faith compliance with Title IX will not face high monetary liability,<sup>141</sup> the current standard goes too far. It allows universities that have failed to protect their students from known risks to evade liability.<sup>142</sup> Although the imposition of liability should be a consideration, it should not impede the achievement of Title IX's purpose of eliminating discrimination based on sex in education<sup>143</sup> and must not be the primary concern of the standards governing private enforcement of Title IX.

The proposed solution will (1) alter the definition of "deliberate indifference," (2) create a presumption of deliberate indifference where the university fails to meet statutory requirements for preventative programs, (3) lay out clear and actionable standards for these required preventative programs, and (4) codify the other *Gebser/Da-*

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<sup>140</sup> See generally *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

<sup>141</sup> See *Gebser*, 524 U.S. at 289–90 ("It would be unsound . . . for . . . a judicially implied system of enforcement [to permit] substantial liability without regard to the recipient's . . . corrective actions upon receiving notice.").

<sup>142</sup> See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007) (discussing the district court holding); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294–96 (11th Cir. 2007) (discussing the district court holding).

<sup>143</sup> See 20 U.S.C. § 1681(a) (2012).



vis factors. These alterations will properly balance the Supreme Court's concerns over allowing excessive liability for peer sexual harassment with ensuring that students do not suffer from discrimination. By creating a more proper balance between these competing interests, the proposed solution will incentivize universities to attempt to diminish the incidence of peer sexual harassment and assault on their campuses.

This solution broadens the definition of "deliberate indifference" to create incentives for universities to comply with statutory and regulatory requirements under Title IX. The proposed statute partially abrogates the *Gebser* and *Davis* enumerations of the deliberate indifference standard.<sup>144</sup> In *Gebser*, the Supreme Court specifically stated that institutions could not be found liable in a private right of action when they fail to follow Title IX regulations.<sup>145</sup> The solution proposed herein would alter this standard to find that failure to comply with Title IX regulations *alone* does not give rise to liability. However, the failure to comply with Title IX regulations will satisfy the deliberate indifference prong where a student can also show that a peer at her university sexually assaulted her, thus incentivizing universities to comply with these regulations in an effort to avoid the presumption of deliberate indifference in potential lawsuits.<sup>146</sup>

The proposed solution will also create and codify a burden-shifting presumption of deliberate indifference to increase plaintiffs' chances of success in litigation against universities and colleges.<sup>147</sup> Failure to implement the programs enumerated by the statute will now create a presumption of deliberate indifference where a student pleads a peer sexual harassment claim under Title IX.<sup>148</sup> The university is then required to overcome that presumption at trial to avoid

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<sup>144</sup> See *infra* Section IV.B.

<sup>145</sup> See 524 U.S. at 291–92.

<sup>146</sup> While it would abrogate *Gebser*, this alteration is supported by the rationale of some courts of appeals. In both *Simpson*, 500 F.3d at 1174, 1176–77, and *Williams*, 477 F.3d at 1293, the courts weighed the allegations of institutional notice and action before the specific incident of peer sexual harassment or sexual assault actually took place in determining whether the plaintiff successfully alleged a claim. In doing so, both courts reinforced an understanding of the deliberate indifference standard that allows for the incorporation of an institution's actions before the incident of peer sexual harassment or sexual assault takes place. See *Simpson*, 500 F.3d at 1178; *Williams*, 477 F.3d at 1293, 1296.

<sup>147</sup> This refers solely to chances of success in court, not to the associated monetary damages. Altering the deliberate indifference standard should neither increase nor constrain the amount of monetary damages available. Courts must retain the freedom to fashion equitable remedies consistent with the purpose of Title IX. See *Gebser*, 524 U.S. at 285.

<sup>148</sup> See *infra* Section IV.B. The statute will also authorize new regulations for programming standards. See *id.*

liability if the plaintiff has proved the other elements of a Title IX claim for peer sexual harassment.<sup>149</sup> An explicit burden-shifting presumption will incentivize universities to comply with the requirements for preventative programs in order to keep the burden of proof on plaintiffs and lessen the chances of monetary liability.<sup>150</sup> Therefore, the presumption will help decrease actual discrimination on campuses by encouraging implementation of proven preventative practices such as bystander intervention training,<sup>151</sup> year-long repetitive programming,<sup>152</sup> and tailored education for high-risk student populations.<sup>153</sup>

The proposed solution explicitly codifies the presumption of deliberate indifference and the requirements that trigger it to ensure clarity and notice for institutions of higher education moving forward. It lays out the specific program requirements with which universities must comply to avoid the presumption of deliberate indifference. The specificity with which these required programs are enumerated within

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149 This proposal is similar to the holdings of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 746–47, 766 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 802, 805 (1998), which decided that employers could be held vicariously liable for the actions of a supervisor in creating a hostile environment under Title VII but that employers would have an affirmative defense available to them surrounding their preventative measures. This approach does have its criticisms. See, e.g., Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 4, 22–24 (2003) (criticizing the *Ellerth-Faragher* affirmative defense for being dependent on the speed with which the victim complains about harassment). But the solution proposed herein does differ in one important respect: it does not operate as an affirmative defense. See *infra* Section IV.B. It merely shifts the burden of proof regarding the deliberate indifference factor from the plaintiff to the defendant and *only* in the instance where an institution has not complied with its preventative Title IX obligations. See *id.*

150 In overcoming the presumption of deliberate indifference, a university may *not* attack the causal relationship between the failure to comply with the statutory or regulatory requirements and the incident of harassment. If lack of causation were permitted to defeat the presumption, it would no longer incentivize universities to comply with the required programs. Causation may, however, be a relevant factor for determining the appropriate level of damages for a successful plaintiff. For example, a student may be entitled to higher compensation if she demonstrates that the university's failure to comply with a requirement to provide education on sexual assault and consent to student athletes had a particularized effect on her. This is consistent with approaches to damages in other areas—for example, the mitigating and aggravating circumstances doctrine in criminal law, see 18 U.S.C. § 3553(b)(1) (2012), and finding punitive damages in employment discrimination cases where employers demonstrate a recklessness towards the law, see 42 U.S.C. § 1981a(b)(1) (2012).

151 See GRAY ET AL., *supra* note 89, at 123–24; see also Amanda Mabry & Monique Mitchell Turner, *Do Sexual Assault Bystander Interventions Change Men's Intentions? Applying the Theory of Normative Social Behavior to Predicting Bystander Outcomes*, 21 J. HEALTH COMM. 276 (2016).

152 See GRAY ET AL., *supra* note 89, at 124–25.

153 See generally Foubert & Perry, *supra* note 88.

the statute provides clear notice to universities of their obligations.<sup>154</sup> However, it also provides flexibility for the Office for Civil Rights to modify the details of the program requirements through administrative procedures. These required programs include those most linked to decreases in peer sexual harassment and sexual violence. One such program is bystander intervention training, which educates community members on what dangerous situations look like and how to intervene to prevent sexual assault from occurring.<sup>155</sup> While most universities engage in some form of sexual assault–prevention programming, these programs are often single events during the year rather than continual education.<sup>156</sup> Year-long programming, including bystander intervention trainings that specifically address college men, have been shown to have greater long-term impacts.<sup>157</sup> Additionally, programs specifically addressing student athletes and fraternities—two communities with far higher rates of sexual violence than the average student community<sup>158</sup>—may mitigate these rates of violence.<sup>159</sup>

Finally, the proposed solution codifies the other *Gebser/Davis* standards to guard against the possibility of excessive liability and bal-

<sup>154</sup> This clear notice is required for any legislation authorized by the Spending Clause of the U.S. Constitution. See U.S. CONST. art. I § 8, cl. 1; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1999).

<sup>155</sup> See GRAY ET AL., *supra* note 89, at 124 (asserting that bystander intervention programming encourages “a shared, community obligation to promote campus safety” and “enable[s] individuals to challenge rape-supportive beliefs and intervene” when someone is in danger); Mabry & Turner, *supra* note 151.

<sup>156</sup> See GRAY ET AL., *supra* note 89, at 124–25 (discussing the failure of “one-shot” programs and suggesting the creation of mandatory programs throughout a student’s four years at university).

<sup>157</sup> See *id.* at 124; Alexandra Cassel, *Are You the Problem, or the Solution? Changing Male Attitudes and Behaviors Regarding Sexual Assault*, 17 PSI CHI J. PSYCHOL. RES. 50, 57 (2012). Implementing these year-long programs is estimated to cost institutions around \$25,000 a year. See *Study Shows Bystander Intervention Training Reduces Sexual Violence in Schools*, CAMPUS SAFETY (Mar. 13, 2017), [https://www.campusafetymagazine.com/research/study\\_shows\\_bystander\\_intervention\\_training\\_reduces\\_sexual\\_violence\\_in\\_scho](https://www.campusafetymagazine.com/research/study_shows_bystander_intervention_training_reduces_sexual_violence_in_scho) [<https://perma.cc/V4JL-X9YV>]. In comparison, the costs of Title IX litigation average around \$350,000 per case. See Sarah Brown, *Lawsuits from Students Accused of Sex Assault Cost Many Colleges More Than \$200,000*, CHRON. HIGHER EDUC. (Aug. 11, 2017), <http://www.chronicle.com/article/Lawsuits-From-Students-Accused/240905> [<https://perma.cc/B65C-AUSA>].

<sup>158</sup> See Jane Friedman, *Greek Life on Campus: Should Colleges Ban Fraternities and Sororities?*, 25 CQ RESEARCHER 987, 989 (2015) (“[F]raternity members were three times more likely than nonmember students to commit rape.”); Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-athletes*, 23 VIOLENCE AGAINST WOMEN 795, 796 (2017) (explaining that “male intercollegiate athletes accounted for 19% of all sexual violence cases” despite making up only “3% of the student populations”).

<sup>159</sup> See generally Foubert & Perry, *supra* note 88.

ance university and student interests. The proposed legislation retains the requirements that in order to have a successful claim in court, (1) the funding recipient must have the authority to take remedial action against the harasser,<sup>160</sup> (2) the funding recipient must have actual knowledge of the harassment,<sup>161</sup> and (3) the harassment must be “so severe, pervasive, and objectively offensive” that it deprives the victim of access to educational opportunities or benefits.<sup>162</sup> The codification of the “actual notice” prong ensures that universities that were unaware of the incident will not be held liable for peer sexual harassment and ensures that the change in the deliberate indifference standard does not open the floodgates of excessive liability for universities,<sup>163</sup> while recognizing that universities should have increased potential liability where they do not engage in preventative measures. By codifying these factors, the proposed legislation does not swing the pendulum so far as to impractically favor students over institutions.

### B. *Text of the Solution*

The proposed text of the legislative solution is below. The legislation, as part of its codification of case law, draws language from the following cases: *Davis*, *Gebser*, *Franklin*, and *Cannon*.<sup>164</sup>

(a) **SHORT TITLE.**—Campus Sexual Assault Prevention Amendment to Title IX

(b) **PURPOSE.**—To decrease peer sexual harassment and provide relief to victims of peer sexual harassment at institutions of higher education, by amending Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1687 (2012).

(c) **DEFINITIONS.**—

(1) **SEXUAL HARASSMENT.**—The term “sexual harassment” is defined as any unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature. Sexual harassment includes acts of sexually-based violence.

(2) **OFFICIAL CONDUCT.**—The term “official conduct” is defined as any act an employee of the funding recipient

<sup>160</sup> See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644 (1999).

<sup>161</sup> See *id.* at 650.

<sup>162</sup> *Id.*

<sup>163</sup> See generally Hoye & Hahn, *supra* note 122.

<sup>164</sup> See *Davis*, 526 U.S. at 644, 650 (including language codified in subsection (d)(1)); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1999) (including language codified in subsection (d)(2)); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992) (including language codified in subsection (d)); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 (1979) (including language codified in subsection (d)).

commits to fulfill her employment duties. This may include, but is not limited to, any actions taken in instruction of a class, grading of exams, academic advising, and coaching of athletics teams.

(3) **ACTUAL NOTICE.**—The term “actual notice” is defined as notice of the misconduct, which must be explicitly communicated to an official of the funding recipient. This notice may come from sources other than the victim.

(4) **DELIBERATE INDIFFERENCE.**—The term “deliberate indifference” is defined as the funding recipient’s response, or lack of response, to sexual harassment when the response is clearly unreasonable in light of the known circumstances. An outright refusal or failure to address a known violation constitutes deliberate indifference.

(d) A victim of sexual harassment has the right to bring an action for relief against the funding recipient for compensatory and punitive damages subject to the following:

(1) The misconduct is committed by an employee of the funding recipient within the course of his or her official conduct and there is an institutional official who—

(A) has the authority to take remedial action against the offending employee;

(B) has actual notice of the misconduct; and

(C) is deliberately indifferent to the misconduct.

(2) The misconduct is committed by either an employee acting outside of their official role or by a student of the funding recipient, and the funding recipient—

(A) has the authority to take remedial action against the offending individual;

(B) has actual notice of the misconduct;

(C) is deliberately indifferent to the misconduct; and

(D) the misconduct is so severe, pervasive, and objectively offensive that it deprives the victim of access to educational opportunities or benefits.

(e) **EXCEPTIONS.**—This section does not apply to federally funded K–12 schools.

(f) **Presumption of Deliberate Indifference.**—

(1) In a private right of action, there is a presumption that the funding recipient was deliberately indifferent to the misconduct at issue where the recipient fails to comply with the requirements set out by either of the following:

- (A) Subsection (g);
- (B) The rules and regulations created by the Office for Civil Rights of the Department of Education under the express authority of Subsection (g).
- (2) The recipient may present evidence at trial to overcome the presumption of deliberate indifference. This evidence may not attack the causal link between the recipient's failure to comply with Subsection (g) and the misconduct in question.
- (g) PREVENTION PROGRAM REQUIREMENTS.—Funding recipients must implement the following:
  - (1) A comprehensive sexual harassment policy enumerated in the recipient's code of conduct, which at minimum—
    - (A) defines sexual harassment;
    - (B) specifies grievance procedures, including the individual(s) on campus to report incidents to and actions taken by the university upon notice of an incident; and
    - (C) complies with any other rules or regulations set out by the Office for Civil Rights of Department of Education under the authority of this section.
  - (2) Educational programming, which shall be held by the institution at regular intervals at least four times throughout an academic year and reach at least seventy percent of students, including at minimum—
    - (A) bystander intervention training;
    - (B) the institution's specific grievance procedure for reporting and responding to sexual harassment; and
    - (C) targeted educational programs for high-risk student populations, which may include, but are not limited to: fraternities and sororities (both official and unofficial), athletic teams (both division and club-level teams), and any other student organization deemed to be high-risk based upon past incidents.
  - (3) These programs shall be implemented according to the rules and regulations promulgated by the Office for Civil Rights of the Department of Education under the authority of this section.
- (h) EFFECTIVE DATE.—This Act shall take effect immediately upon its passing. The Department of Education shall promulgate initial rules and regulations for its implementation within two calendar years of its passing.

### C. *Application of the Solution to Counterarguments*

The proposed legislation incentivizes universities to educate their student bodies about sexual harassment and sexual assault. These required educational programs will aid Title IX's goal—prohibiting discrimination based on sex in education—by decreasing incidents of peer sexual harassment and sexual assault.<sup>165</sup> No solution is without detractors, however, and this Section will address anticipated criticisms of the proposed legislation.

#### 1. *Increasing Universities' Costs*

The first anticipated criticism of the proposed legislation is that it will place an unacceptably high burden of cost on universities by widening the scope of institutional liability too far. The legislation codifies specific safeguards to prevent universities from being subject to excessive monetary liability. Universities must still receive *actual notice* of the misconduct, and *then* they must act with *deliberate indifference* to the misconduct. Even though the failure to comply with Title IX obligations will now create a presumption that the university acted with deliberate indifference, the legislation lays out clear actions for universities to take to avoid the presumption.

Ultimately, while there is the potential for increased liability, universities can overcome this presumption if they properly discharge their duties to students. For example, the university in *Doe v. University of the Pacific* would not be subject to any risk of increased liability because it implemented a policy against sexual harassment and sexual violence, regularly held educational programs at orientation and throughout the year, and targeted educational efforts at fraternities and athletic teams.<sup>166</sup> Moreover, the presumption of deliberate indifference is *not* de facto liability. Universities may present evidence of the reasonableness of their actions in court to overcome the presumption of deliberate indifference. A university that investigates a report of sexual assault promptly and thoroughly, works with the victim to maintain confidentiality, and provides proportionate consequences for the offending student will likely overcome the presumption. Therefore, the presumption of deliberate indifference will not unduly enlarge universities' potential liability.

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<sup>165</sup> 20 U.S.C. § 1681(a) (2012). See generally Silbaugh, *supra* note 54.

<sup>166</sup> See *Doe v. Univ. of the Pac.*, No. CIV. S-09-764 FCD/KJN, 2010 WL 5135360, at \*2 (E.D. Cal. Dec. 8, 2010), *aff'd*, 467 F. App'x 685 (9th Cir. 2012).

The proposed legislation increases the likelihood of liability for exactly those universities it is intended to reach: universities that are deliberately indifferent. Take *Williams v. Board of Regents of University System of Georgia* as an example—assuming the university did not have knowledge of the student’s prior history of assault. The University of Georgia failed both to have a timely hearing concerning the plaintiff’s sexual assault<sup>167</sup> and to implement sexual assault–prevention training for their student athletes.<sup>168</sup> Under the proposed legislation, instead of succeeding on their motion to dismiss, the university likely would be held liable in the district court. The University of Georgia, now subject to the presumption of deliberate indifference, would be required to prove that it was not deliberately indifferent to the plaintiff’s sexual assault. It would need to show why the hearing was delayed for over a year and why it reasonably believed that the individual accused of sexual misconduct would not sexually harass students given his history.<sup>169</sup> On the facts available, the University of Georgia would likely not escape liability in the district court under the new formulation of the deliberate indifference standard. Had the proposed legislation been in place at the time of the assault, it is far more likely that the university would have ensured that it properly addressed the plaintiff’s report, including by providing a timely hearing, to avoid placing itself in a position of heightened liability.

## 2. *Requiring Universities to Prove Negative Facts*

The presumption of deliberate indifference does not require institutions to prove a negative—i.e., that they were *not* deliberately indifferent. While it might appear on its face to do so, the reality is the opposite. To overcome the presumption of deliberate indifference, the institution is presenting *positive* evidence that it acted *reasonably* in response to the report of sexual harassment or violence. This is far more appropriate than the current standard, under which the plaintiff is placed in the position of proving that what the institution did was *not* reasonable<sup>170</sup>—thereby requiring the plaintiff prove a negative.

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167 See *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296 (11th Cir. 2007).

168 See *id.* at 1290.

169 The individual, Tony Cole, had been accused of sexually assaulting “two part-time employees of the college’s athletic department by groping the women . . . and threatening them when they rejected his advances.” *Id.* At a subsequent school, “Cole was dismissed from the basketball team because of disciplinary problems, including an incident in which he whistled at and made lewd suggestions to a female store clerk.” *Id.*

170 See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).



Assigning the burden of proof for the deliberate indifference prong to universities is sensible because universities are in a better position to know the rationale for the actions taken to address complaints.

### 3. *Free Speech Concerns*

A third criticism is that the new legislation will negatively impact universities' approach to academic free speech. Even in its current iteration, both legal scholars and academic faculty members across the country have put forth concerns about Title IX enforcement infringing upon academic freedom of speech for faculty members and students.<sup>171</sup> There may be concerns that the legislation may further incentivize universities to either infringe upon professor and student speech on campus or compel speech from their professors.<sup>172</sup>

#### a. *Infringement of Student and Professor Speech*

The proposed legislation will not increase the incentive for a university administration to overaggressively enforce Title IX to the detriment of free inquiry and thought. The legislation lays out concrete programs for educating students about sexual harassment and assault. These new requirements do not unduly or unfairly target faculty or other students for legitimate speech within in classrooms.<sup>173</sup> Even with the creation of a presumption of deliberate indifference, the legislation focuses on the actions of the *university* in response to instances of peer sexual harassment or assault, not the acts of an individual professor or student. Admittedly, the legislation may result in more in-depth investigations into allegations of sexual harassment against professors and students.<sup>174</sup> However, the legislation does not infringe upon the

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<sup>171</sup> See AM. ASS'N OF UNIV. PROFESSORS, *supra* note 117, at 69–70.

<sup>172</sup> See *id.* at 77 (discussing how the Office for Civil Rights expansion of the definition of sexual harassment infringes upon academic freedom of speech).

<sup>173</sup> While the premise of the criticism is debatable, there is not enough space to adequately address existing issues of academic free speech and Title IX enforcement. It is sufficient to note that there is vast disagreement on the subject, and this solution (if you happen to agree with the premise that Title IX does infringe on academic freedom of speech) settles for not making the problem any worse than it currently is. See generally Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385 (2009) (arguing that racial and sexual harassment law has been used to suppress and punish much constitutionally protected speech in universities). But see Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School*, 75 N.D. L. REV. 205 (1999) (reasoning that the nature of the public school system and the established jurisprudence of free speech rights in school permits far greater regulation of harassing speech).

<sup>174</sup> While institutions may pay slightly more to ensure they are making correct determinations in sexual assault investigations, it will likely still be cheaper than the costs of defending

understanding that actionable harassment must rise to a level that is “so severe, pervasive, and objectively offensive that it [deprives] the victim[] of access to the educational opportunities or benefits”;<sup>175</sup> rather, the legislation codifies it. Accordingly, proper compliance with Title IX should not have any impact upon academic free speech.<sup>176</sup>

*b. Compulsory Speech Concerns*

A related concern is that the required educational programs would constitute unconstitutional compelled speech. The First Amendment protects the right to stay silent; individuals may not be “compelled to express adherence to an ideological point of view that they find unacceptable.”<sup>177</sup> The expression of or compliance with antidiscrimination principles, however, has been recognized as a compelling state interest that does not violate the First Amendment.<sup>178</sup> The legislation does not require universities to express an ideological point of view. Rather, it only requires that universities inform students of the legal definitions of sexual assault, notify them of their avenues for reporting incidents, and apprise students of actions that can be taken to prevent sexual assault. The only viewpoint that schools must express is their compliance with federal law. Furthermore, universities do not have to accept federal funding under Title IX; they can refuse federal funding and avoid compliance with Title IX requirements.<sup>179</sup> Therefore, the new solution will not unconstitutionally compel speech from universities.

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Title IX litigation. For example, the costs of Title IX litigation average around \$350,000 per case. *See Brown, supra* note 157.

<sup>175</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

<sup>176</sup> Public relations problems, on the other hand, are quite a different matter. Even without Title IX in place, the perception that a professor has been accused of sexual harassment for statements in the classroom can be highly damaging to a professor’s career. *See AM. ASS’N OF UNIV. PROFESSORS, supra* note 117, at 94. This problem is a result of university administrators being nervous about public image rather than Title IX’s requirements and guidance. *See, e.g., Scott Jaschik, Too Risky for Boulder?*, *INSIDE HIGHER ED* (Dec. 16, 2013), <https://www.insidehighered.com/news/2013/12/16/tenured-professor-boulder-says-she-being-forced-out-over-lecture-prostitution> [<https://perma.cc/8LAT-BPUA>].

<sup>177</sup> William M. Howard, Annotation, *Constitutional Challenges to Compelled Speech—Particular Situations or Circumstances*, 73 A.L.R. 6th 281 (2012).

<sup>178</sup> *See Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 669 (2010); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 872 (11th Cir. 2011); *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649–50 (9th Cir. 2008); *In re Rothenberg*, 676 N.W.2d 283, 292 (Minn. 2004).

<sup>179</sup> *See* 20 U.S.C. § 1681(a) (2012) (requiring only compliance of programs or activities “receiving Federal financial assistance”). While the author recognizes that this is unlikely, it is still a choice that universities have in their arsenal.

### CONCLUSION

University students face the reality of potential sexual assault almost every day. For those students who have experienced either attempted or completed sexual assault, the results can be devastating. Students without proper support may find themselves struggling academically; avoiding classes, buildings, and opportunities where they know their assailant will be; or withdrawing from campus life altogether. Universities have a duty to both educate their students and create a campus environment that promotes the safety of every student. They are failing because the laws governing institutional action against peer sexual harassment are failing.

These failures can be remedied by legislation that (1) creates new statutory obligations for the institution to take preventative measures against sexual assault, and (2) allows aggrieved students to bring independent private actions with significant penalties for universities that fail to comply with these obligations. The proposed legislative solution provides greater motivation to universities to protect their students from the risk of sexual harassment or assault and, where a student has been violated, to ensure that student does not suffer a second violation at the hands of their own university.